UNITED STATES REPORTS

VOLUME 383

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1965

FEBRUARY 14 THROUGH APRIL 4, 1966

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.
ABE FORTAS, Associate Justice.

RETIRED.

STANLEY REED, Associate Justice.

NICHOLAS deB. KATZENBACH, Attorney General.
THURGOOD MARSHALL, Solicitor General.
JOHN F. DAVIS, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HENRY CHARLES HALLAM, Jr., Librarian.

SUPREME COURT OF THE UNITED STATES.

Allotment of Justices.

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

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

For the First Circuit, Abe Fortas, 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 11, 1965.

(For next previous allotment, see 371 U. S., p. v.)

TABLE OF CASES REPORTED

NOTE: Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered.

	Page
Abbott Laboratories *v.* Gardner	924
Abe *v.* Richardson	902
Accardi *v.* Pennsylvania R. Co.	225
Acme Industrial Co., Labor Board *v.*	905
Adams, Swann *v.*	210
Adams, United States *v.*	39
Aetna Casualty & Surety Co. *v.* Third Nat. Bank	944
Alabama *v.* Bland	947
Alabama, Chavers *v.*	960
Alabama, Mills *v.*	904
Alabama, Saylor *v.*	917
Alabama Electric Coop. *v.* Securities & Exch. Comm'n	968
Alaska Airlines, Northwest Airlines *v.*	936
Albers *v.* State Bd. of Equalization	960
Alexander *v.* Faubus	271
Allbright-Nell Co. *v.* Schnell	934
Allen *v.* Wilson	964
American Air Filter Co. *v.* Continental Air Filters	934
American Broad.-Paramount Theatres, United States *v.*	906
American Dist. Telegraph Co. *v.* United States	933
American Surety Co. of N. Y., Coral Gables Bank *v.*	912
Anders *v.* California	966
Anderson *v.* Shuford	935
Andrews *v.* Smith	954
Ansourian *v.* United States	949
Arizona *v.* California	268
Arizona, Cota *v.*	929
Arizona, Miranda *v.*	903
Arkansas Governor, Alexander *v.*	271
Arkansas Governor, Crawford County Bar Assn. *v.*	271
Aro Mfg. Co. *v.* Automobile Research Corp.	947
Arrington *v.* Ohio	906

Page

Association. For labor union, see name of trade.
Association of the Bar of New York, Samuels *v*..... 954
Atchison, T. & S. F. R. Co., Baltimore & O. R. Co. *v*..... 832
Atchison, T. & S. F. R. Co., Canada Packers *v*..... 906
Atchison, T. & S. F. R. Co., Chicago & N. W. R. Co. *v*.... 940, 964
Atchison, T. & S. F. R. Co., United States *v*..... 964
Atlantic C. L. R. Co., Interstate Com. Comm'n *v*..... 576
Atlass, Darr *v*..... 923
Atlass, Muth *v*..... 923
Attorney General *v*. Morgan..... 903, 955, 964
Attorney General, Oliver *v*..... 915
Attorney General, South Carolina *v*..... 301
Attorney General of Illinois, Thomas *v*..... 952
Attorney General of Mass., "John Cleland's Memoirs" *v*..... 413
Attorney General of New Hampshire, DeGregory *v*..... 825
Aurillo *v*. Fogliani..... 952
Automatic Canteen Co., England *v*..... 925
Automatic Fire Alarm Co. *v*. United States..... 933
Automobile Research Corp., Aro Mfg. Co. *v*..... 947
Automobile Workers *v*. Hoosier Cardinal Corp..... 696
Baer, Rosenblatt *v*..... 75
Bagley *v*. Rhay..... 953
Bailey *v*. United States..... 959
Bailey *v*. Van Buskirk..... 948
Bakes *v*. United States..... 968
Balkcom, Cade *v*..... 961
Balkcom, Fortner *v*..... 912
Baltimore & O. R. Co. *v*. Atchison, T. & S. F. R. Co..... 832
Bank of Marin *v*. England..... 906
Bar Assn. of New York City, Samuels *v*..... 954
Barnes *v*. Beto..... 920
Barnes *v*. Rederi A/B Fredrika..... 910
Baxstrom *v*. Herold..... 107
Beaver *v*. United States..... 937
Bell *v*. Florida..... 954
Bell *v*. Texas..... 923
Bell *v*. United States..... 947
Bennett, Carey *v*..... 951
Bennett *v*. Wilkins..... 913
Benton *v*. California..... 938
Beto, Barnes *v*..... 920
Beto, Guidry *v*..... 950
Biloche *v*. Washington..... 949

Page
Biloxi, Bridges *v*. 574
Birdsell *v*. United States. 923
Black *v*. United States. 973
Black Diamond S. S. Corp., United States *v*. 910
Blackwell, McCaffrey *v*. 929
Blanchard Importing Co. *v*. Charles Gilman & Son. 968
Bland, Alabama *v*. 947
Board of Education, Parker *v*. 939
Board of Election of Monroe County *v*. United States. 575
Bogan *v*. Wilkins. 919
Boles, Greathouse *v*. 904
Boles, Long *v*. 904
Boles, Wood *v*. 904
Bond *v*. Floyd. 956
Booker *v*. United States. 961
Book "John Cleland's Memoirs" *v*. Atty. Gen. of Mass. 413
Borax, Commissioner *v*. 935
Borden Co., Federal Trade Comm'n *v*. 637
Boulad *v*. California. 915
Bove, Glazer *v*. 910
Bowden *v*. California Adult Auth. 922
Bowling *v*. United States. 908, 973
Bowman *v*. United States. 950
Boys Town, U. S. A., Inc. *v*. World Church. 910
Braun *v*. Wilson. 920
Breaks Park Comm'n, Kiser *v*. 945
Brennan *v*. Grover. 926
Brenner *v*. Manson. 519
Brewer *v*. Pennsylvania Bd. of Parole. 920
Bridges *v*. Biloxi. 574
Brinkley *v*. Cox. 918
Broderick & Bascom Rope Co. *v*. Mangan. 926
Brooklyn Bar Assn., Fried *v*. 945
Brooks *v*. United States. 916, 969
Bros Inc. *v*. Browning Mfg. Co. 940
Bros Inc., W. E. Grace Mfg. Co. *v*. 936
Brotherhood. For labor union, see name of trade.
Brown *v*. Cavell. 937
Brown *v*. Giffin Industries. 952
Brown *v*. Louisiana. 131
Brown *v*. New York. 939
Browning Mfg. Co., Bros Inc. *v*. 940
Bruner *v*. Texas. 945

Page

Bryant, Knight & Wall Co. *v*. . . . 958
Bryant *v*. Wilkins . . . 972
Burde *v*. Commissioner . . . 966
Burgdorf *v*. California . . . 908
Burke, Farrell *v*. . . . 970
Burke, Welsher *v*. . . . 954
Burns *v*. Richardson . . . 902
Burr *v*. Immigration and Naturalization Service . . . 915
Butler *v*. United States . . . 909
Butts *v*. Harrison . . . 663
Byrne *v*. Kysar . . . 913
Cade *v*. Balkcom . . . 961
California, Anders *v*. . . . 966
California, Arizona *v*. . . . 268
California, Benton *v*. . . . 938
California, Boulad *v*. . . . 915
California, Burgdorf *v*. . . . 908
California, Chapman *v*. . . . 956
California, Churchill *v*. . . . 961
California, Coleman *v*. . . . 917
California, Cross *v*. . . . 573
California, Dedmon *v*. . . . 920
California, Demes *v*. . . . 914
California, Dixon *v*. . . . 962
California *v*. El Paso Gas Co. . . . 955
California, Emory *v*. . . . 912
California, Flanagan *v*. . . . 931
California, Frazier *v*. . . . 931
California, Gohlke *v*. . . . 962
California, Hernandez *v*. . . . 923
California, Hochberg *v*. . . . 904
California, Humphrey *v*. . . . 971
California, Kingston *v*. . . . 920
California, McMorris *v*. . . . 102
California, Nafe *v*. . . . 962
California, Neal *v*. . . . 953
California, Oppenheimer *v*. . . . 930, 973
California, Pratt *v*. . . . 920
California *v*. Stewart . . . 903
California, Thomson *v*. . . . 963
California, Weller *v*. . . . 953
California, Williams *v*. . . . 916
California, Woodley *v*. . . . 948

Page
California Adult Auth., Bowden *v*. 922
California Adult Auth., Cantrell *v*. 930
California Adult Auth., Conway *v*. 971
California Adult Auth., Hays *v*. 920
California Adult Auth., Johnson *v*. 964
California Adult Auth., Williams *v*. 901
California Bd. of Equalization, Albers *v*. 960
California District Court of Appeal, Scott *v*. 920
California Legislature, Jupiter *v*. 972
Calissi, Grasberger *v*. 947
Callender *v*. Florida 270
Calmar, Inc. *v*. Cook Chemical Co. 1
Campbell *v*. United States 907
Canada Packers *v*. Atchison, T. & S. F. R. Co. 906
Cantrell *v*. California Adult Auth. 930
Capitol Skateland *v*. Washington Tax Comm'n. 103
Caraballo *v*. LaVallee 950
Carden *v*. Tennessee 959
Carey *v*. Bennett 951
Carnation Co. *v*. Pacific Westbound Conf. 213, 932
Carr *v*. United States 968
Carter *v*. Wisconsin 948
Caruso *v*. Fay 939
Cascade Nat. Gas Corp. *v*. El Paso Gas Co. 955
Cason *v*. Florida 918
Castellana *v*. United States 928
Castellano *v*. United States 949
Cavell, Brown *v*. 937
Cervantes *v*. United States 904
Chairman of N. C. State Bd. of Elections, Drum *v*. 831
Chambers *v*. Florida 948
Chandler *v*. Texaco, Inc. 936
Chapman *v*. California 956
Charles Gilman & Son, Blanchard Importing Co. *v*. 968
Charleston Memorial Hospital *v*. Darling 946
Chavers *v*. Alabama 960
Chemstrand Corp. *v*. Perfect Fit Products 942
Chemstrand Corp., Perfect Fit Products *v*. 942
Chesapeake & Ohio R. Co. *v*. Ludwig 946
Chicago, B. & Q. R. Co. *v*. Ill. Commerce Comm'n. 912
Chicago & N. W. R. Co. *v*. Atchison, T. & S. F. R. Co. 940, 964
Chrysler Corp., Hanover Ins. Co. *v*. 906
Churchill *v*. California 961
Ciampini *v*. Maroney 918

	Page
Cichos *v.* Indiana	966
Ciesielski *v.* Ohio	411
City. See name of city.	
Clark, Thomas *v.*	952
Clayton Chemical & Packaging Co. *v.* United States	821
"Cleland's, John, Memoirs" *v.* Atty. Gen. of Mass	413
Clerk of House of Representatives, Schack *v.*	904
Cohen *v.* Joseph	909
Cohen, Shotkin *v.*	953
Coleman *v.* California	917
Coleman *v.* New Jersey	950
Colgate-Palmolive Co. *v.* Cook Chemical Co	1
Collier *v.* United States	933
Collins *v.* United States	960
Collins *v.* Yeager	953
Colorado, Cruz *v.*	915
Colorado, Gallegos *v.*	971
Colorado, Washington *v.*	953
Columbus *v.* Royal	925
Commerce Loan Co., Perry *v.*	392
Commissioner *v.* Borax	935
Commissioner, Burde *v.*	966
Commissioner, Fribourg Navigation Co. *v.*	272
Commissioner, Hollywood Baseball Assn. *v.*	824
Commissioner, Leyman Estate *v.*	832
Commissioner, Mayer *v.*	935
Commissioner, R. C. Owen Co. *v.*	967
Commissioner *v.* Tellier	687
Commissioner of Internal Revenue. See Commissioner.	
Commissioner of Patents *v.* Manson	519
Commodity Credit Corp., Tenn. Tobacco Growers *v.*	907
Commonwealth. See also name of Commonwealth.	
Commonwealth Oil Ref. Co. *v.* Martinez	936
Communications Commission. See Federal Com. Comm'n.	
Connecticut, Robinson *v.*	960
Conner, Simler *v.*	928
Consolo *v.* Federal Maritime Comm'n	607
Conti *v.* Patterson	961
Continental Air Filters, American Air Filter Co. *v.*	934
Continental Industries, M. B. Skinner Co. *v.*	934
Conway *v.* California Adult Auth	971
Conway, Watkins *v.*	941
Cook Chemical Co., Calmar, Inc. *v.*	1
Cook Chemical Co., Colgate-Palmolive Co. *v.*	1

Page
Cook County Mental Health Clinic, Kandl *v*..... 901, 940
Coral Gables First Nat. Bk. *v*. American Surety Co..... 912
Cordova *v*. Wilson..... 920
Coronado *v*. United States..... 921
Costello *v*. United States..... 942
Cota *v*. Arizona..... 929
Cottage *v*. United States..... 969
County. See name of county.
County Bd. of Election of Monroe County *v*. United States.. 575
Cox, Brinkley *v*..... 918
Cox, Pearce *v*..... 918
Cox, Silva *v*..... 919
Cozzi *v*. United States..... 911
Craig *v*. Florida..... 959
Cravalho *v*. Richardson..... 902
Crawford *v*. Davis..... 921
Crawford County Bar Assn. *v*. Faubus..... 271
Cross *v*. California..... 573
Cross *v*. Kenton..... 921
Crouch *v*. Stanley..... 945
Crow *v*. Missouri..... 914
Cruz *v*. Colorado..... 915
Cummings *v*. Florida..... 931
Cunningham, Heinze *v*..... 968
Currie *v*. Florida..... 918
Dagampat *v*. United States..... 950
Darling, Charleston Memorial Hospital *v*..... 946
Darr *v*. Atlass..... 923
Darrah *v*. Illinois..... 919, 963
Darst *v*. Washington Bd. of Prison Terms and Paroles..... 961
Daup, *In re*..... 904
Davenport *v*. Kentucky..... 970
Davis, Crawford *v*..... 921
Deacon, Operating Engineers *v*..... 103
Dean Foods Co., Federal Trade Comm'n *v*..... 901
Dedmon *v*. California..... 920
Deere Co., Graham *v*..... 1
DeGregory *v*. Attorney General of New Hampshire..... 825
De Lago *v*. New York..... 963
DeMary *v*. Pate..... 920
Demes *v*. California..... 914
Demko, United States *v*..... 966
Department of Pub. Works of Ill., Drobnick *v*..... 959
De Pinto, Gorsuch *v*..... 973

Page
Devlin *v.* Florida 919
Dicker *v.* United States 936
Diner's Club, Evans *v.* 952
Di Palermo *v.* United States 930
Di Paolo *v.* New Jersey 949
Director of Internal Revenue. See Commissioner; District Director of Internal Revenue.
District Court. See U. S. District Court.
District Court of Iowa, Long *v.* 925, 956
District Director of Internal Revenue, Malat *v.* 569
District Director of Internal Revenue, Pizitz, Inc. *v.* 910
District Judge. See U. S. District Judge.
District of Columbia, Hicks *v.* 252
Dixon *v.* California 962
Doft, Goldstein *v.* 960
Dorchester Gas Producing Co. *v.* Federal Power Comm'n 969
Douglas *v.* Wirtz 909
Dowd *v.* Maxwell 960
Drobnick *v.* Dept. of Pub. Works of Ill. 959
Drum *v.* Seawell 831
Duesing *v.* Udall 912
Duffy Constr. Corp., Salemi *v.* 927, 973
Du Pont de Nemours & Co. *v.* Maloney 948
Du Pont de Nemours & Co., Maloney *v.* 948
Duval *v.* United States 932
Dyson *v.* Maryland 106
Easter *v.* Ziff 922
Eddy, Holmes *v.* 922
Edgerton *v.* North Carolina 929
Edwards *v.* United States 929
E. I. Du Pont de Nemours & Co. *v.* Maloney 948
E. I. Du Pont de Nemours & Co., Maloney *v.* 948
Eldridge *v.* United States 931
Election Bd. of Monroe Co. *v.* United States 575
Electrical Workers, Hearst Corp. *v.* 937
Electrical Workers *v.* Labor Board 943
Elfe *v.* LaVallee 949
Ellington, Smith *v.* 954
Ellis *v.* Stonewall Properties, Inc. 962
El Paso Nat. Gas Co., California *v.* 955
El Paso Nat. Gas Co., Cascade Gas Corp. *v.* 955
El Paso Nat. Gas Co., Southern Cal. Edison Co. *v.* 955
Emory *v.* California 912
Empresa Lineas Maritimas Argentinas, Logan *v.* 970

Page
Engberg *v.* Kansas 921
England *v.* Automatic Canteen Co 925
England, Bank of Marin *v* 906
Errico, Immigration and Naturalization Service *v* 941
Ertel Mfg. Corp. *v.* Labor Board 945
Eskridge *v.* Rhay 922
Estate. See name of estate.
Evans *v.* Diner's Club 952
Ewell, United States *v* 116
Fabrizio, United States *v* 904
"Fanny Hill" ("John Cleland's Memoirs") *v.* Atty. Gen. of Massachusetts 413
Farnsworth *v.* Turner 932
Faroni, Jones *v* 909
Farrell *v.* Burke 970
Faubus, Alexander *v* 271
Faubus, Crawford County Bar Assn. *v* 271
Fay, Caruso *v* 939
Fay, Fazio *v* 938
Fazio *v.* Fay 938
Federal Com. Comm'n, W. W. I. Z., Inc. *v* 967
Federal Maritime Comm'n, Consolo *v* 607
Federal Power Comm'n, Dorchester Gas Producing Co. *v* 969
Federal Power Comm'n, United Gas Pipe Line Co. *v* 924
Federal Trade Comm'n *v.* Borden Co 637
Federal Trade Comm'n *v.* Dean Foods Co 901
Federal Trade Comm'n, United Biscuit Co. *v* 926
Felburn *v.* New York Central R. Co 935
Fjellhammer *v.* United States 923
Flanagan *v.* California 931
Fleming *v.* Illinois 967
Flick-Reedy Corp. *v.* Hydro-Line Mfg. Co 958
Flick-Reedy Corp., Hydro-Line Mfg. Co. *v* 958
Florida, Bell *v* 954
Florida, Callender *v* 270
Florida, Cason *v* 918
Florida, Chambers *v* 948
Florida, Craig *v* 959
Florida, Cummings *v* 931
Florida, Currie *v* 918
Florida, Devlin *v* 919
Florida, Garrison *v* 919
Florida, Grizzell *v* 937
Florida, Gurganious *v* 917

Page
Florida, Hardin *v*. 971
Florida, Johnson *v*. 956
Florida, Mott *v*. 919
Florida, Schack *v*. 964
Florida, Thomas *v*. 938
Florida Governor, Knight & Wall Co. *v*. 958
Florida Secretary of State, Swann *v*. 210
Floyd, Bond *v*. 956
Fogliani, Aurillo *v*. 952
Fojon *v*. United States. 919
Ford *v*. Traynor. 915
Forgett *v*. United States. 926
Forrest Village Apts. *v*. United States. 943
Forsberg *v*. United States. 950
Fortner *v*. Balkcom. 912
Foster, *In re*. 966
Foulkes *v*. United States. 944
Fowler *v*. United States. 907
Franzblau *v*. Soles. 911
Frazier *v*. California. 931
Fredrika, Rederi A/B, Barnes *v*. 910
Freedman *v*. National Maritime Union. 917
Fribourg Navigation Co. *v*. Commissioner. 272
Fried *v*. Brooklyn Bar Assn. 945
Furtak *v*. New York. 922, 952
Furtak *v*. Wilkins. 932
Futrovsky, Goodman *v*. 946
Gallegos *v*. Colorado. 971
Gardner, Abbott Laboratories *v*. 924
Garrison *v*. Florida. 919
Garrity *v*. New Jersey. 941
Garvin *v*. United States. 914
Gatling *v*. New York. 971
Gauthier *v*. Wisconsin. 916
General Electric Co., Servo Corp. *v*. 934
General Sani-Can Mfg. Corp. *v*. U. S. District Court. 924
Gerrity, Nehring *v*. 922
Gibbs, Mine Workers *v*. 715
Giffin Industries, Brown *v*. 952
Giles *v*. Maryland. 941
Gillentine *v*. United States. 922
Gilman & Son, Blanchard Importing Co. *v*. 968
Ginsburg *v*. Ginsburg. 907, 963
Ginzburg *v*. United States. 463

Page
Glazer *v.* Bove 910
Glenn *v.* McMann 915
Globe-Democrat Pub. Co., St. Louis Mailers' Union *v.* 931
Gohlke *v.* California 962
Gojack *v.* United States 964
Goldman *v.* Virginia 969
Goldstein *v.* Doft 960
Goodman *v.* Futrovsky 946
Goodwin *v.* Kansas 914
Gorsuch *v.* De Pinto 973
Gorsuch *v.* Landoe 973
Government Employees Ins. Co. *v.* United States 939
Governor. See name of State.
Grace Mfg. Co. *v.* Bros Inc 936
Gradsky *v.* United States 265
Graham *v.* John Deere Co 1
Grand River Dam Auth. *v.* National Gypsum Co 907
Grasberger *v.* Calissi 947
Gray *v.* Henderson 961
Greathouse *v.* Boles 904
Green *v.* Osgood-Lewis-Perkins, Inc 946
Green *v.* Rhay 918
Grene *v.* United States 265
Grinnell Corp. *v.* United States 933
Grinnell Corp., United States *v.* 933
Grizzell *v.* Florida 937
Grover, Brennan *v.* 926
Guest, United States *v.* 745
Guidry *v.* Beto 950
Gunby, Yost *v.* 959
Gurganious *v.* Florida 917
Hackett *v.* United States 973
Hallett, Skolnick *v.* 922
Hanover Ins. Co. *v.* Chrysler Corp 906
Hardin *v.* Florida 971
Harper *v.* United States 951
Harper *v.* Virginia Bd. of Elections 663
Harris *v.* Illinois 971
Harris *v.* Wilson 951
Harrison, Butts *v.* 663
Harrison *v.* Schaefer 269
Hawaii Governor *v.* Richardson 902
Hawley *v.* Virginia 910
Hayes *v.* New York 918

	Page
Hays *v.* California Adult Auth	920
Hazel *v.* United States	914
HC&D Moving & Storage Co. *v.* Yamane	104
Hearst Corp. *v.* Electrical Workers	937
Heider *v.* Michigan Sugar Co	905
Heinze *v.* Cunningham	968
Heinze, Owens *v.*	938
Heinze, Sierra *v.*	914
Heinze, Toth *v.*	916
Helmandollar, Lord *v.*	928
Hemphill *v.* Washington Tax Comm'n	103
Henderson, Gray *v.*	961
Hernandez *v.* California	923
Herold, Baxstrom *v.*	107
Herr *v.* United States	922
Hetenyi, Mancusi *v.*	913
Hicks *v.* District of Columbia	252
Hill *v.* New York	960
Hillegas *v.* Sams	928
"Hill, Fanny" ("John Cleland's Memoirs") *v.* Atty. Gen. of Massachusetts	413
Hilton Hotels Corp., Surowitz *v.*	363
Ho *v.* Kam	936
Hobbs *v.* Lane	967
Hochberg *v.* California	904
Holland *v.* United States	928
Holley, Outboard Marine Corp. *v.*	934
Hollywood Baseball Assn. *v.* Commissioner	824
Holmes *v.* Eddy	922
Holmes Electric Protective Co. *v.* United States	933
Holt *v.* Kirby	902
Home Fed. Sav. & Loan Assn., Mundt *v.*	931
Hoosier Cardinal Corp., Automobile Workers *v.*	696
Hopson *v.* Texaco, Inc	262
Hostetter, Joseph E. Seagram & Sons *v.*	902
House of Representatives Clerk, Schack *v.*	904
Houston, Rhodes *v.*	971
Howard *v.* Kentucky	924
Howell *v.* Oregon	922
Hudson, Tabas *v.*	969
Humble Oil & Ref. Co., Robinson *v.*	911
Humphrey *v.* California	971
Hyde Constr. Co., Koehring Co. *v.*	939
Hydro-Line Mfg. Co. *v.* Flick-Reedy Corp	958

Page
Hydro-Line Mfg. Co., Flick-Reedy Corp. *v*..... 958
Idaho, Smith *v*..... 916
Idaho Sheet Metal Works *v*. Wirtz..... 190, 963
Illinois, Darrah *v*..... 919, 963
Illinois, Fleming *v*..... 967
Illinois, Harris *v*..... 971
Illinois, Nelson *v*..... 918
Illinois, Smith *v*..... 910, 953
Illinois, Varnadoe *v*..... 929
Illinois Attorney General, Thomas *v*..... 952
Illinois Commerce Comm'n, Chicago, B. & Q. R. Co. *v*..... 912
Illinois Dept. of Public Works, Drobnick *v*..... 959
Immigration and Naturalization Service, Burr *v*..... 915
Immigration and Naturalization Service *v*. Errico..... 941
Immigration and Naturalization Service, Plummer *v*..... 941
Immigration and Naturalization Service, Rocha *v*..... 927
Immigration and Naturalization Service, Scott *v*..... 941
Indiana, Cichos *v*..... 966
Indian Lake Estates, Ten Individual Defendants *v*..... 947
Indiviglio *v*. United States..... 907
In re. See name of party.
Internal Revenue Service. See Commissioner; District Director of Internal Revenue.
International. For labor union, see name of trade.
Interstate Com. Comm'n *v*. Atlantic C. L. R. Co..... 576
Iowa District Court, Long *v*..... 925, 956
Irwin *v*. United States..... 967
James *v*. Wainwright..... 937
Janes, Stewart *v*..... 962
Jeffrey Galion Mfg. Co., Machinists *v*..... 927
Jenkins *v*. Maryland..... 834
Jervis Corp. *v*. Nelmor Corp..... 970
Jett *v*. United States..... 935
Jiggs, Inc. *v*. Slumbertogs, Inc..... 969
"John Cleland's Memoirs" *v*. Atty. Gen. of Mass..... 413
John Deere Co., Graham *v*..... 1
Johnson *v*. California Adult Auth..... 964
Johnson *v*. Florida..... 956
Johnson *v*. Kentucky..... 913
Johnson *v*. New Jersey..... 903
Johnson, United States *v*..... 169
Jones *v*. Faroni..... 909
Jones *v*. Murphy..... 913
Jones *v*. Ohio..... 951

Page
Jones, Rhodes *v*. 919, 963
Jones *v*. United States 922
Joseph, Cohen *v*. 909
Joseph E. Seagram & Sons *v*. Hostetter 902
Jupiter *v*. California Legislature 972
Kaiser Jeep Corp., Siwecki *v*. 962
Kam, Ho *v*. 936
Kam Hon Ho *v*. Kam Moon Kam 936
Kam Moon Kam, Kam Hon Ho *v*. 936
Kandl *v*. Urse 901, 940
Kansas, Engberg *v*. 921
Kansas, Goodwin *v*. 914
Kansas, Morton *v*. 904
Kansas, Sanders *v*. 961
Katzenbach *v*. Morgan 903, 955, 964
Katzenbach, South Carolina *v*. 301
Kaufman *v*. United States 951
Kenner *v*. United States 958
Kent *v*. United States 541
Kenton, Cross *v*. 921
Kentucky, Davenport *v*. 970
Kentucky, Howard *v*. 924
Kentucky, Johnson *v*. 913
Kentucky, Kinmon *v*. 930
Kentucky, Lynn *v*. 938
Khabiri *v*. Virginia Elec. & Power Co 971
Kindelan *v*. United States 944
Kingston *v*. California 920
Kinmon *v*. Kentucky 930
Kirby, Holt *v*. 902
Kirschner *v*. West Co 945
Kiser *v*. Breaks Park Comm'n 945
Klein, Spevack *v*. 942
Klinger, Reyes *v*. 932
K-N Enterprises *v*. West Co 945
Knetsch *v*. United States 957
Knight & Wall Co. *v*. Bryant 958
Knoll *v*. Knoll 909, 973
Knowles, Tibbetts *v*. 927
Koehring Co. *v*. Hyde Constr. Co 939
Kroah *v*. Russell 914
Kropp, Ortega *v*. 930
Kukich *v*. Serbian Eastern Orthodox Church 574
Kysar, Byrne *v*. 913

Page
Labor Board *v.* Acme Industrial Co. 905
Labor Board, Electrical Workers *v.* 943
Labor Board, Ertel Mfg. Co. *v.* 945
Labor Board, S. D. Warren Co. *v.* 958
Labor Union. See name of trade.
Landoe, Gorsuch *v.* 973
Lane, Hobbs *v.* 967
La Placa *v.* United States 927
Larro *v.* United States 944
LaVallee, Caraballo *v.* 950
LaVallee, Elfe *v.* 949
LaVallee, Rodriguez *v.* 951
La Vina, Scott *v.* 917
Leach *v.* United States 917
Lease Management, Worthington Corp. *v.* 937
Lee *v.* United States 908
Lester *v.* Tennessee 952
Levin, Minchella *v.* 904
Levine *v.* United States 265
Leyde *v.* Rhay 973
Leyman Estate *v.* Commissioner 832
Lichota *v.* United States 954
Link *v.* United States 915
Linn *v.* Plant Guard Workers 53
Local. For labor union, see name of trade.
Locke *v.* River Lines 946
Logan *v.* Empresa Lineas Maritimas Argentinas 970
Logan *v.* New York 970
Long *v.* Boles 904
Long *v.* District Court of Iowa 925, 956
Lord *v.* Helmandollar 928
Louisiana, Brown *v.* 131
Louisiana, McIlvaine *v.* 921, 954
Louis Pizitz Dry Goods Co. *v.* Patterson 910
Louisville & N. R. Co., Railroad Trainmen *v.* 923
Louisville & N. R. Co. *v.* United States 102
Ludwig, Chesapeake & Ohio R. Co. *v.* 946
Lusk *v.* United States 967
Lynch *v.* United States 904
Lynn *v.* Kentucky 938
Mac. See also Mc.
Machado *v.* New York 921
Machado *v.* Wilkins 916, 963
Machinists *v.* Jeffrey Galion Mfg. Co. 927

Page

Mailers' Union *v.* Globe-Democrat Pub. Co. 931
Maimonides Hospital, Zanca *v.* 922
Malat *v.* Riddell 569
Maloney *v.* E. I. Du Pont de Nemours & Co. 948
Maloney, E. I. Du Pont de Nemours & Co. *v.* 948
Mancusi *v.* Hetenyi 913
Mancusi, Stevenson *v.* 951
Mangan, Broderick & Bascom Rope Co. *v.* 926
Manson, Brenner *v.* 519
Marin Bank *v.* England 906
Maritime Union, Freedman *v.* 917
Marks, Stevens *v.* 234
Maroney, Ciampini *v.* 918
Martinez, Commonwealth Oil Ref. Co. *v.* 936
Maryland, Dyson *v.* 106
Maryland, Giles *v.* 941
Maryland, Jenkins *v.* 834
Massachusetts, McGruder *v.* 972
Massachusetts Atty. Gen., "John Cleland's Memoirs" *v.* 413
Maxwell, Dowd *v.* 960
Maxwell, Pinch *v.* 938
Maxwell, Sheppard *v.* 902
Maxwell, Smith *v.* 931
Maxwell, Turpin *v.* 917
Maxwell, Vitoratos *v.* 105
Mayer *v.* Commissioner 935
M. B. Skinner Co. *v.* Continental Industries 934
Mc. See also Mac.
McCaffrey *v.* Blackwell 929
McCloskey, Stevens *v.* 234
McCullough Tool Co. *v.* Well Surveys, Inc 933
McDonald *v.* Rhay 931
McGann *v.* Richardson 922
McGann *v.* United States 916
McGettrick, Velotta *v.* 944
McGrath *v.* McMann 952
McGruder *v.* Massachusetts 972
McIlvaine *v.* Louisiana 921, 954
McIntosh *v.* Stephenson 930
McIntosh *v.* United States 922
McLamb *v.* Wilson 955
McMann, Glenn *v.* 915
McMann, McGrath *v.* 952
McMorris *v.* California 102

Page
Mercer *v.* Russell 954
Messina, Mutual Health & Accident Assn. *v.* 908
Meyer, Rhodes *v.* 939
Michaels *v.* United States 918
Michigan, Robinson *v.* 920
Michigan Sugar Co., Heider *v.* 905
Miller *v.* Rhay 965
Miller *v.* Virginia 831
Mills *v.* Alabama 904
Minchella *v.* Levin 904
Mine Workers *v.* Gibbs 715
Miranda *v.* Arizona 903
Mishkin *v.* New York 502
Missouri, Crow *v.* 914
Missouri, Spica *v.* 972
Mohler *v.* U. S. Bd. of Parole 916
Monroe County Election Board *v.* United States 575
Monsanto Chemical Co. *v.* Perfect Fit Products 942
Monsanto Chemical Co., Perfect Fit Products *v.* 942
Moon *v.* United States 929
Moore Co., Sid Richardson Carbon & Gas Co. *v.* 925
Morgan, Katzenbach *v.* 903, 955, 964
Morgan, New York Bd. of Elections *v.* 903, 955, 964
Morton *v.* Kansas 904
Motorlease Corp. *v.* United States 573
Mott *v.* Florida 919
Mozingo *v.* York County Nat. Gas Auth. 970
Mundt *v.* Home Fed. Sav. & Loan Assn. 931
Murchison, Riess *v.* 946
Murphy, Jones *v.* 913
Murray *v.* United States 949
Muth *v.* Atlass 923
Mutual Health & Accident Assn. *v.* Messina 908
Myers, Smith *v.* 931
Myers, Walls *v.* 952
Nafe *v.* California 962
National Gypsum Co., Grand River Dam Auth. *v.* 907
National Labor Relations Board. See Labor Board.
National Maritime Union, Freedman *v.* 917
National Mediation Board, World Airways *v.* 926
National Steel Corp., United States *v.* 905
Neal *v.* California 953
Nebraska, Sheldon *v.* 930
Nebraska Bar Assn., Nielsen *v.* 105, 954

Page
Necchi Sewing Mach. Corp. *v.* Necchi S. p. A. 909
Necchi S. p. A., Necchi Sewing Mach. Corp. *v.* 909
Nehring *v.* Gerrity 922
Nello L. Teer Co. *v.* United States 934
Nelmor Corp., Jervis Corp. *v.* 970
Nelson *v.* Illinois 918
Nesbitt *v.* United States 926
Nevada, Rainsberger *v.* 954
New Hampshire Attorney General, DeGregory *v.* 825
New Jersey, Coleman *v.* 950
New Jersey, Di Paolo *v.* 949
New Jersey, Garrity *v.* 941
New Jersey, Johnson *v.* 903
New Jersey, Trantino *v.* 922
New York, Brown *v.* 939
New York, De Lago *v.* 963
New York, Furtak *v.* 922, 952
New York, Gatling *v.* 971
New York, Hayes *v.* 918
New York, Hill *v.* 960
New York, Logan *v.* 970
New York, Machado *v.* 921
New York, Mishkin *v.* 502
New York, Overby *v.* 939
New York, Penn *v.* 969
New York, Pugach *v.* 575
New York, Rodriguez *v.* 939
New York, Tornetto *v.* 952
New York, Van Slyke *v.* 953
New York, Vignera *v.* 903
New York, Wager *v.* 920, 954
New York, Wilson *v.* 930
New York, Young *v.* 921
New York Bd. of Elections *v.* Morgan 903, 955, 964
New York Central R. Co., Felburn *v.* 935
New York City Bar Assn., Samuels *v.* 954
New York Liquor Auth., Seagram & Sons *v.* 902
New York Supreme Court Justice, Stevens *v.* 234
New York Tax Comm'n, Powless *v.* 911
Nielsen *v.* Nebraska Bar Assn. 105, 954
Nolan *v.* Rhodes 104
North Carolina, Edgerton *v.* 929
North Carolina, Perry *v.* 951
North Carolina State Bd. of Elections Chairman, Drum *v.* ... 831

Page
Northwest Airlines *v.* Alaska Airlines 936
Oberhauser, Spry *v.* 919
Odell *v.* State Dept. of Pub. Welfare of Wis 939
Ohio, Arrington *v.* 906
Ohio, Ciesielski *v.* 411
Ohio, Jones *v.* 951
Ohio, Spink *v.* 927
Ohio, Stevens *v.* 939, 963
Ohio, Taylor *v.* 918, 951
Ohio Governor, Nolan *v.* 104
Oliver *v.* Attorney General 915
O'Malley, United States *v.* 627
Operating Engineers *v.* Deacon 103
Oppenheimer *v.* California 930, 973
Oregon, Howell *v.* 922
Ortega *v.* Kropp 930
Osgood-Lewis-Perkins, Inc., Green *v.* 946
Outboard Marine Corp. *v.* Holley 934
Overby *v.* New York 939
Owen Co. *v.* Commissioner 967
Owens *v.* Heinze 938
Owensby *v.* United States 962
Pacific Westbound Conf., Carnation Co. *v.* 213, 932
Pagano *v.* United States 928
Panczko *v.* United States 935
Parker *v.* Board of Education, Prince George's County 939
Pate, DeMary *v.* 920
Pate *v.* Robinson 375
Pate, Thomas *v.* 962
Patents Commissioner *v.* Manson 519
Patterson, Conti *v.* 961
Patterson, Pizitz, Inc. *v.* 910
Payson *v.* United States 957
Pearce *v.* Cox 918
Penn *v.* New York 969
Pennsylvania, Stello *v.* 922
Pennsylvania, Wallis *v.* 970
Pennsylvania Bd. of Parole, Brewer *v.* 920
Pennsylvania R. Co., Accardi *v.* 225
Perati *v.* United States 957
Perez *v.* Wainwright 938
Perfect Fit Products *v.* Monsanto Chemical Co 942
Perfect Fit Products, Monsanto Chemical Co. *v.* 942
Perry *v.* Commerce Loan Co 392

	Page
Perry *v.* North Carolina	951
Perryton Wholesale, Inc. *v.* Pioneer Distributing Co	945
Pert *v.* Wainwright	972
Peyton, Reickauer *v.*	918
Peyton, Vess *v.*	953
Philipp *v.* Washington	927
Pinch *v.* Maxwell	938
Pioneer Distributing Co., Perryton Wholesale *v.*	945
Pizitz Dry Goods Co. *v.* Patterson	910
Pizitz, Inc. *v.* Patterson	910
Plant Guard Workers, Linn *v.*	53
Plummer *v.* Immigration and Naturalization Service	941
Postell *v.* Wilson	931, 955
Power Commission. See Federal Power Comm'n.	
Powless *v.* New York Tax Comm'n	911
Pratt *v.* California	920
Price, United States *v.*	787
Prince George's County Bd. of Education, Parker *v.*	939
Probate Judge *v.* Stanley	945
Puerto Rico, Sociedad de Mario Mercado e Hijos *v.*	412
Pugach *v.* New York	575
Railroad Trainmen *v.* Louisville & N. R. Co	923
Rainsberger *v.* Nevada	954
Rangen, Inc. *v.* Sterling Nelson & Sons, Inc	936
R. C. Owen Co. *v.* Commissioner	967
Recorder's Court Judge, Washington *v.*	962
Rederi A/B Fredrika, Barnes *v.*	910
Reeves *v.* United States	929
Reickauer *v.* Peyton	918
Reyes *v.* Klinger	932
Rhay, Bagley *v.*	953
Rhay, Eskridge *v.*	922
Rhay, Green *v.*	918
Rhay, Leyde *v.*	973
Rhay, McDonald *v.*	931
Rhay, Miller *v.*	965
Rhay, Stiltner *v.*	931
Rhodes *v.* Houston	971
Rhodes *v.* Jones	919, 963
Rhodes *v.* Meyer	939
Rhodes, Nolan *v.*	104
Richardson, Abe *v.*	902
Richardson, Burns *v.*	902
Richardson, Cravalho *v.*	902

Page
Richardson, Hawaii Governor *v.* ... 902
Richardson, McGann *v.* ... 922
Richardson Carbon & Gas Co. *v.* Moore Co. ... 925
Riddell, Malat *v.* ... 569
Riess *v.* Murchison ... 946
River Lines, Locke *v.* ... 946
Roberts, Schack *v.* ... 904
Roberts *v.* United States ... 265
Robinson *v.* Connecticut ... 960
Robinson *v.* Humble Oil & Ref. Co. ... 911
Robinson *v.* Michigan ... 920
Robinson, Pate *v.* ... 375
Robinson *v.* State Hospital Director ... 931
Robinson *v.* United States ... 911
Rocha *v.* Immigration and Naturalization Service ... 927
Rodriguez *v.* LaVallee ... 951
Rodriguez *v.* New York ... 939
Rosen *v.* United States ... 908
Rosenblatt *v.* Baer ... 75
Rosenstiel *v.* Rosenstiel ... 940
Roth, Vida *v.* ... 922
Rough Diamond Co. *v.* United States ... 957
Royal, Columbus *v.* ... 925
Royal Court Apts. *v.* United States ... 968
Russell, Kroah *v.* ... 914
Russell, Mercer *v.* ... 954
Ryan *v.* Vickers ... 944
S & A Co., United States *v.* ... 942
St. Louis Mailers' Union *v.* Globe-Democrat Pub. Co. ... 931
Salazar *v.* Wilson ... 954
Salemi *v.* Duffy Constr. Corp. ... 927, 973
Salter *v.* United States ... 943
Sams, Hillegas *v.* ... 928
Samuels *v.* Bar Assn. of New York City ... 954
Sanders *v.* Kansas ... 961
Santana, *In re* ... 939, 963
Saylor *v.* Alabama ... 917
Scalza *v.* United States ... 922
Schack *v.* Florida ... 964
Schack *v.* Roberts ... 904
Schack *v.* Simpson ... 904
Schaefer, Harrison *v.* ... 269
Schnell, Allbright-Nell Co. *v.* ... 934
Schulenburg, Signatrol, Inc. *v.* ... 959

	Page
Scott *v.* Calif. District Court of Appeal	920
Scott *v.* Immigration and Naturalization Service	941
Scott *v.* La Vina	917
S. D. Warren Co. *v.* Labor Board	958
Seagram & Sons *v.* Hostetter	902
Seawell, Drum *v.*	831
Secretary of HEW, Abbott Laboratories *v.*	924
Secretary of Interior, Duesing *v.*	912
Secretary of Labor, Douglas *v.*	909
Secretary of Labor, Idaho Metal Works *v.*	190, 963
Secretary of Labor *v.* Steepleton Tire Co	190
Secretary of State of Fla., Swann *v.*	210
Securities & Exch. Comm'n, Alabama Elec. Coop. *v.*	968
Serbian Eastern Orthodox Church, Kukich *v.*	574
Servo Corp. *v.* General Electric Co	934
Sheldon *v.* Nebraska	930
Sheppard *v.* Maxwell	902
Shotkin *v.* Cohen	953
Shott, Tehan *v.*	931
Shuford, Anderson *v.*	935
Sid Richardson Carbon & Gas Co. *v.* Moore Co	925
Sierra *v.* Heinze	914
Signatrol, Inc. *v.* Schulenburg	959
Silva *v.* Cox	919
Simari *v.* Wilkins	930
Simler *v.* Conner	928
Simpson, Schack *v.*	904
Simpson *v.* United States	971
Siwecki *v.* Kaiser Jeep Corp	962
Skinner Co. *v.* Continental Industries	934
Skolnick *v.* Hallett	922
Slumbertogs, Inc., Jiggs, Inc. *v.*	969
Smith, Andrews *v.*	954
Smith *v.* Ellington	954
Smith *v.* Idaho	916
Smith *v.* Illinois	910, 953
Smith *v.* Maxwell	931
Smith *v.* Myers	931
Smith *v.* Toledo	949
Sociedad de Mario Mercado e Hijos *v.* Puerto Rico	412
Soles, Franzblau *v.*	911
South Carolina *v.* Katzenbach	301
Southern Cal. Edison Co. *v.* El Paso Gas Co	955
Southwest Potash Corp. *v.* United States	911

Page
Spevack *v.* Klein 942
Spica *v.* Missouri 972
Spink *v.* Ohio 927
Spry *v.* Oberhauser 919
Stanley, Crouch *v.* 945
State. See also name of State.
State Bd. of Equalization, Albers *v.* 960
State Dept. of Pub. Welfare of Wis., Odell *v.* 939
State Hospital Director, Robinson *v.* 931
Steepleton Tire Co., Wirtz *v.* 190
Stello *v.* Pennsylvania 922
Stephenson, McIntosh *v.* 930
Sterling Nelson & Sons, Inc., Rangen, Inc. *v.* 936
Stevens *v.* Marks 234
Stevens *v.* McCloskey 234
Stevens *v.* Ohio 939, 963
Stevenson *v.* Mancusi 951
Stewart, California *v.* 903
Stewart *v.* Janes 962
Stiltner *v.* Rhay 931
Stiltner *v.* Washington 919, 963
Stonewall Properties, Inc., Ellis *v.* 962
Straub *v.* United States 908
Surowitz *v.* Hilton Hotels Corp. 363
Swann *v.* Adams 210
Tabas *v.* Hudson 969
Tandler *v.* United States 961
Tarin *v.* United States 938
Tax Comm'n of N. Y., Powless *v.* 911
Taylor *v.* Ohio 918, 951
Teer Co. *v.* United States 934
Tehan *v.* Shott 931
Tellier, Commissioner *v.* 687
Ten Individual Defendants *v.* Indian Lake Estates 947
Tennessee, Carden *v.* 959
Tennessee, Lester *v.* 952
Tennessee, Williams *v.* 963
Tennessee Gas Co. *v.* United States 943
Tennessee Tobacco Growers *v.* Commodity Credit Corp. 907
Texaco, Inc., Chandler *v.* 936
Texaco, Inc., Hopson *v.* 262
Texas, Bell *v.* 923
Texas, Bruner *v.* 945
Texas, Wells *v.* 930

Page
Thaggard *v.* United States 958
Third Nat. Bk. & Tr. Co., Aetna Casualty Co. *v.* 944
Thomas *v.* Clark 952
Thomas *v.* Florida 938
Thomas *v.* Pate 962
Thomas *v.* Ward 916
Thomson *v.* California 963
Tibbetts *v.* Knowles 927
Time-O-Matic Co., Signatrol, Inc. *v.* 959
Tippett *v.* United States 908
Toledo, Smith *v.* 949
Tornetto *v.* New York 952
Toth *v.* Heinze 916
Trade Commission. See Federal Trade Comm'n.
Tramontana *v.* Varig Airlines 943
Transportation-Communication Union *v.* Union Pac. R. Co. . 905
Trantino *v.* New Jersey 922
Traynor, Ford *v.* 915
Tremont *v.* United States 944
Turner, Farnsworth *v.* 932
Turpin *v.* Maxwell 917
2000 Plastic Tubular Cases *v.* United States 913
Udall, Duesing *v.* 912
Union. For labor union, see name of trade.
Union Pac. R. Co., Transportation-Com. Union *v.* 905
United. For labor union, see name of trade.
United Biscuit Co. *v.* Federal Trade Comm'n 926
United Gas Pipe Line Co. *v.* Federal Power Comm'n 924
United States *v.* Adams 39
United States *v.* American Broad.-Paramount Theatres 906
United States, American Dist. Telegraph Co. *v.* 933
United States, Ansourian *v.* 949
United States *v.* Atchison, T. & S. F. R. Co 964
United States, Automatic Fire Alarm Co. *v.* 933
United States, Bailey *v.* 959
United States, Bakes *v.* 968
United States, Beaver *v.* 937
United States, Bell *v.* 947
United States, Birdsell *v.* 923
United States, Black *v.* 973
United States *v.* Black Diamond S. S. Corp 910
United States, Booker *v.* 961
United States, Bowling *v.* 908, 973
United States, Bowman *v.* 950

Page
United States, Brooks *v*. 916, 969
United States, Butler *v*. 909
United States, Campbell *v*. 907
United States, Carr *v*. 968
United States, Castellana *v*. 928
United States, Castellano *v*. 949
United States, Cervantes *v*. 904
United States, Clayton Chemical & Packaging Co. *v*. 821
United States, Collier *v*. 933
United States, Collins *v*. 960
United States, Coronado *v*. 921
United States, Costello *v*. 942
United States, Cottage *v*. 969
United States, County Bd. of Election of Monroe County *v*. . 575
United States, Cozzi *v*. 911
United States, Dagampat *v*. 950
United States *v*. Demko. 966
United States, Dicker *v*. 936
United States, Di Palermo *v*. 930
United States, Duval *v*. 932
United States, Edwards *v*. 929
United States, Eldridge *v*. 931
United States *v*. Ewell. 116
United States *v*. Fabrizio. 904
United States, Fjellhammer *v*. 923
United States, Fojon *v*. 919
United States, Forgett *v*. 926
United States, Forrest Village Apts. *v*. 943
United States, Forsberg *v*. 950
United States, Foulkes *v*. 944
United States, Fowler *v*. 907
United States, Garvin *v*. 914
United States, Gillentine *v*. 922
United States, Ginzburg *v*. 463
United States, Gojack *v*. 964
United States, Government Employees Ins. Co. *v*. 939
United States, Gradsky *v*. 265
United States, Grene *v*. 265
United States *v*. Grinnell Corp. 933
United States, Grinnell Corp. *v*. 933
United States *v*. Guest. 745
United States, Hackett *v*. 973
United States, Harper *v*. 951
United States, Hazel *v*. 914

	Page
United States, Herr *v*.	922
United States, Holland *v*.	928
United States, Holmes Electric Protective Co. *v*.	933
United States, Indiviglio *v*.	907
United States, Irwin *v*.	967
United States, Jett *v*.	935
United States *v*. Johnson	169
United States, Jones *v*.	922
United States, Kaufman *v*.	951
United States, Kenner *v*.	958
United States, Kent *v*.	541
United States, Kindelan *v*.	944
United States, Knetsch *v*.	957
United States, La Placa *v*.	927
United States, Larro *v*.	944
United States, Leach *v*.	917
United States, Lee *v*.	908
United States, Levine *v*.	265
United States, Lichota *v*.	954
United States, Link *v*.	915
United States, Louisville & N. R. Co. *v*.	102
United States, Lusk *v*.	967
United States, Lynch *v*.	904
United States, McGann *v*.	916
United States, McIntosh *v*.	922
United States, Michaels *v*.	918
United States, Monroe County Bd. of Election *v*.	575
United States, Moon *v*.	929
United States, Motorlease Corp. *v*.	573
United States, Murray *v*.	949
United States *v*. National Steel Corp.	905
United States, Nello L. Teer Co. *v*.	934
United States, Nesbitt *v*.	926
United States *v*. O'Malley	627
United States, Owensby *v*.	962
United States, Pagano *v*.	928
United States, Panczko *v*.	935
United States, Payson *v*.	957
United States, Perati *v*.	957
United States *v*. Price	787
United States, Reeves *v*.	929
United States, Roberts *v*.	265
United States, Robinson *v*.	911
United States, Rosen *v*.	908

Page
United States, Rough Diamond Co. *v*. 957
United States, Royal Court Apts. *v*. 968
United States *v*. S & A Co. 942
United States, Salter *v*. 943
United States, Scalza *v*. 922
United States, Simpson *v*. 971
United States, Southwest Potash Corp. *v*. 911
United States, Straub *v*. 908
United States, Tandler *v*. 961
United States, Tarin *v*. 938
United States, Teer Co. *v*. 934
United States, Tennessee Gas Co. *v*. 943
United States, Thaggard *v*. 958
United States, Tippett *v*. 908
United States, Tremont *v*. 944
United States, 2000 Plastic Tubular Cases *v*. 913
United States, United Transports *v*. 411
United States, Vasquez-Ochoa *v*. 939
United States, Wabash Fire & Cas. Ins. Co. *v*. 909
United States, Wapnick *v*. 923
United States, Ware *v*. 919
United States, Westover *v*. 903
United States, Williams *v*. 917
United States, Wilson *v*. 944
United States, Wright *v*. 973
U. S. Bd. of Parole, Mohler *v*. 916
U. S. District Court, General Sani-Can Mfg. Corp. *v*. 924
U. S. District Court Chief Judge, Minchella *v*. 904
U. S. District Court Chief Judge, Schack *v*. 904
U. S. District Judge *v*. Texaco, Inc. 936
U. S. District Judge, Vida *v*. 922
U. S. *ex rel.* See name of real party in interest.
United Transports *v*. United States. 411
Urse, Kandl *v*. 901, 940
Van Buskirk, Bailey *v*. 948
Van Slyke *v*. New York. 953
Varig Airlines, Tramontana *v*. 943
Varnadoe *v*. Illinois. 929
Vasquez-Ochoa *v*. United States. 939
Velotta *v*. McGettrick. 944
Vess *v*. Peyton. 953
Veterans Administration Hosp. Dir., White *v*. 904
Vickers, Ryan *v*. 944
Vida *v*. Roth. 922

Page
Vignera *v.* New York 903
Virginia, Goldman *v.* 969
Virginia, Hawley *v.* 910
Virginia, Miller *v.* 831
Virginia, Wallace *v.* 956
Virginia Bd. of Elections, Harper *v.* 663
Virginia Elec. & Power Co., Khabiri *v.* 971
Virginia Governor, Butts *v.* 663
Vitoratos *v.* Maxwell 105
Wabash Fire & Cas. Ins. Co. *v.* United States 909
Wager *v.* New York 920, 954
Wainwright, James *v.* 937
Wainwright, Perez *v.* 938
Wainwright, Pert *v.* 972
Wallace *v.* Virginia 956
Wallis *v.* Pennsylvania 970
Walls *v.* Myers 952
Wapnick *v.* United States 923
Ward, Thomas *v.* 916
Warden. See name of warden.
Ware *v.* United States 919
Warren Co. *v.* Labor Board 958
Washington, Biloche *v.* 949
Washington *v.* Colorado 953
Washington, Philipp *v.* 927
Washington *v.* Recorder's Court Judge 962
Washington, Stiltner *v.* 919, 963
Washington Bd. of Prison Terms and Paroles, Darst *v.* 961
Washington Tax Comm'n, Capitol Skateland *v.* 103
Washington Tax Comm'n, Hemphill *v.* 103
Watkins *v.* Conway 941
W. E. Grace Mfg. Co. *v.* Bros Inc 936
Weller *v.* California 953
Wells *v.* Texas 930
Well Surveys, Inc., McCullough Tool Co. *v.* 933
Welsher *v.* Burke 954
West Co., Kirschner *v.* 945
West Co., K-N Enterprises *v.* 945
Westover *v.* United States 903
White *v.* Director, Veterans Adm. Hosp 904
White *v.* Wilson 962
Wilkins, Bennett *v.* 913
Wilkins, Bogan *v.* 919
Wilkins, Bryant *v.* 972

Page
Wilkins, Furtak *v*..... 932
Wilkins, Machado *v*..... 916, 963
Wilkins, Simari *v*..... 930
Williams *v*. California..... 916
Williams *v*. California Adult Auth..... 901
Williams *v*. Tennessee..... 963
Williams *v*. United States..... 917
Wilson, Allen *v*..... 964
Wilson, Braun *v*..... 920
Wilson, Cordova *v*..... 920
Wilson, Harris *v*..... 951
Wilson, McLamb *v*..... 955
Wilson *v*. New York..... 930
Wilson, Postell *v*..... 931, 955
Wilson, Salazar *v*..... 954
Wilson *v*. United States..... 944
Wilson, White *v*..... 962
Wirtz, Douglas *v*..... 909
Wirtz, Idaho Sheet Metal Works *v*..... 190, 963
Wirtz *v*. Steepleton Tire Co..... 190
Wisconsin, Carter *v*..... 948
Wisconsin, Gauthier *v*..... 916
Wisconsin Dept. of Pub. Welfare, Odell *v*..... 939
Wood *v*. Boles..... 904
Wood *v*. Wood..... 943
Woodley *v*. California..... 948
World Airways *v*. National Mediation Bd..... 926
World Church, Boys Town, U. S. A., Inc. *v*..... 910
Worthington Corp. *v*. Lease Management..... 937
Wright *v*. United States..... 973
W. W. I. Z., Inc. *v*. Federal Com. Comm'n..... 967
Yamane, HC&D Moving & Storage Co. *v*..... 104
Yeager, Collins *v*..... 953
York County Nat. Gas Auth., Mozingo *v*..... 970
Yost *v*. Gunby..... 959
Young *v*. New York..... 921
Zanca *v*. Maimonides Hospital..... 922
Ziff, Easter *v*..... 922

TABLE OF CASES CITED

Page

Abbate v. United States, 359 U. S. 187 124, 126, 127
Abernathy v. Alabama, 380 U. S. 447 270
Acker v. Comm'r, 258 F. 2d 568 690
Adams, Application of, 50 C. C. P. A. (Pat.) 1185 530, 532, 538
Adams v. Mills, 286 U. S. 397 595, 600
Adamson v. California, 332 U. S. 46 675, 676, 678
Alabama v. United States, 371 U. S. 37 311, 325, 326, 334, 336
Alberts v. California, 354 U. S. 476 509
Albertson v. Control Bd., 382 U. S. 70 245
Allen v. United States, 164 U. S. 492 552
Allen-Bradley Local v. Wisconsin Bd., 315 U. S. 740 59, 729, 730
Allied Stores v. Bowers, 358 U. S. 522 674
Amalgamated. For labor union, see name of trade.
American Can Co. v. Comm'r, 317 F. 2d 604 571
American Com. Assn. v. Douds, 339 U. S. 382 507, 785, 795
American Fire & Cas. Co. v. Finn, 341 U. S. 6 723
American Propeller v. United States, 300 U. S. 475 823
Aptheker v. Secy. of State, 378 U. S. 500 760, 770
Arizona Grocery v. Atchison, T. & S. F. R. Co., 284 U. S. 370 591, 600, 624
Armstrong Co. v. Nu-Enamel Corp., 305 U. S. 315 725

Page

Arnold v. Ben Kanowsky, Inc., 361 U. S. 388 206
Assigned Car Cases, 274 U. S. 564 329
Association. For labor union, see name of trade.
Atalanta Trading v. FTC, 258 F. 2d 365 656
Atlanta Motel v. United States, 379 U. S. 241 324, 330, 759, 784
A. & P. Tea Co. v. Supermarket Corp., 340 U. S. 147 3, 6, 12, 17
Attorney General v. "Tropic of Cancer," 345 Mass. 11 418
Auto Club of Mich. v. Comm'r, 353 U. S. 180 297
Automatic Canteen v. FTC, 346 U. S. 61 662
Auto Workers v. Russell, 356 U. S. 634 62, 64, 66, 729, 730
Auto Workers v. Wisconsin Bd., 351 U. S. 266 729, 730
Baker v. Carr, 369 U. S. 186 773
Baldwin v. Milling Co., 307 U. S. 478 580, 601
Ballet Russe v. Ballet Theatre, 133 F. 2d 187 732
Baltimore Mayor v. Dawson, 350 U. S. 877 754
Baltimore & O. R. Co. v. Brady, 61 F. 2d 242, 288 U. S. 448 587, 595
Baltimore & O. R. Co. v. Pitcairn Coal, 215 U. S. 481 592, 593
Baltimore & O. R. Co. v. United States, 12 F. Supp. 261 604
Baltimore S. S. Co. v. Phillips, 274 U. S. 316 704, 723–725
Barenblatt v. United States, 360 U. S. 109 830

Page

Barnard v. United States, 342 F. 2d 309 188
Barr v. Matteo, 360 U. S. 564 85
Barrett v. Indiana, 229 U. S. 26 681
Bates v. Little Rock, 361 U. S. 516 829
Baxstrom v. Herold, 383 U. S. 107 670, 681
Bayless v. United States, 147 F. 2d 169 121
Beauharnais v. Illinois, 343 U. S. 250 90, 457
Beavers v. Haubert, 198 U. S. 77 120
Beckridge Corp. v. Comm'r, 129 F. 2d 318 279, 296
Bedford v. Hunt, 3 Fed. Cas. 37 533
Bell v. Comm'r, 320 F. 2d 953 690
Bell v. Maryland, 378 U. S. 226 355, 756, 780
Bergel, Application of, 48 C. C. P. A. (Pat.) 1102 531, 535
Bernhardt v. Polygraphic Co., 350 U. S. 198 707
Bingham Trust v. Comm'r, 325 U. S. 365 690
Bishop v. United States, 350 U. S. 961 378, 386
Black v. United States, 355 F. 2d 104 553, 555, 556, 558–562, 564, 565, 568
Blockburger v. United States, 284 U. S. 299 124
Blum v. Machinists, 42 N. J. 389 57
Board of County Comm'rs v. United States, 308 U. S. 343 709
Board of Governors v. Agnew, 329 U. S. 441 572
Boman v. Birmingham Transit, 280 F. 2d 531 794
Borak v. J. I. Case Co., 317 F. 2d 838 725
Borden's Farm Prods. v. Ten Eyck, 11 F. Supp. 599 652

Page

Bosc v. 39 Broadway, Inc., 80 F. Supp. 825 374
Boss Mfg. v. Payne Glove, 71 F. 2d 768 659
Boutell v. Walling, 327 U. S. 463 197, 205
Bowles v. Willingham, 321 U. S. 503 331
Boyce Motor Lines v. United States, 342 U. S. 337 507, 785
Boynton v. Virginia, 364 U. S. 454 270, 759, 773
Branch, Ex parte, 234 Mo. 466 257
Brantley v. Devereaux, 237 F. Supp. 156 57
Breard v. Alexandria, 341 U. S. 622 475, 498
Breedlove v. Suttles, 302 U. S. 277 665, 669–673, 683
Bremner, Application of, 37 C. C. P. A. (Pat.) 1032 529, 530, 539, 540
Brewer v. Hoxie School Dist., 238 F. 2d 91 780
Bridges v. California, 314 U. S. 252 429
Brotherhood. For labor union, see name of trade.
Brown v. Bd. of Education, 347 U. S. 483 311, 670, 677, 678, 682, 754
Brown Lumber v. Louisville & N. R. Co., 299 U. S. 393 600
Brown & Sharpe v. Kar Eng. Co., 154 F. 2d 48 16
Bruce's Juices v. American Can, 87 F. Supp. 985 656
Brumley v. Chattanooga Speedway, 138 Tenn. 534 720
Brunson v. Johnston, 15 N. Y. 2d 647 114
Buchanan v. Warley, 245 U. S. 60 148
Budlong Estate v. Comm'r, 7 T. C. 756 632
Burnet v. Northern Tr. Co., 283 U. S. 782 630
Burnett v. New York Central, 380 U. S. 424 703, 708

Page
Burns v. Comm'r, 177 F. 2d 739 633
Burns v. Meyer, 100 U. S. 671 49
Burns v. Ohio, 360 U. S. 252 128
Burroughs Co. v. Comm'r, 47 F. 2d 178 690
Burstyn, Inc. v. Wilson, 343 U. S. 495 144, 431
Burton v. United States, 202 U. S. 344 188
Burton v. Wilmington Parking Auth., 365 U. S. 715 754, 756, 794
Butler v. Michigan, 352 U. S. 380 465, 483
Butler v. Thompson, 341 U. S. 937 671, 683
Butts v. Harrison, 383 U. S. 663 317
Bynum v. United States, 104 U. S. App. D. C. 368 551
Cafeteria Union v. Angelos, 320 U. S. 293 58
Caldwell v. Alabama Dry Dock, 161 F. 2d 83 707
Cammarano v. United States, 358 U. S. 498 283, 693
Campbell v. Haverhill, 155 U. S. 610 704, 707, 709
Carlson v. Landon, 342 U. S. 524 337
Carpenters v. United States, 330 U. S. 395 736, 743
Carrington v. Rash, 380 U. S. 89 325, 667, 670, 681, 683
Carroll v. McNeill, 294 F. 2d 117 113
Case Co. v. Labor Bd., 321 U. S. 332 700
Central R. Co. v. United States, 257 U. S. 247 593
Chandler v. Fretag, 348 U. S. 3 694
Chaplinsky v. New Hampshire, 315 U. S. 568 133, 442, 461
Chattanooga Foundry v. Atlanta, 203 U. S. 390 704, 709
City. See name of city.
Page
Ciucci v. Illinois, 356 U. S. 571 125
Civil Rights Cases, 109 U. S. 3 755, 782, 783
Clancy v. Daily News, 202 Minn. 1 85
Clark Thread v. Comm'r, 100 F. 2d 257 279, 280, 296
Cohn v. United States, 259 F. 2d 371 282, 283, 293, 297
Cole v. Arkansas, 333 U. S. 196 478, 500
Cole v. Hall, 339 F. 2d 881 73
Coleman v. MacLennan, 78 Kan. 711 86
Collins v. Hardyman, 341 U. S. 651 779, 805
Collins v. Markley, 346 F. 2d 230 118, 128
Commercial Pictures v. Regents, 346 U. S. 587 144
Commissioner v. Burns, 9 T. C. 979 633, 634
Commissioner v. Church Estate, 335 U. S. 632 631, 632
Commissioner v. Cleveland Mayer Realty, 160 F. 2d 1012 294
Commissioner v. Gidwitz' Estate, 196 F. 2d 813 633, 634
Commissioner v. Gillette Motor Co., 364 U. S. 130 572
Commissioner v. Glenshaw Glass, 348 U. S. 426 298
Commissioner v. Hager's Estate, 173 F. 2d 613 633
Commissioner v. Heininger, 320 U. S. 467 689, 692, 694
Commissioner v. Holmes Estate, 326 U. S. 480 631, 633
Commissioner v. Korell, 339 U. S. 619 571
Commissioner v. McDermott's Estate, 222 F. 2d 665 630, 634, 635
Commissioner v. Mutual Fertilizer, 159 F. 2d 470 294
Commissioner v. Schwartz, 232 F. 2d 94 690
Commissioner v. Sullivan, 356 U. S. 27 692–694

Page

Commissioner of Internal Revenue. See Commissioner.
Commonwealth. See also name of Commonwealth.
Commonwealth v. Gordon, 66 Pa. D. & C. 101 432
Commonwealth v. Holmes, 17 Mass. 336 425, 430
Communications Commission. See FCC.
Concrete Appliances v. Gomery, 269 U. S. 177 15
Conley v. Gibson, 355 U. S. 41 700
Consolidated Edison v. Labor Bd., 305 U. S. 197 620
Consolo v. Fed. Maritime Comm'n, 383 U. S. 607 579, 587
Constr. Laborers v. Curry, 371 U. S. 542 72
Constr. Workers v. Laburnum Corp., 347 U. S. 656 61, 66, 729, 730
Cooper v. Aaron, 358 U. S. 1 148
Cope v. Anderson, 331 U. S. 461 704, 708, 711
Corfield v. Coryell, 4 Wash. C. C. 371 764, 768
Corn Products v. Comm'r, 350 U. S. 46 572
Counselman v. Hitchcock, 142 U. S. 547 244, 249, 250
Covington & Cincinnati Bridge v. Kentucky, 154 U. S. 204 759
Cox v. Louisiana, 379 U. S. 536 133–135, 138, 140, 143, 144, 148, 149, 157–159, 163, 475, 670
Cox v. Louisiana, 379 U. S. 559 157, 158, 166
Coyle v. Smith, 221 U. S. 559 329
Crandall v. Nevada, 6 Wall. 35 757, 764, 767, 768, 770, 772
Crane v. Comm'r, 331 U. S. 1 571

Page

Crawford v. Heysinger, 123 U. S. 589 33
Cuno Corp. v. Automatic Devices, 314 U. S. 84 15
Dale v. Temple Co., 186 Tenn. 69 720
Dalton v. Marzall, 342 U. S. 818 523
Dann v. Studebaker-Packard, 288 F. 2d 201 725
Danville v. Chesapeake & O. R. Co., 34 F. Supp. 620 595
Debs, In re, 158 U. S. 564 768, 769
DeGregory v. Attorney General, 368 U. S. 19 826
DeGregory v. Wyman, 360 U. S. 717 826
Del Vecchio v. Bowers, 296 U. S. 280 557
Densmore v. Scofield, 102 U. S. 375 15
Dept. of Banking v. Pink, 317 U. S. 264 41
Deputy v. du Pont, 308 U. S. 488 689
De Sylva v. Ballentine, 351 U. S. 570 705, 706
Detroit Edison v. Comm'r, 319 U. S. 98 277, 288, 289
Director of Internal Revenue. See Commissioner.
District of Columbia v. Hunt, 82 U. S. App. D. C. 159 257
District of Columbia v. Little, 339 U. S. 1 557
Dixon v. United States, 381 U. S. 68 297
D. L. Piazza Co. v. West Coast Line, 210 F. 2d 947 587, 614
Dodson, Application of, 48 C. C. P. A. (Pat.) 1125 531
D'Oench, Duhme & Co. v. FDIC, 315 U. S. 447 705
Dombrowski v. Pfister, 380 U. S. 479 144, 148, 475, 483
Dominus Rex v. Curl, 2 Strange 789 (K. B.) 428

Page

Douglas v. California, 372 U. S. 353 128, 668, 682
Dowd Box v. Courtney, 368 U. S. 502 700
Draper v. Washington, 372 U. S. 487 128
Drivers v. Meadowmoor Co., 312 U. S. 287 166
Dukes v. Painters, 191 Tenn. 495 720
Durham v. United States, 94 U. S. App. D. C. 228 550
Dusky v. United States, 362 U. S. 402 387, 388
Edelman v. California, 344 U. S. 357 257
Edins v. Helzberg's Diamond Shops, 315 F. 2d 223 394
Edwards v. California, 314 U. S. 160 668, 682, 758–760, 767, 768, 770
Edwards v. South Carolina, 372 U. S. 229 135, 142, 155, 159, 163
Edwards v. United States, 117 U. S. App. D. C. 383 545
Eldorado Coal v. Mager, 255 U. S. 522 279, 295
Engineers Ltd. Pipeline, 44 T. C. 226 287
Englander Motors v. Ford Motor, 293 F. 2d 802 704
Erie R. Co. v. Tompkins, 304 U. S. 64 726, 769
Estate. See name of estate.
Evans v. Newton, 382 U. S. 296 682, 755, 756, 795
Everard's Breweries v. Day, 265 U. S. 545 327
Ex parte. See name of party.
"Fanny Hill" v. Massachusetts, 383 U. S. 413 476, 478, 486, 491, 493, 494, 496, 501, 515
Far East Conf. v. United States, 342 U. S. 570 220–222, 620
Farmers Union v. WDAY, 360 U. S. 525 88
Fay v. Noia, 372 U. S. 391 128

Page

FCC v. Pottsville Broad. Co., 309 U. S. 134 525
FTC v. Anheuser-Busch, 363 U. S. 536 639, 659
FTC v. Mandel Bros., 359 U. S. 385 640
FTC v. Mary Carter Paint, 382 U. S. 46 620
FTC v. Minneapolis-Honeywell, 344 U. S. 206 41
FTC v. Morton Salt, 334 U. S. 37 660
Feiner v. New York, 340 U. S. 315 133, 149
Ferguson v. District of Columbia, 270 U. S. 633 253
Ferguson v. Skrupa, 372 U. S. 726 674
Fishgold v. Sullivan Corp., 328 U. S. 275 228, 229
Fiske v. Kansas, 274 U. S. 380 456
Fitzgerald v. Pan American Airways, 229 F. 2d 499 773
Florida v. Mellon, 273 U. S. 12 324
Flournoy v. Weiner, 321 U. S. 253 512
Folkers, Application of, 52 C. C. P. A. (Pat.) 1269 535
Ford Motor v. Labor Bd., 305 U. S. 364 823
Forman v. United States, 361 U. S. 416 41
Freedman v. Maryland, 380 U. S. 51 483
Fribourg Nav. Co. v. Comm'r, 335 F. 2d 15 297
Fribourg Nav. Co. v. Comm'r, 383 U. S. 272 573
Frost Trucking v. Railroad Comm'n, 271 U. S. 583 243
Gaines v. Miller, 111 U. S. 395 713
Garland, Ex parte, 4 Wall. 333 324
Garment Workers v. Labor Bd., 237 F. 2d 545 739
Garner v. Louisiana, 368 U. S. 157 133, 134, 138–141, 146, 155, 156, 163, 164

Page

Garner v. Teamsters, 346 U. S. 485 59, 71
Garrison v. Louisiana, 379 U. S. 64 64, 67, 68, 77, 84, 91, 92, 94
Gayle v. Browder, 352 U. S. 903 670
General Motors v. District of Columbia, 380 U. S. 553 568
Georgia v. Pennsylvania R. Co., 324 U. S. 439 307
Gerber Prods. v. Beech-Nut, 160 F. Supp. 916 647, 658
Gibbons v. Ogden, 9 Wheat. 1 6, 327
Giboney v. Empire Storage, 336 U. S. 490 475
Gibson v. Florida Leg. Comm'n, 372 U. S. 539 829
Gideon v. Wainwright, 372 U. S. 335 694
Gilberg v. Goffi, 21 App. Div. 2d 517 83
Ginzburg v. United States, 383 U. S. 463 417, 420, 421, 454, 456, 457, 459, 503, 510, 516, 518
Gitlow v. New York, 268 U. S. 652 456
Glass v. De Roo, 44 C. C. P. A. (Pat.) 723 528
Glidden Co. v. Zdanok, 370 U. S. 530 523, 525, 526
Gloucester Ferry v. Pennsylvania, 114 U. S. 196 759
Goesaert v. Cleary, 335 U. S. 464 674
Goldberg, In re, 53 F. 2d 454 403
Gomillion v. Lightfoot, 364 U. S. 339 311, 325, 672
Gore v. United States, 357 U. S. 386 125, 127
Gorin v. United States, 312 U. S. 19 507, 785
Graham v. John Deere Co., 383 U. S. 1 48, 526, 529
Gray v. Sanders, 372 U. S. 368 667
Green v. United States, 113 U. S. App. D. C. 348 553

Page

Green v. United States, 355 U. S. 184 125–128
Griffin v. Illinois, 351 U. S. 12 128, 668, 682
Griffin v. Maryland, 378 U. S. 130 756, 795
Griswold v. Connecticut, 381 U. S. 479 358, 498, 676
Grosjean v. American Press Co., 297 U. S. 233 430
Gross v. Cantor, 270 N. Y. 93 99
Grove Press v. Christenberry, 175 F. Supp. 488 472
Grove Press v. Christenberry, 276 F. 2d 433 472, 496
Grove Press v. Gerstein, 378 U. S. 577 491
Gruschwitz, In re, 375 U. S. 967 523
Guaranty Tr. Co. v. York, 326 U. S. 99 703
Guinn v. United States, 238 U. S. 347 311, 325
Gulf, M. & N. R. Co. v. Merchants' Specialty, 50 F. 2d 21 601
Gully v. First Nat. Bk., 299 U. S. 109 725
Guss v. Utah Labor Bd., 353 U. S. 1 71, 72
Haas v. Henkel, 216 U. S. 462 172
Hague v. CIO, 307 U. S. 496 779, 805
Hall v. United States, 95 Ct. Cl. 539 279, 281, 296
Hampton v. Jacksonville, 304 F. 2d 320 794
Handler v. Denver, 102 Colo. 53 257
Hannah v. Larche, 363 U. S. 420 326
Hanover Bank v. Comm'r, 369 U. S. 672 571
Harling v. United States, 111 U. S. App. D. C. 174 544, 545, 551, 555, 561
Harman v. Forssenius, 380 U. S. 528 666
Harper v. Virginia Bd. of Elections, 240 F. Supp. 270 686

Page

Harper v. Virginia Bd. of Elections, 383 U. S. 663 317
Hass, In re, 31 C. C. P. A. (Pat.) 895 522
Heart of Atlanta Motel v. United States, 379 U. S. 241 324, 330, 759, 784
Heflin v. United States, 358 U. S. 415 253
Helvering v. Hallock, 309 U. S. 106 631
Helvering v. Reynolds, 313 U. S. 428 298
Helvering v. Winmill, 305 U. S. 79 283
Henderson v. United States, 339 U. S. 816 759, 773
Henze, Application of, 37 C. C. P. A. (Pat.) 1009 522
Herget v. Central Bank, 324 U. S. 4 704
Hernandez, Inc. v. Arnold Bernstein, M.B.H., 116 F. 2d 849 626
Hertz Corp. v. United States, 364 U. S. 122 277, 282, 290–292
Higgins v. Comm'r, 312 U. S. 212 298
Hillsdale Coal & Coke v. Pennsylvania R. Co., 237 F. 272 595
Hirabayashi v. United States, 320 U. S. 81 356
Hitchings, Application of, 342 F. 2d 80 531
Hoag v. New Jersey, 356 U. S. 464 125
Hodges v. United States, 203 U. S. 1 755
Hogg v. Emerson, 11 How. 587 33
Hoke v. United States, 227 U. S. 308 759
Holmberg v. Armbrecht, 327 U. S. 392 704, 705, 709, 711, 713
Holmes v. Atlanta, 350 U. S. 879 754
Home Bldg. & Loan v. Blaisdell, 290 U. S. 398 334
Hoover Co. v. Coe, 325 U. S. 79 527

Page

Hoover Exp. Co. v. United States, 356 U. S. 38 694
Hotchkiss v. Greenwood, 11 How. 248 4, 11, 12, 14–17
House v. Mayo, 324 U. S. 42 253
Hurn v. Oursler, 289 U. S. 238 722–724
Hygrade Provision Co. v. Sherman, 266 U. S. 497 507, 785
Illinois Central v. ICC, 206 U. S. 441 599
Industrial Tr. Co. v. Comm'r, 165 F. 2d 142 631, 632
In re. See name of party.
Internal Revenue Service. See Commissioner.
International. For labor union, see name of trade.
ILGWU v. Labor Bd., 237 F. 2d 545 739
Int'l Shoe Co. v. Cocreham, 246 La. 244 324
ICC v. Atlantic C. L. R. Co., 383 U. S. 576 612, 614, 615, 617
ICC v. Delaware, L. & W. R. Co., 220 U. S. 235 586
ICC v. Illinois Central, 215 U. S. 452 592–594
ICC v. Union P. R. Co., 222 U. S. 541 593
Jackson v. Denno, 378 U. S. 368 96, 387
Jacobellis v. Ohio, 378 U. S. 184 420, 421, 442, 443, 457, 460, 462, 479, 484, 499
James v. Boles, 339 F. 2d 431 389
James v. Bowman, 190 U. S. 127 326
James v. United States, 366 U. S. 213 691, 786
James Everard's Breweries v. Day, 265 U. S. 545 327
Jamison v. Texas, 318 U. S. 413 474
Jensen, In re, 200 F. 2d 58 403, 407
Jeoffroy Mfg. v. Graham, 219 F. 2d 511 4, 25

Page

J. I. Case Co. v. Labor Bd., 321 U. S. 332 700
Johnson v. Hoosier Cardinal Corp., 134 Ind. 477 699
Johnson v. Virginia, 373 U. S. 61 138, 139, 147, 754
Johnston Seed v. United States, 90 F. Supp. 358 621
Joint Council. For labor union, see name of trade.
Jones, Application of, 32 C. C. P. A. (Pat.) 1020 522
Joseph, Thomas A., 26 T. C. 562 690
Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 144, 431
Kamisaroff v. Johnston, 13 N. Y. 2d 66 114
Katz v. Horni Signal Mfg., 145 F. 2d 961 536
Katzenbach v. McClung, 379 U. S. 294 324, 328, 330, 759
Keele Hair Specialists v. FTC, 275 F. 2d 18 620
Kent v. Dulles, 357 U. S. 116 760, 770
Kent v. Reid, 114 U. S. App. D. C. 330 548, 552
Kerr v. Enoch Pratt Library, 149 F. 2d 212 794
Kilbourn v. Thompson, 103 U. S. 168 179–181
Killebrew v. United States, 234 F. Supp. 481 287, 297
King, The, v. Boston, 33 Commw. L. R. 386 180
Kingsley Pictures v. Regents, 360 U. S. 684 144, 164, 431
Kittredge v. Comm'r, 88 F. 2d 632 279, 280, 296
Klaxon Co. v. Stentor Mfg., 313 U. S. 487 705
Korematsu v. United States, 323 U. S. 214 668, 682
Kornhauser v. United States, 276 U. S. 145 689, 690
Kotch v. River Pilot Comm'rs, 330 U. S. 552 673, 674, 682
Kovacs v. Cooper, 336 U. S. 77 457, 475

Page

Krimmel, Application of, 48 C. C. P. A. (Pat.) 1116 531
Labor Bd. v. Columbian Enameling, 306 U. S. 292 620
Labor Bd. v. Electric Cleaner, 315 U. S. 685 625
Labor Bd. v. Nevada Copper, 316 U. S. 105 620
Labor Bd. v. Seven-Up Co., 344 U. S. 344 621
Labor Bd. v. Southland Mfg., 201 F. 2d 244 620
Labor Bd. v. Tennessee Coal, 307 F. 2d 374 719
Labor Bd. v. Walton Mfg., 369 U. S. 404 621
Labor Union. See name of trade.
Lane, Edward V., 37 T. C. 188 293
Lane v. Brown, 372 U. S. 477 128
Lane v. Wilson, 307 U. S. 268 311, 325
Lanzetta v. New Jersey, 306 U. S. 451 254
Larkin v. Putnam's Sons, 14 N. Y. 2d 399 427
Lassiter v. Northampton Bd., 360 U. S. 45 333, 665, 666, 673, 685
Lauer v. United States, 320 F. 2d 187 118, 121, 128
Le Roy v. Sidney, 1 Sid. 168 (K. B.) 428
Levering & Garrigues v. Morrin, 289 U. S. 103 725
Lewis-Simas-Jones Co. v. Southern Pac. Co., 283 U. S. 654 580
Lilly v. Comm'r, 343 U. S. 90 689, 692, 694
Lincoln Eng. Co. v. Stewart-Warner, 303 U. S. 545 25
Liner v. Jafco, Inc., 375 U. S. 301 72
Linn v. Plant Guard Workers, 383 U. S. 53 89, 93
Local. For labor union, see name of trade.
Lochner v. New York, 198 U. S. 45 669, 686

Page

Lockerty v. Phillips, 319 U. S. 182 331
Logan v. United States, 144 U. S. 263 771, 779, 805
Lombard v. Louisiana, 373 U. S. 267 756, 795
Longhorn Portland Cement Co., 3 T. C. 310 691
Louisiana v. United States, 380 U. S. 145 312, 325, 326, 334, 666, 667, 672
Louisville & N. R. Co. v. Behlmer, 175 U. S. 648 601
Louisville & N. R. Co. v. Mottley, 211 U. S. 149 727
Louisville & N. R. Co. v. Sloss-Sheffield Co., 269 U. S. 217 594, 595, 625
Lowell v. Lewis, 15 Fed. Cas. 1018 533
Lucas v. 44th General Assembly, 377 U. S. 713 683
Lyles v. United States, 103 U. S. App. D. C. 22 389
Maass v. Higgins, 312 U. S. 443 634
Mac. See also Mc.
Macabe Co., 42 T. C. 1105 277, 287, 293
Mahaley, In re, 187 F. Supp. 229 394
Malat v. Riddell, 383 U. S. 569 824
Mallory v. United States, 354 U. S. 449 545
Malloy v. Hogan, 378 U. S. 1 238–240, 250, 669, 678
Manual Enterprises v. Day, 370 U. S. 478 442, 460, 474, 483, 493, 499, 508
Marconi Wireless v. United States, 320 U. S. 1 36
Marcus v. Search Warrant, 367 U. S. 717 483, 512, 513
Martin v. Mott, 12 Wheat. 19 356
Martin v. Struthers, 319 U. S. 141 475
Martino v. Mich. Window Cleaning, 327 U. S. 173 197
Maryland Drydock v. Labor Bd., 183 F. 2d 538 61

Page

Massachusetts v. Mellon, 262 U. S. 447 324
Massachusetts Universalist Conv. v. Hildreth & Rogers Co., 183 F. 2d 497 726
Massey Motors v. United States, 364 U. S. 92 277, 282, 288–290, 293, 294
Mast, Foos & Co. v. Stover Mfg., 177 U. S. 485 36
May v. Heiner, 281 U. S. 238 630
May v. United States, 84 U. S. App. D. C. 233 188
Mayorga, In re, 355 F. 2d 89 394
Mayor of Baltimore v. Dawson, 350 U. S. 877 754
Mc. See also Mac.
McAllister v. Magnolia Petroleum, 357 U. S. 221 704
McBride v. Teeple, 311 U. S. 649 525
McCarty v. Lehigh Valley R. Co., 160 U. S. 110 49
McClain v. Ortmayer, 141 U. S. 419 12
McClaine v. Rankin, 197 U. S. 154 704, 706
McCluny v. Silliman, 3 Pet. 270 704, 709
McClurg v. Kingsland, 1 How. 202 6
McComb v. Factory Stores, 81 F. Supp. 403 197
McCormick v. Burnet, 283 U. S. 784 630
McCulloch v. Maryland, 4 Wheat. 316 326, 358, 689, 783, 784
McDaniel v. Shea, 108 U. S. App. D. C. 15 558
McElmoyle v. Cohen, 13 Pet. 312 713
McGowan v. Maryland, 366 U. S. 420 328
McKenzie v. Irving Tr. Co., 323 U. S. 365 705
McLean v. Denver & Rio Grande, 203 U. S. 38 626
Meeker v. Lehigh Valley R. Co., 236 U. S. 434 594

Page

Meeker & Co. v. Lehigh Valley R. Co., 236 U. S. 412 580, 590, 591, 594, 595
Memoirs v. Massachusetts, 383 U. S. 413 476, 478, 486, 491, 493, 494, 496, 501, 515
Mercantile Nat. Bk. v. Langdeau, 371 U. S. 555 598
Metropolitan Co. v. Brownell, 294 U. S. 580 674
Meyer v. Teamsters, 416 Pa. 401 57
Michigan Tr. Co. v. Kavanagh, 284 F. 2d 502 636
Midland Valley R. Co. v. Excelsior Coal, 86 F. 2d 177 595
Milk Wagon Drivers v. Meadowmoor Dairies, 312 U. S. 287 731
Miller v. Brass Co., 104 U. S. 350 31
Minnesota v. Probate Court, 309 U. S. 270 674
Mishkin v. New York, 383 U. S. 502 417, 421, 454, 456, 466, 475, 476
Mitchell v. Kentucky Finance Co., 359 U. S. 290 196, 201
Mitchell v. United States, 313 U. S. 80 759
Mitchell Coal & Coke v. Pennsylvania R. Co., 230 U. S. 247 590–592, 594
Monroe v. Pape, 365 U. S. 167 784, 794
Monroe Auto Equip. v. Heckethorn Mfg., 332 F. 2d 406 36
Monrosa, The, v. Carbon Black, 359 U. S. 180 514
Monsanto Chemical Co. v. Coe, 79 U. S. App. D. C. 155 521, 534
Moore v. New York Cotton Exch., 270 U. S. 593 617
Morgan v. Katzenbach, 247 F. Supp. 196 317
Morrisdale Coal v. Pennsylvania R. Co., 230 U. S. 304 590

Page

Morrison-Knudsen Co. v. O'Leary, 288 F. 2d 542 619
Morsman v. Burnet, 283 U. S. 783 630
Motorlease Corp. v. United States, 215 F. Supp. 356 283, 287
Mounce v. United States, 355 U. S. 180 491
Mountain States Feed v. United States, 245 F. Supp. 369 287
Moviecolor Ltd. v. Eastman Kodak, 288 F. 2d 80 705, 708, 711
Moynahan v. Pari-Mutuel Guild, 317 F. 2d 209 726
Muir v. Louisville Park Assn., 347 U. S. 971 754
Mulford v. Smith, 307 U. S. 38 337
Municipal Bond Corp. v. Commissioner, 341 F. 2d 683 571
Murdock v. Pennsylvania, 319 U. S. 105 474, 665, 675
Murphy v. Waterfront Comm'n, 378 U. S. 52 250
Musher Foundation v. Alba Trading, 127 F. 2d 9 723, 724
Myers v. Anderson, 238 U. S. 368 311, 325
NAACP v. Alabama, 357 U. S. 449 141, 829
NAACP v. Button, 371 U. S. 415 141, 146, 147
National Labor Relations Board. See Labor Board.
Neal v. Delaware, 103 U. S. 370 325
Nelson, Application of, 47 C. C. P. A. (Pat.) 1031 530, 535, 538
New Orleans v. Barthe, 376 U. S. 189 754
New Orleans Park Assn. v. Detiege, 358 U. S. 54 754
New Process Gear v. New York Central, 250 F. 2d 569 595
News Syndicate v. New York Central, 275 U. S. 179 595

Page

New York v. O'Neill, 359 U. S. 1 758, 760
New York Times v. Sullivan, 376 U. S. 254 62, 65, 68, 77, 80, 81, 83–92, 94, 95, 100, 182, 430, 474
Niemotko v. Maryland, 340 U. S. 268 133
Nixon v. Herndon, 273 U. S. 536 678, 679
Norris, Application of, 37 C. C. P. A. (Pat.) 876 522
North American Co. v. SEC, 327 U. S. 686 329
Oakley v. Louisville & N. R. Co., 338 U. S. 278 232
Occidental Loan v. United States, 235 F. Supp. 519 287
O'Leary v. Brown-Pacific-Maxon, 340 U. S. 504 621
Omaechevarria v. Idaho, 246 U. S. 343 507, 785
One, Inc. v. Olesen, 355 U. S. 371 490
Original Ballet Russe v. Ballet Theatre, 133 F. 2d 187 732
O'Sullivan v. Felix, 233 U. S. 318 704
Pacific Contact Lab. v. Solex Lab., 209 F. 2d 529 16
Palko v. Connecticut, 302 U. S. 319 678
Passenger Cases, 7 How. 283 758
Patsone v. Pennsylvania, 232 U. S. 138 682
Paul v. Virginia, 8 Wall. 168 766
Pauling v. News Syndicate, 335 F. 2d 659 86
Peck v. Coos Bay Times, 122 Ore. 408 86
Peckham v. Comm'r, 327 F. 2d 855 690
Pee v. United States, 107 U. S. App. D. C. 47 555, 562
Pennekamp v. Florida, 328 U. S. 331 84
Pennsylvania v. Bd. of Trusts, 353 U. S. 230 756, 795
Pennsylvania v. Nelson, 350 U. S. 497 827, 830
Pennsylvania P. U. C. v. Pennsylvania R. Co., 382 U. S. 281 575
Pennsylvania R. Co. v. Jacoby & Co., 242 U. S. 89 594
Pennsylvania R. Co. v. United States, 363 U. S. 202 587, 588, 590, 597, 599, 602
Pennsylvania R. Co. v. Weber, 257 U. S. 85 594
People v. Baker, 26 Ill. 2d 484 385
People v. Bruce, 31 Ill. 2d 459 420
People v. Finkelstein, 9 N. Y. 2d 342 507, 510, 511
People v. Finkelstein, 11 N. Y. 2d 300 510
People v. Fritch, 13 N. Y. 2d 119 507, 510
People v. Henderson, 60 Cal. 2d 482 128
People v. Laino, 10 N. Y. 2d 161 242, 244–246, 249
People v. Richmond County News, 9 N. Y. 2d 578 506, 508
People v. Ryan, 11 App. Div. 2d 155 244
People v. Shrake, 25 Ill. 2d 141 385
People v. Steuding, 6 N. Y. 2d 214 244–246
People ex rel. See name of real party in interest.
Perry v. Commerce Loan Co., 340 F. 2d 588 394, 399
Peterson v. Greenville, 373 U. S. 244 756, 794, 795
Petrocarbon Ltd. v. Watson, 101 U. S. App. D. C. 214 523
Phelps Dodge Corp. v. Labor Bd., 313 U. S. 177 621
Phillips Co. v. Grand Trunk W. R. Co., 236 U. S. 662 599, 600
Piazza Co. v. West Coast Line, 210 F. 2d 947 587, 614
Pittsburgh & W. V. R. Co. v. United States, 6 F. 2d 646 604

Page

Plessy v. Ferguson, 163 U. S. 537 669, 670, 677
Plumbers v. Borden, 373 U. S. 690 59, 72
Poleski v. Polish Am. Pub. Co., 254 Mich. 15 86
Pollard v. United States, 352 U. S. 354 120
Pope v. Williams, 193 U. S. 621 666
Port v. United States, 143 Ct. Cl. 334 690
Porter Co. v. Central Vermont R. Co., 366 U. S. 272 600
Porto Rican Tobacco v. American Tobacco, 30 F. 2d 234 658
Postum Cereal v. Calif. Fig Nut Co., 272 U. S. 693 524–527
Potts v. Creager, 155 U. S. 597 15
Powell v. Pennsylvania, 127 U. S. 678 681
Powers-Kennedy Co. v. Concrete Co., 282 U. S. 175 33
Procter & Gamble v. United States, 225 U. S. 282 593
Prudential Ins. v. Cheek, 259 U. S. 530 512
Public Util. Comm'n v. Pollak, 343 U. S. 451 498, 795
Public Util. Comm'n v. United States, 355 U. S. 534 335
Quantity of Books v. Kansas, 378 U. S. 205 483, 512, 513
Quarles, In re, 158 U. S. 532 771, 780, 805
Queen, The, v. Read, 11 Mod. 142 (Q. B.) 428
Queen, The, v. White, 13 Sup. Ct. R. 322 180
Railway Express Agcy. v. New York, 336 U. S. 106 331
Raley v. Ohio, 360 U. S. 423 245, 246, 248, 250, 251
Rawlings v. Ray, 312 U. S. 96 708, 711
Reckendorfer v. Faber, 92 U. S. 347 15

Page

RFC v. Beaver County, 328 U. S. 204 706
Recordak Corp. v. United States, 163 Ct. Cl. 294 571
Regan v. New York, 349 U. S. 58 239–244, 248, 251
Regina v. Bunting, 7 Ont. 524 180
Regina v. Hicklin, [1868] L. R. 3 Q. B. 360 509
Reiner v. I. Leon Co., 285 F. 2d 501 36
Retail Clerks v. Lion Dry Goods, 369 U. S. 17 697
Rex v. Curl, 2 Strange 789 (K. B.) 428
Rex v. Wilkes, 4 Burr. 2527 (K. B.) 429
Reynolds v. Sims, 377 U. S. 533 210, 667, 670, 681–683
Richards v. United States, 369 U. S. 1 705
Riley v. Dun & Bradstreet, 195 F. 2d 812 732
Roberto Hernandez, Inc. v. Arnold Bernstein, M.B.H., 116 F. 2d 849 626
Robinson v. California, 370 U. S. 660 257
Robinson v. Florida, 378 U. S. 153 756, 795
Rochester Tel. Corp. v. United States, 307 U. S. 125 593, 602, 603, 614
Rogers v. Richmond, 365 U. S. 534 386
Rogoff, Application of, 46 C. C. P. A. (Pat.) 733 528
Roland Co. v. Walling, 326 U. S. 657 197, 200, 203
Rollingwood Corp. v. Commissioner, 190 F. 2d 263 571
Rosenblatt v. Baer, 383 U. S. 75 68
Roth v. United States, 354 U. S. 476 90, 418, 421, 426, 428, 430, 433, 441–443, 451, 455, 456, 460–462, 465, 467, 471, 474, 475, 483, 484, 493, 494, 496, 498–500, 506–509, 511

Page

Round v. Commissioner, 332 F. 2d 590 630, 633
Ruschig, Application of, 52 C. C. P. A. (Pat.) 1238 536
St. Louis & S. F. R. Co. v. Spiller, 275 U. S. 156 580
Salinger v. Cowles, 195 Iowa 873 86
Salsburg v. Maryland, 346 U. S. 545 328
Salzhandler v. Caputo, 316 F. 2d 445 73
San Diego Council v. Garmon, 359 U. S. 236 55, 57, 59, 62, 72, 721, 730
Schenck v. United States, 249 U. S. 47 457
Schering Corp. v. Gilbert, 153 F. 2d 428 49
Schlageter, In re, 319 F. 2d 821 394
Schneider v. State, 308 U. S. 147 456
Schneiderman v. United States, 320 U. S. 118 737
Schnell v. Davis, 336 U. S. 933 311, 325, 334, 672
Schnell v. Peter Eckrich & Sons, 365 U. S. 260 598
Schowgurow v. Maryland, 240 Md. 121 106, 834
Schriber Co. v. Cleveland Tr. Co., 311 U. S. 211 33, 49
Screws v. United States, 325 U. S. 91 91, 507, 754, 760, 784–786, 792–794, 801, 806
SEC v. Chenery Corp., 332 U. S. 194 621
SEC v. Ralston Purina Co., 346 U. S. 119 332
Security Adm. v. Quaker Oats, 318 U. S. 218 621
Seymour v. Osborne, 11 Wall. 516 49
Seymour Mfg. v. Burnet, 61 App. D. C. 22 279, 296
Shaw v. Cooper, 7 Pet. 292 15
Shelley v. Kraemer, 334 U. S. 1 682, 756
Shelton v. Tucker, 364 U. S. 479 829

Page

Shioutakon v. District of Columbia, 98 U. S. App. D. C. 371 555, 558
Shortell, In re, 31 C. C. P. A. (Pat.) 1062 16
Showers Estate v. Comm'r, 14 T. C. 902 633
Shuttlesworth v. Birmingham, 382 U. S. 87 138, 141, 144, 478
Siler v. Louisville & N. R. Co., 213 U. S. 175 617
Simkins v. Moses H. Cone Hosp., 323 F. 2d 959 794
Sinclair v. United States, 279 U. S. 263 188
Sinclair & Carroll Co. v. Interchemical Corp., 325 U. S. 327 49, 50
Sinkler v. Missouri Pac. R. Co., 356 U. S. 326 263, 264
Skinner v. Oklahoma, 316 U. S. 535 668, 670, 674
Slaughter-House Cases, 16 Wall. 36 678
Smith v. Allwright, 321 U. S. 649 311, 325, 794, 795
Smith v. Bennett, 365 U. S. 708 128
Smith v. Cahoon, 283 U. S. 553 674
Smith v. California, 361 U. S. 147 474, 483, 510
Smith v. Evening News Assn., 371 U. S. 195 71, 700, 703, 706
Smith v. Holiday Inns, 336 F. 2d 630 794
Smith v. Maryland, 240 Md. 464 106, 834
Smith v. Snow, 294 U. S. 1 50
Smith v. United States, 360 U. S. 1 120
Smith Leasing Co., 43 T. C. 37 293
South Carolina v. Katzenbach, 383 U. S. 301 679, 783, 784
Southern R. Co. v. St. Louis Hay & Grain, 214 U. S. 297 591, 600, 601

Page

Southern R. Co. v. United States, 193 F. 664 604
Speiser v. Randall, 357 U. S. 513 88, 483, 516
Spiegel Estate v. Comm'r, 335 U. S. 701 633
Spiller v. Atchison, T. & S. F. R. Co., 253 U. S. 117 594
Standard-Vacuum Oil v. United States, 339 U. S. 157 823
Stark v. Twin City Carpenters, 219 F. Supp. 528 73
State. See name of State.
State ex rel. See name of real party in interest.
Steele v. General Mills, 329 U. S. 433 707
Steelworkers v. Enterprise Corp., 363 U. S. 593 700
Steelworkers v. R. H. Bouligny, Inc., 382 U. S. 145 70, 74
Stevens, Application of, 234 F. Supp. 25 239
Stevens v. McCloskey, 239 F. Supp. 419 240
Stickney v. ICC, 164 F. 638 586
Strachman v. Palmer, 177 F. 2d 427 726
Strauder v. West Virginia, 100 U. S. 303 780
Stromberg v. California, 283 U. S. 359 90, 141
Stroud v. Benson, 254 F. 2d 448 332
Sunshine Book Co. v. Summerfield, 355 U. S. 372 491
Swift & Co. v. Wickham, 382 U. S. 111 575
Switchmen's Union v. Nat. Mediation Bd., 320 U. S. 297 333
Switzer Bros. v. Locklin, 207 F. 2d 483 597
Sydlyes Case, 1 Keble 620 (K. B.) 428
Szwarc, Application of, 50 C. C. P. A. (Pat.) 1571 523, 530
Takahashi v. Fish & Game Comm'n, 334 U. S. 410 682

Page

Talley v. California, 362 U. S. 60 829
Tank Truck Rentals v. Comm'r, 356 U. S. 30 694
Tanzer v. Crowley Pub. Corp., 240 App. Div. 203 85
Taylor v. Louisiana, 370 U. S. 154 133, 134, 140, 148, 156, 163
Taylor v. United States, 282 F. 2d 16 384
Teamsters v. Lucas Flour, 369 U. S. 95 701–703, 710
Teamsters v. Morton, 377 U. S. 252 721, 728, 731, 742
Tenney v. Brandhove, 341 U. S. 367 179–181
Terminiello v. Chicago, 337 U. S. 1 133, 135, 144, 147
Terry v. Adams, 345 U. S. 461 311, 325, 794, 795
Texas & P. R. Co. v. Abilene Cotton Oil, 204 U. S. 426 592
Texas & P. R. Co. v. American Tie & Timber, 234 U. S. 138 579
Textile Mills v. Comm'r, 314 U. S. 326 693
Textile Workers v. Lincoln Mills, 353 U. S. 448 700, 701, 703, 706, 710
Thomas v. Collins, 323 U. S. 516 147
Thomas v. Cunningham, 313 F. 2d 934 385
Thomas v. Michael, 35 C. C. P. A. (Pat.) 1036 529
Thompson, In re, 51 F. Supp. 12 399
Thornhill v. Alabama, 310 U. S. 88 68, 89, 182
Tot v. United States, 319 U. S. 463 330
Trade Commission. See FTC.
Tralins v. Gerstein, 378 U. S. 576 491
Trans-Lux Corp. v. Md. Bd. of Censors, 240 Md. 98 420
Turner v. Memphis, 369 U. S. 350 754

Page

Twining v. New Jersey, 211 U. S. 78 758, 766
Union. For labor union, see name of trade.
United. For labor union, see name of trade.
United Biscuit v. FTC, 350 F. 2d 615 660
United States v. Alabama, 192 F. Supp. 677 309, 312
United States v. Alabama, 252 F. Supp. 95 317, 666
United States v. American Trucking Assns., 310 U. S. 534 205, 400
United States v. Atkins, 323 F. 2d 733 313
United States v. Ball, 163 U. S. 662 121, 125, 126
United States v. Bennett, 186 F. 2d 407 571
United States v. Bianchi & Co., 373 U. S. 709 601, 619
United States v. Book Ulysses, 72 F. 2d 705 472, 497
United States v. Booth, 148 F. 112 188
United States v. Borden Co., 308 U. S. 188 217, 751, 752
United States v. Brown, 381 U. S. 437 324
United States v. Bush & Co., 310 U. S. 371 356
United States v. California, 332 U. S. 19 335
United States v. Calif. Eastern Line, 348 U. S. 351 333
United States v. Carlo Bianchi & Co., 373 U. S. 709 601, 619
United States v. Caviness, 239 F. Supp. 545 546
United States v. Classic, 313 U. S. 299 665, 771, 773, 779, 805
United States v. County Bd. of Elections, 248 F. Supp. 316 317
United States v. Crescent Amusement, 323 U. S. 173 41
United States v. Cruikshank, 92 U. S. 542 755, 771, 772, 779, 805

Page

United States v. Darby, 312 U. S. 100 328, 784
United States v. Dennis, 183 F. 2d 201 457
United States v. Duke, 332 F. 2d 759 312
United States v. Gainey, 380 U. S. 63 188
United States v. Gilmore, 372 U. S. 39 689
United States v. Harris, 106 U. S. 629 755
United States v. Hill, 248 U. S. 420 759
United States v. H. Muehlstein & Co., 42 Cust. Ct. 760 822
United States v. Hudson, 7 Cranch 32 773
United States v. Illinois Central, 263 U. S. 515 593
United States v. ICC, 91 U. S. App. D. C. 178 619
United States v. ICC, 337 U. S. 426 585–588, 590, 597, 602, 613, 614
United States v. Jackson, 318 F. 2d 1 324
United States v. Jones, 336 U. S. 641 599, 601
United States v. Kendrick, 331 F. 2d 110 389
United States v. Klaw, 350 F. 2d 155 510, 518
United States v. Leslie Salt, 350 U. S. 383 283
United States v. Logue, 344 F. 2d 290 313
United States v. Los Angeles R. Co., 273 U. S. 299 603
United States v. Louisiana, 225 F. Supp. 353 309, 312
United States v. Louisville & N. R. Co., 235 U. S. 314 593, 594
United States v. Ludey, 274 U. S. 295 276, 279, 295
United States v. Lynd, 301 F. 2d 818 312
United States v. Memphis Cotton Oil, 288 U. S. 62 723

Page

United States v. Mississippi, 229 F. Supp. 925 309, 314
United States v. Mississippi, 339 F. 2d 679 312
United States v. Mississippi, 380 U. S. 128 326, 672
United States v. Miss. Valley Gen. Co., 364 U. S. 520 89
United States v. Moore, 129 F. 630 759, 767
United States v. Mosley, 238 U. S. 383 785, 789, 800
United States v. Motorlease Corp., 334 F. 2d 617 297
United States v. New York, N. H. & H. R. Co., 355 U. S. 253 332
United States v. Palmer, 230 F. Supp. 716 314
United States v. Parker, 236 F. Supp. 511 314
United States v. Penton, 212 F. Supp. 193 312
United States v. Petrillo, 332 U. S. 1 159
United States v. Philadelphia Nat. Bk., 374 U. S. 321 218
United States v. Powell, 212 U. S. 564 755
United States v. Price, 383 U. S. 787 749, 753–755, 779, 780, 782–784
United States v. Rabinowich, 238 U. S. 78 792
United States v. Ragen, 314 U. S. 513 507, 785
United States v. Raines, 362 U. S. 17 317, 326
United States v. Rebhuhn, 109 F. 2d 512 472, 474
United States v. Reese, 92 U. S. 214 326
United States v. Romano, 382 U. S. 136 188, 330
United States v. Roth, 237 F. 2d 796 431, 486
United States v. S & A Co., 338 F. 2d 629 287
United States v. Sullivan, 274 U. S. 259 691
United States v. Swift & Co., 318 U. S. 442 752, 795

Page

United States v. Tateo, 377 U. S. 463 121, 125, 126
United States v. Tellier, 255 F. 2d 441 688
United States v. Texas, 252 F. Supp. 234 317, 666
United States v. 31 Photographs, 156 F. Supp. 350 474
United States v. Thomas, 362 U. S. 58 311, 325, 326, 336
United States v. Waddell, 112 U. S. 76 805
United States v. Western P. R. Co., 352 U. S. 59 579, 587
United States v. Wheeler, 254 U. S. 281 759, 764, 766
United States v. Williams, 341 U. S. 58 790, 807
United States v. Williams, 341 U. S. 70 754, 755, 759, 786, 789–791, 797–800, 802, 803, 806, 807
U. S. ex rel. See name of real party in interest.
U. S. Nav. Co. v. Cunard S. S. Co., 284 U. S. 474 220–222, 620
Universal Camera v. Labor Bd., 340 U. S. 474 485, 620, 621
Universal Oil Prods. v. Globe Oil & Ref., 322 U. S. 471 533
Uphaus v. Wyman, 360 U. S. 72 828, 830
Utility Workers v. Consolidated Edison, 309 U. S. 261 63
Valentine v. Chrestensen, 316 U. S. 52 474
Vanston Bondholders v. Green, 329 U. S. 156 705
Virginia, Ex parte, 100 U. S. 339 326, 327, 679, 784
Virginian Hotel v. Helvering, 319 U. S. 523 288, 294
Walters v. St. Louis, 347 U. S. 231 111, 681
Wason, Ex parte, L. R. 4 Q. B. 573 183
Watkins v. United States, 119 U. S. App. D. C. 409 553, 556, 558–563, 565, 568

Page

Watkins v. United States, 354 U. S. 178 829
Watson v. Maryland, 218 U. S. 173 674
Watson v. Memphis, 373 U. S. 526 139, 148, 754
Welch v. Helvering, 290 U. S. 111 689, 690
West Coast Hotel v. Parrish, 300 U. S. 379 682
Westinghouse Employees v. Westinghouse, 348 U. S. 437 700, 709
Wham-O-Mfg. v. Paradise Mfg., 327 F. 2d 748 726
Whitaker v. Comm'r, 259 F. 2d 379 287
Wier Long Leaf Lumber Co., 9 T. C. 990 277, 280–282, 296, 297
Wilhite v. United States, 108 U. S. App. D. C. 279 557, 558
Wilke, Application of, 50 C. C. P. A. (Pat.) 964 530
Williams v. Fears, 179 U. S. 270 758, 766
Williams v. United States, 341 U. S. 97 784, 790, 792–795, 807
Williamson v. Lee Optical Co., 348 U. S. 483 331
Wilson v. New, 243 U. S. 332 335
Wirkler v. Perkins, 44 C. C. P. A. (Pat.) 1005 528
Wirtz v. Modern Trash-moval, 323 F. 2d 451 206
Wright v. Georgia, 373 U. S. 284 133, 138, 139, 142, 143, 146, 148, 149, 754
Wyoming Builders v. United States 227 F. Supp. 534 287
Yakus v. United States, 321 U. S. 414 331
Yarbrough, Ex parte, 110 U. S. 651 771, 779
Yawkey Estate v. Comm'r, 12 T. C. 1164 633
Yick Wo v. Hopkins, 118 U. S. 356 667, 682
Young, Ex parte, 209 U. S. 123 603
Youngdahl v. Rainfair, Inc., 355 U. S. 131 729–731
Zeitlin v. Arnebergh, 59 Cal. 2d 901 420
Zemel v. Rusk, 381 U. S. 1 760

TABLE OF STATUTES CITED

(A) Statutes of the United States.

Page

1790, Apr. 10, c. 7, 1 Stat. 109 ..... 1, 519
1793, Feb. 21, c. 11, 1 Stat. 318 ..... 1, 519
1798, July 14, c. 74, 1 Stat. 596 75
1836, July 4, c. 357, 5 Stat. 117 ..... 1, 519
1842, Aug. 30, c. 270, § 28, 5 Stat. 548..... 413
1864, June 3, c. 106, 13 Stat. 99 696
1865, Mar. 3, c. 89, § 16, 13 Stat. 504..... 463
1866, Apr. 9, c. 31, 14 Stat. 27 787
June 27, c. 140, 14 Stat. 74..... 787
1867, Mar. 2, c. 176, 14 Stat. 517 382
1870, May 31, c. 114, 16 Stat. 140..... 301, 696
§ 16 787
July 8, c. 230, 16 Stat. 198 ..... 1, 519
1871, Feb. 28, c. 99, 16 Stat. 433 301
1873, Mar. 3, c. 241, 17 Stat. 579 787
1887, Feb. 4, c. 104, § 3, 24 Stat. 379, as amended 745
§ 8 576
§ 9 ..... 234, 576
§§ 13, 15..... 576
§ 16 ..... 576, 607
§ 17 576
§ 216 745
1889, Mar. 2, c. 382, § 5, 25 Stat. 855..... 576
1890, July 2, c. 647, 26 Stat. 209, as amended. 213, 696
§ 2 637

Page

1894, Feb. 8, c. 25, 28 Stat. 36 301
1898, July 1, c. 541, Chapters I–VII, XI–XIII, 30 Stat. 544, as amended 392
§§ 12, 14, 366, 472, 602, 652, 656, 657, 660, 661, 686 392
1903, Feb. 5, c. 487, 32 Stat. 797 392
1906, June 29, c. 3591, § 5, 34 Stat. 584..... 576
1908, Apr. 22, c. 149, 35 Stat. 65, as amended. 262, 696
1909, Feb. 9, c. 100, § 2, 35 Stat. 614, as amended 116
1914, Sept. 26, c. 311, § 5, 38 Stat. 717, as amended 637
Oct. 15, c. 323, 38 Stat. 730, as amended. 213, 696
§ 2 637
§ 4B 696
1915, Mar. 4, c. 153, § 20, 38 Stat. 1164, as amended 262
1916, July 17, c. 245, 39 Stat. 360..... 696
Sept. 7, c. 451, §§ 1–45, 39 Stat. 728, as amended 213
§§ 14, 16, 22, 30, 31. 607
1919, Feb. 24, c. 18, § 402, 40 Stat. 1057..... 627
1920, June 5, c. 250, § 33, 41 Stat. 988..... 262
1921, Nov. 23, c. 136, § 206, 42 Stat. 227..... 272
1926, Feb. 26, c. 27, § 302, 44 Stat. 9, as amended 627

Page

1927, Mar. 2, c. 273, § 11, 44 Stat. 1335..... 519
1929, Mar. 2, c. 488, 45 Stat. 1475..... 519
1930, June 17, c. 497, § 402, 46 Stat. 590, as amended 821
1931, Mar. 3, c. 454, 46 Stat. 1516..... 627
1932, Mar. 23, c. 90, § 6, 47 Stat. 70..... 715
1933, May 27, c. 38, 48 Stat. 74, as amended.... 363
§ 17 ..... 265, 687
1934, June 6, c. 404, 48 Stat. 881, as amended.... 363
June 19, c. 652, § 315, 48 Stat. 1064..... 75
1935, July 5, c. 372, § 2, 49 Stat. 449, as amended 715
§ 7 53
§ 8 ..... 53, 715
§ 9 53
§ 10 ..... 53, 696
§ 14 53
Aug. 9, c. 498, 49 Stat. 543, as amended.... 745
1936, June 19, c. 592, 49 Stat. 1526..... 637
1937, June 3, c. 296, 50 Stat. 246 213
1938, June 22, c. 575, Chapters I–VII, XI–XIII, 52 Stat. 840, as amended..... 392
June 25, c. 675, 52 Stat. 1040..... 607
June 25, c. 676, §§ 1–19, 52 Stat. 1060, as amended 190
1939, Aug. 11, c. 685, 53 Stat. 1404..... 262
1940, Sept. 16, c. 720, § 8, 54 Stat. 885, as amended 225
Sept. 18, c. 722, § 12, 54 Stat. 898..... 576
1942, Oct. 2, c. 578, § 5, 56 Stat. 765..... 687
Oct. 21, c. 619, § 151, 56 Stat. 798..... 272
1946, June 11, c. 324, §§ 5, 10, 60 Stat. 237.... 607

Page

1947, June 23, c. 120, § 1, 61 Stat. 136..... 53
§§ 101, 301. 53, 696, 715
§ 303 ..... 53, 715
1948, June 24, c. 625, § 9, 62 Stat. 604, as amended 225
1949, Oct. 26, c. 736, § 11, 63 Stat. 910..... 190
1950, Sept. 8, c. 932, § 405, 64 Stat. 798, as amended 687
Dec. 29, c. 1189, §§ 2, 3, 64 Stat. 1129, as amended..... 607
1951, July 31, c. 275, § 104, 65 Stat. 131..... 687
1952, July 19, c. 950, 66 Stat. 792..... 1
1955, July 7, c. 283, 69 Stat. 282 696
1957, Sept. 9, Pub. L. 85–315, 71 Stat. 634... 301
1958, Aug. 23, Pub. L. 85–726, § 404, 72 Stat. 731 745
1959, Sept. 14, Pub. L. 86–257, § 101, 73 Stat. 519 53
§ 704 715
1960, May 6, Pub. L. 86–449, 74 Stat. 86.... 301
1961, May 5, Pub. L. 87–30, § 9, 75 Stat. 65.... 190
Oct. 3, Pub. L. 87–346, 75 Stat. 762..... 213
1962, Mar. 9, Pub. L. 87–413, 76 Stat. 21.... 541
1964, July 2, Pub. L. 88–352, Tit. I, 78 Stat. 241. 301
Title II..... 301, 745
Titles III, IV.... 745
§§ 201, 207, 301, 401 745
1965, Aug. 6, Pub. L. 89–110, 79 Stat. 437 301, 663
1966, Mar. 7, Pub. L. 89–359, 80 Stat. 28.... 832
Revised Statutes.
§ 1979 ..... 169, 787
§ 1980 169
§ 2004 663
§§ 4578, 4580, 4581..... 262
§ 4886 ..... 1, 519

Page

U. S. Code.
Title 5, §§ 1004, 1009, 1032, 1033 607
Title 7, § 601 et seq.... 213
Title 8, §§ 43, 47 (1946 ed.) 169
Title 11, §§ 32, 766, 872, 1001–1086 392
Title 15,
§ 13 637
§ 15b 696
§ 77a et seq..... 363
§ 77q 265, 687
§ 78a et seq..... 363
Title 18,
§ 2 787
§§ 241, 242.... 745, 787
§ 281 169
§ 371. 169, 265, 687, 787
§ 1341 ..... 265, 687
§§ 1461, 3237..... 463
§ 3731 ..... 116, 745
Title 19, § 1402..... 821
Title 21, § 174..... 116
Title 26,
§ 162 687
§§ 167, 337..... 272
§ 1221 569
§§ 1231, 1245, 1250. 272
§ 2036 627
§§ 4704, 4705, 7237.. 116
§ 7805 272
Title 28,
§ 211 519
§ 1253 576
§ 1254 252
§ 1256 519
§ 1257 502
§ 1336 576
§§ 1346, 1391..... 301
§§ 1398, 1404..... 576
§ 1491 301
§ 1498 39
§ 1542 519
§ 1651 252
§ 1652 696
§ 1912 607
§ 2103 502
§ 2255 116
§§ 2321–2325 576
§ 2633 821
Title 29,
§ 106 715
§§ 141 et seq., 151.. 53

Page

U. S. Code—Continued.
Title 29—Continued.
§ 152 715
§ 158 ..... 53, 715
§ 160 696
§ 164 53
§ 185 ..... 53, 696, 715
§ 187 ..... 53, 715
§§ 201–219 190
§ 411 53
Title 35,
§ 7 519
§ 101 ..... 1, 519
§§ 102, 103..... 1, 39
§§ 112, 135, 141, 142, 145 519
§ 286 696
Title 42,
§ 1971 663
§ 1983 787
§§ 2000a, 2000a–6, 2000b, 2000c.... 745
Title 45, § 51 et seq... 262
Title 46,
§§ 679, 682, 683, 688 262
§§ 801–842 213
§§ 812, 815, 821, 829, 830, 1111 Note.. 607
Title 49,
§ 3 745
§ 8 576
§ 9 ..... 234, 576
§§ 13, 15–17..... 576
§§ 316, 1374 745
Title 50 App.,
§ 308 (1946 ed.).. 225
§ 451 et seq..... 225
§ 965 (1946 ed.).. 687
§ 2105 (1952 ed.). 687
Administrative Orders Review Act..... 607
Administrative Procedure Act 607
Agricultural Marketing Agreement Act of 1937.. 213
Alien and Sedition Act.... 75
Bankruptcy Act..... 392
Civil Rights Act of 1866.. 787
Civil Rights Act of 1870... 696
Civil Rights Act of 1957.. 301
Civil Rights Act of 1960.. 301
Civil Rights Act of 1964. 301, 745
Clayton Act..... 213, 637, 696

Page

Communications Act of 1934. 75
Criminal Appeals Act..... 745
Defense Production Act of 1950 687
Enforcement Act..... 301, 787
Fair Labor Standards Act of 1938..... 190
Federal Employers' Liability Act 696
Federal Farm Loan Act... 696
Federal Food, Drug, and Cosmetic Act..... 607
Federal Trade Commission Act 637
Hepburn Act:..... 576
Hobbs Act..... 607
Internal Revenue Code of 1939.
§ 117 272
§§ 810, 811..... 627
Internal Revenue Code of 1954.
§ 162 687
§§ 167, 337..... 272
§ 1221 569
§§ 1231, 1245, 1250..... 272
§ 2036 627
§§ 4704, 4705, 7237..... 116
§ 7805 272

Page

Interstate Commerce Act 576, 607
Jones Act..... 262
Labor Management Relations Act, 1947... 53, 696, 715
Mail Fraud Act..... 265
National Bank Act..... 696
National Labor Relations Act 53, 715
Norris-LaGuardia Act..... 715
Patent Act..... 1, 39, 696
Revenue Act of 1918..... 627
Revenue Act of 1926..... 627
Robinson-Patman Act..... 637
Rules of Decisions Act..... 696
Securities Act of 1933..... 265, 363, 687
Securities Exchange Act of 1934 363
Selective Training and Service Act of 1940..... 225
Sherman Act..... 213, 637, 696
Shipping Act, 1916.... 213, 607
Stabilization Act of 1942.. 687
Tariff Act..... 413
Transportation Act of 1940. 576
Universal Military Training and Service Act..... 225
Voting Rights Act of 1965.. 301, 663

(B) Constitutions and Statutes of the States and the District of Columbia.

Alabama.
Const., §§ 178, 194.... 663
Code Tit. 17, § 12.... 663
Arizona.
Rev. Stat. Ann. § 13–384 234
Connecticut.
Gen. Stat. § 12–2..... 234
Delaware.
Code Ann. Tit. 8, § 101 et seq..... 363
District of Columbia.
Code 1961,
§§ 2–2202, 11–907, 11–912, 11–914, 11–915, 11–927, 11–929, 22–1801, 22–2801, 22–2901. 541
§ 22–3302 252

Dist. of Columbia—Cont.
Code 1961—Continued.
§ 24–301 541
Code (Supp. IV, 1965) §§ 11–1502, 11–1551, 11–1553, 11–1586, 16–2306, 16–2307, 16–2308, 16–2313..... 541
Juvenile Court Act.... 541
Illinois.
Rev. Stat. c. 38, §§ 104–1—104–3, 592, 593.. 375
Code of Criminal Procedure of 1963..... 375
Indiana.
Stat. Ann. §§ 2–601, 2–602 (1965 Supp.)... 696
Stat. Ann. § 2–608 (1946 Repl. Vol.)..... 696

Page

Louisiana.
Const. Art. I, §§ 3, 5.. 131
Acts 1963, No. 91..... 131
Rev. Stat. §§ 14:63.3, 14 : 100.1, 14 : 103.1 (Cum. Supp. 1962).. 131
Criminal Code, Tit. 14, Art. 103..... 131
Maine.
Rev. Stat. Ann. Tit. 29, §§ 108, 584..... 663
Rev. Stat. Ann. Tit. 36, § 1381 663
Massachusetts.
Gen. Laws c. 272, § 28. 413
Mississippi.
Const., §§ 241, 243.... 663
Code §§ 3130, 3160, 3235 663
New Hampshire.
Laws 1959, c. 399..... 75
Rev. Stat. Ann. §§ 514:9, 526:1..... 75
Rev. Stat. Ann. § 588:1. 825
Rev. Stat. Ann. § 588: 8–a (1965 Supp.)... 825
Rev. Stat. Ann. § 603:1. 825
New Mexico.
Stat. § 14–17–14 (1965 Supp.) 413
Stat. § 59–3–4 696
New York.
Const., Art. I, § 6.... 234
Laws 1965, c. 524..... 107

Page

New York—Continued.
Laws 1965, c. 540, §§ 1, 2..... 107
Code Crim. Proc. §§ 662–b, 872, as amended 107
Correction Law §§ 375, 384, 388, 412..... 107
General Business Law § 330 502
Mental Hygiene Law §§ 70, 72, 74, 85, 135. 107
Penal Law § 381..... 234
Penal Law § 1141..... 502
Penal Law §§ 2446, 2447 234
South Carolina.
Code Ann. § 23–342 (1965 Supp.)..... 301
Texas.
Const., Art. 6, § 2.... 663
Election Code, Arts. 5.02, 5.09..... 663
Virginia.
Const., §§ 18, 20–23, 173 663
Code §§ 24–18, 24–22, 24–136, 24–160—24–168, 58–1163..... 663
Vermont.
Act of Feb. 23, 1966... 663
Stat. Ann. Tit. 24, § 701, as amended... 663

(C) Reorganization Plan.

Reorganization Plan No. 7 of 1961, 75 Stat. 840..... 607

(D) Foreign Constitutions and Statutes.

Burma.
Const., Art. 17..... 463
England.
23 Edw. 3..... 252
25 Edw. 3, Stat. I.... 252
4 Hen. 8, c. 8..... 169
12 Rich. 2, c. 7..... 252
1 W. & M., Sess. 2, c. 2. 169
Bill of Rights of 1689.. 169
Fox's Libel Act of 1792. 75
Statute of Labourers.. 252
Statute of Monopolies. 1
Strode's Act..... 169
India.
Const., Art. 19..... 463
Ireland.
Const., Art. 40..... 463
Libya.
Const., Art. 22..... 463
Nigeria.
Const., Art. 25..... 463
Switzerland.
Const., Art. 55..... 463
Zambia.
Const., Art. 22..... 463

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1965.

GRAHAM ET AL. *v.* JOHN DEERE CO. OF KANSAS CITY ET AL.

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

No. 11. Argued October 14, 1965.—Decided February 21, 1966.*

In No. 11 petitioners sued for infringement of a patent, consisting of a combination of old mechanical elements, for a device designed to absorb shock from plow shanks in rocky soil to prevent damage to the plow. In 1955 the Fifth Circuit held the patent valid, ruling that a combination is patentable when it produces an "old result in a cheaper and otherwise more advantageous way." Here the Eighth Circuit held that since there was no new result in the combination the patent was invalid. Petitioners in Nos. 37 and 43 filed actions for declaratory judgments declaring invalid respondent's patent relating to a plastic finger sprayer with a "hold-down" cap used as a built-in dispenser for containers with liquids, principally insecticides. By cross-action respondent claimed infringement. The District Court and the Court of Appeals sustained the patent. *Held:* The patents do not meet the test of the "nonobvious" nature of the "subject matter sought to be patented" to a person having ordinary skill in the pertinent art, set forth in § 103 of the Patent Act of 1952, and are therefore invalid. Pp. 3–37.

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*Together with No. 37, *Calmar, Inc.* v. *Cook Chemical Co.*, and No. 43, *Colgate-Palmolive Co.* v. *Cook Chemical Co.*, also on certiorari to the same court.

(a) In carrying out the constitutional command of Art. I, § 8, that a patent system "promote the Progress of . . . useful Arts," Congress established the two statutory requirements of novelty and utility in the Patent Act of 1793. Pp. 3, 6, 12.

(b) This Court in *Hotchkiss* v. *Greenwood,* 11 How. 248 (1851), additionally conditioned the issuance of a patent upon the evidence of more ingenuity and skill than that possessed by an ordinary mechanic acquainted with the business. P. 11.

(c) In § 103 of the 1952 Patent Act Congress added the statutory nonobvious subject matter requirement, originally expounded in *Hotchkiss,* which merely codified judicial precedents requiring a comparison of the subject matter sought to be patented and the prior art, tying patentable inventions to advances in the art. Although § 103 places emphasis upon inquiries into obviousness, rather than into "invention," the general level of innovation necessary to sustain patentability remains unchanged under the 1952 Act. Pp. 14–17.

(d) This section permits a more practical test of patentability. The determination of "nonobviousness" is made after establishing the scope and content of prior art, the differences between the prior art and the claims at issue, and the level of ordinary skill in the pertinent art. P. 17.

(e) With respect to each patent involved here the differences between the claims in issue and the pertinent prior art would have been obvious to a person reasonably skilled in that art. Pp. 25–26, 37.

333 F. 2d 529, affirmed; 336 F. 2d 110, reversed and remanded.

Orville O. Gold argued the cause for petitioners in No. 11. With him on the brief was *Claude A. Fishburn. Dennis G. Lyons* argued the cause for petitioners in Nos. 37 and 43. With him on the briefs for petitioner in No. 37 were *Victor H. Kramer* and *Francis G. Cole.* On the brief for petitioner in No. 43 were *George H. Mortimer* and *Howard A. Crawford.*

S. Tom Morris argued the cause for respondents in No. 11. With him on the brief were *W. W. Gibson* and *Thomas E. Scofield. Gordon D. Schmidt* argued the cause for respondent in Nos. 37 and 43. With him on

the brief were *Carl E. Enggas, Hugh B. Cox* and *Charles A. Miller.*

Briefs of *amici curiae* in No. 11 were filed by *Roger Robb* for the American Bar Association; by *Stanton T. Lawrence, Jr.,* for the New York Patent Law Association; by *George E. Frost* for the Illinois State Bar Association; by *J. Vincent Martin, Alfred H. Evans* and *Russell E. Schlorff* for the State Bar of Texas; and by *Robert W. Hamilton* for the School of Law of the University of Texas.

MR. JUSTICE CLARK delivered the opinion of the Court.

After a lapse of 15 years, the Court again focuses its attention on the patentability of inventions under the standard of Art. I, § 8, cl. 8, of the Constitution and under the conditions prescribed by the laws of the United States. Since our last expression on patent validity, *A. & P. Tea Co.* v. *Supermarket Corp.,* 340 U. S. 147 (1950), the Congress has for the first time expressly added a third statutory dimension to the two requirements of novelty and utility that had been the sole statutory test since the Patent Act of 1793. This is the test of obviousness, *i. e.,* whether "the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made." § 103 of the Patent Act of 1952, 35 U. S. C. § 103 (1964 ed.).

The questions, involved in each of the companion cases before us, are what effect the 1952 Act had upon traditional statutory and judicial tests of patentability and what definitive tests are now required. We have concluded that the 1952 Act was intended to codify judicial precedents embracing the principle long ago

announced by this Court in *Hotchkiss* v. *Greenwood,* 11 How. 248 (1851), and that, while the clear language of § 103 places emphasis on an inquiry into obviousness, the general level of innovation necessary to sustain patentability remains the same.

I.

The Cases.

(a). No. 11, *Graham* v. *John Deere Co.,* an infringement suit by petitioners, presents a conflict between two Circuits over the validity of a single patent on a "Clamp for vibrating Shank Plows." The invention, a combination of old mechanical elements, involves a device designed to absorb shock from plow shanks as they plow through rocky soil and thus to prevent damage to the plow. In 1955, the Fifth Circuit had held the patent valid under its rule that when a combination produces an "old result in a cheaper and otherwise more advantageous way," it is patentable. *Jeoffroy Mfg., Inc.* v. *Graham,* 219 F. 2d 511, cert. denied, 350 U. S. 826. In 1964, the Eighth Circuit held, in the case at bar, that there was no new result in the patented combination and that the patent was, therefore, not valid. 333 F. 2d 529, reversing 216 F. Supp. 272. We granted certiorari, 379 U. S. 956. Although we have determined that neither Circuit applied the correct test, we conclude that the patent is invalid under § 103 and, therefore, we affirm the judgment of the Eighth Circuit.

(b). No. 37, *Calmar, Inc.* v. *Cook Chemical Co.,* and No. 43, *Colgate-Palmolive Co.* v. *Cook Chemical Co.,* both from the Eighth Circuit, were separate declaratory judgment actions, but were filed contemporaneously. Petitioner in *Calmar* is the manufacturer of a finger-operated sprayer with a "hold-down" cap of the type commonly seen on grocers' shelves inserted in bottles of insecticides and other liquids prior to shipment. Petitioner in *Colgate-Palmolive* is a purchaser of the sprayers

and uses them in the distribution of its products. Each action sought a declaration of invalidity and noninfringement of a patent on similar sprayers issued to Cook Chemical as assignee of Baxter I. Scoggin, Jr., the inventor. By cross-action, Cook Chemical claimed infringement. The actions were consolidated for trial and the patent was sustained by the District Court. 220 F. Supp. 414. The Court of Appeals affirmed, 336 F. 2d 110, and we granted certiorari, 380 U. S. 949. We reverse.

Manifestly, the validity of each of these patents turns on the facts. The basic problems, however, are the same in each case and require initially a discussion of the constitutional and statutory provisions covering the patentability of the inventions.

II.

At the outset it must be remembered that the federal patent power stems from a specific constitutional provision which authorizes the Congress "To promote the Progress of . . . useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries." Art. I, § 8, cl. 8.[1] The clause is both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the sixteenth and seventeenth centuries by the English Crown, is limited to the promotion of advances in the "useful arts." It was written against the backdrop of the practices—eventually curtailed by the Statute of Monopolies—of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public. See Meinhardt, Inventions, Patents and Monopoly, pp. 30–35 (London, 1946). The Congress in the

[1] The provision appears in the Constitution spliced together with the copyright provision, which we omit as not relevant here. See H. R. Rep. No. 1923, 82d Cong., 2d Sess., at 4 (1952); DeWolf, An Outline of Copyright Law, p. 15 (Boston, 1925).

exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must "promote the Progress of . . . useful Arts." This is the *standard* expressed in the Constitution and it may not be ignored. And it is in this light that patent validity "requires reference to a standard written into the Constitution." *A. & P. Tea Co.* v. *Supermarket Corp., supra,* at 154 (concurring opinion).

Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim. This is but a corollary to the grant to Congress of any Article I power. *Gibbons* v. *Ogden,* 9 Wheat. 1. Within the scope established by the Constitution, Congress may set out conditions and tests for patentability. *McClurg* v. *Kingsland,* 1 How. 202, 206. It is the duty of the Commissioner of Patents and of the courts in the administration of the patent system to give effect to the constitutional standard by appropriate application, in each case, of the statutory scheme of the Congress.

Congress quickly responded to the bidding of the Constitution by enacting the Patent Act of 1790 during the second session of the First Congress. It created an agency in the Department of State headed by the Secretary of State, the Secretary of the Department of War

and the Attorney General, any two of whom could issue a patent for a period not exceeding 14 years to any petitioner that "hath . . . invented or discovered any useful art, manufacture, . . . or device, or any improvement therein not before known or used" if the board found that "the invention or discovery [was] sufficiently useful and important . . . ." 1 Stat. 110. This group, whose members administered the patent system along with their other public duties, was known by its own designation as "Commissioners for the Promotion of Useful Arts."

Thomas Jefferson, who as Secretary of State was a member of the group, was its moving spirit and might well be called the "first administrator of our patent system." See Federico, Operation of the Patent Act of 1790, 18 J. Pat. Off. Soc. 237, 238 (1936). He was not only an administrator of the patent system under the 1790 Act, but was also the author of the 1793 Patent Act. In addition, Jefferson was himself an inventor of great note. His unpatented improvements on plows, to mention but one line of his inventions, won acclaim and recognition on both sides of the Atlantic. Because of his active interest and influence in the early development of the patent system, Jefferson's views on the general nature of the limited patent monopoly under the Constitution, as well as his conclusions as to conditions for patentability under the statutory scheme, are worthy of note.

Jefferson, like other Americans, had an instinctive aversion to monopolies. It was a monopoly on tea that sparked the Revolution and Jefferson certainly did not favor an equivalent form of monopoly under the new government. His abhorrence of monopoly extended initially to patents as well. From France, he wrote to Madison (July 1788) urging a Bill of Rights provision restricting monopoly, and as against the argument that

limited monopoly might serve to incite "ingenuity," he argued forcefully that "the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression," V Writings of Thomas Jefferson, at 47 (Ford ed., 1895).

His views ripened, however, and in another letter to Madison (Aug. 1789) after the drafting of the Bill of Rights, Jefferson stated that he would have been pleased by an express provision in this form:

> "Art. 9. Monopolies may be allowed to persons for their own productions in literature & their own inventions in the arts, for a term not exceeding — years but for no longer term & no other purpose." *Id.*, at 113.

And he later wrote:

> "Certainly an inventor ought to be allowed a right to the benefit of his invention for some certain time. . . . Nobody wishes more than I do that ingenuity should receive a liberal encouragement." Letter to Oliver Evans (May 1807), V Writings of Thomas Jefferson, at 75–76 (Washington ed.).

Jefferson's philosophy on the nature and purpose of the patent monopoly is expressed in a letter to Isaac McPherson (Aug. 1813), a portion of which we set out in the margin.[2] He rejected a natural-rights theory in

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[2] "Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses

intellectual property rights and clearly recognized the social and economic rationale of the patent system. The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge. The grant of an exclusive right to an invention was the creation of society—at odds with the inherent free nature of disclosed ideas—and was not to be freely given. Only inventions and discoveries which furthered human knowledge, and were new and useful, justified the special inducement of a limited private monopoly. Jefferson did not believe in granting patents for small details, obvious improvements, or frivolous devices. His writings evidence his insistence upon a high level of patentability.

As a member of the patent board for several years, Jefferson saw clearly the difficulty in "drawing a line between the things which are worth to the public the embarrassment of an exclusive patent, and those which are not." The board on which he served sought to draw such a line and formulated several rules which are preserved in

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the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from any body." VI Writings of Thomas Jefferson, at 180–181 (Washington ed.).

Jefferson's correspondence.[3] Despite the board's efforts, Jefferson saw "with what slow progress a system of general rules could be matured." Because of the "abundance" of cases and the fact that the investigations occupied "more time of the members of the board than they could spare from higher duties, the whole was turned over to the judiciary, to be matured into a system, under which every one might know when his actions were safe and lawful." Letter to McPherson, *supra*, at 181, 182. Apparently Congress agreed with Jefferson and the board that the courts should develop additional conditions for patentability. Although the Patent Act was amended, revised or codified some 50 times between 1790 and 1950, Congress steered clear of a statutory set of requirements other than the bare novelty and utility tests reformulated in Jefferson's draft of the 1793 Patent Act.

III.

The difficulty of formulating conditions for patentability was heightened by the generality of the constitutional grant and the statutes implementing it, together with the underlying policy of the patent system that "the things which are worth to the public the embarrassment

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[3] "[A] machine of which we are possessed, might be applied by every man to any use of which it is susceptible." Letter to Isaac McPherson, *supra*, at 181.

"[A] change of material should not give title to a patent. As the making a ploughshare of cast rather than of wrought iron; a comb of iron instead of horn or of ivory . . . ." *Ibid.*

"[A] mere change of form should give no right to a patent, as a high-quartered shoe instead of a low one; a round hat instead of a three-square; or a square bucket instead of a round one." *Id.*, at 181–182.

"[A combined use of old implements.] A man has a right to use a saw, an axe, a plane separately; may he not combine their uses on the same piece of wood?" Letter to Oliver Evans (Jan. 1814), VI Writings of Thomas Jefferson, at 298 (Washington ed.).

of an exclusive patent," as Jefferson put it, must outweigh the restrictive effect of the limited patent monopoly. The inherent problem was to develop some means of weeding out those inventions which would not be disclosed or devised but for the inducement of a patent.

This Court formulated a general condition of patentability in 1851 in *Hotchkiss* v. *Greenwood,* 11 How. 248. The patent involved a mere substitution of materials—porcelain or clay for wood or metal in doorknobs—and the Court condemned it, holding:[4]

> "[U]nless more ingenuity and skill . . . were required . . . than were possessed by an ordinary mechanic acquainted with the business, there was an absence of that degree of skill and ingenuity which constitute essential elements of every invention. In other words, the improvement is the work of the skilful mechanic, not that of the inventor." At p. 267.

Hotchkiss, by positing the condition that a patentable invention evidence more ingenuity and skill than that possessed by an ordinary mechanic acquainted with the business, merely distinguished between new and useful innovations that were capable of sustaining a patent and those that were not. The *Hotchkiss* test laid the cornerstone of the judicial evolution suggested by Jefferson and left to the courts by Congress. The language in the case, and in those which followed, gave birth to "invention" as a word of legal art signifying patentable inventions. Yet, as this Court has observed, "[t]he truth is the word ['invention'] cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty

[4] In historical retrospect, the specific result in *Hotchkiss* flows directly from an application of one of the rules of the original board of "Commissioners," n. 3, second rule, *supra.*

or not." *McClain* v. *Ortmayer,* 141 U. S. 419, 427 (1891); *A. & P. Tea Co.* v. *Supermarket Corp., supra,* at 151. Its use as a label brought about a large variety of opinions as to its meaning both in the Patent Office, in the courts, and at the bar. The *Hotchkiss* formulation, however, lies not in any label, but in its functional approach to questions of patentability. In practice, *Hotchkiss* has required a comparison between the subject matter of the patent, or patent application, and the background skill of the calling. It has been from this comparison that patentability was in each case determined.

IV.

The 1952 Patent Act.

The Act sets out the conditions of patentability in three sections. An analysis of the structure of these three sections indicates that patentability is dependent upon three explicit conditions: novelty and utility as articulated and defined in § 101 and § 102, and nonobviousness, the new statutory formulation, as set out in § 103. The first two sections, which trace closely the 1874 codification, express the "new and useful" tests which have always existed in the statutory scheme and, for our purposes here, need no clarification.[5] The pivotal

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[5] "§ 101. *Inventions patentable*

"Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."

"§ 102. *Conditions for patentability; novelty and loss of right to patent*

"A person shall be entitled to a patent unless—

"(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

"(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in

section around which the present controversy centers is § 103. It provides:

> "§ 103. *Conditions for patentability; non-obvious subject matter*
>
> "A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made."

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this country, more than one year prior to the date of the application for patent in the United States, or

"(c) he has abandoned the invention, or

"(d) the invention was first patented or caused to be patented by the applicant or his legal representatives or assigns in a foreign country prior to the date of the application for patent in this country on an application filed more than twelve months before the filing of the application in the United States, or

"(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or

"(f) he did not himself invent the subject matter sought to be patented, or

"(g) before the applicant's invention thereof the invention was made in this country by another who had not abandoned, suppressed, or concealed it. In determining priority of invention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other."

The precursors of these sections are to be found in the Act of February 21, 1793, c. 11, 1 Stat. 318; Act of July 4, 1836, c. 357, 5 Stat. 117; Act of July 8, 1870, c. 230, 16 Stat. 198; Rev. Stat. § 4886 (1874).

The section is cast in relatively unambiguous terms. Patentability is to depend, in addition to novelty and utility, upon the "non-obvious" nature of the "subject matter sought to be patented" to a person having ordinary skill in the pertinent art.

The first sentence of this section is strongly reminiscent of the language in *Hotchkiss*. Both formulations place emphasis on the pertinent art existing at the time the invention was made and both are implicitly tied to advances in that art. The major distinction is that Congress has emphasized "nonobviousness" as the operative test of the section, rather than the less definite "invention" language of *Hotchkiss* that Congress thought had led to "a large variety" of expressions in decisions and writings. In the title itself the Congress used the phrase "Conditions for patentability; *non-obvious subject matter*" (italics added), thus focusing upon "nonobviousness" rather than "invention." [6] The Senate and House Reports, S. Rep. No. 1979, 82d Cong., 2d Sess. (1952); H. R. Rep. No. 1923, 82d Cong., 2d Sess. (1952), reflect this emphasis in these terms:

> "Section 103, for the first time in our statute, provides a condition which exists in the law and has existed for more than 100 years, but only by reason of decisions of the courts. An invention which has been made, and which is new in the sense that the same thing has not been made before, may still not be patentable if the difference between the new thing and what was known before is not considered sufficiently great to warrant a patent. That has been expressed in a large variety of ways in decisions of

[6] The corresponding provision in the preliminary draft was titled "Conditions for patentability, *lack of invention*" (italics added), Proposed Revision and Amendment of the Patent Laws, Preliminary Draft with Notes, House Committee on the Judiciary (Committee Print, 1950).

the courts and in writings. Section 103 states this requirement in the title. It refers to the difference between the subject matter sought to be patented and the prior art, meaning what was known before as described in section 102. If this difference is such that the subject matter as a whole would have been obvious at the time to a person skilled in the art, then the subject matter cannot be patented.

"That provision paraphrases language which has often been used in decisions of the courts, and the section is added to the statute for uniformity and definiteness. This section should have a stabilizing effect and minimize great departures which have appeared in some cases." H. R. Rep., *supra,* at 7; S. Rep., *supra,* at 6.

It is undisputed that this section was, for the first time, a statutory expression of an additional requirement for patentability, originally expressed in *Hotchkiss.* It also seems apparent that Congress intended by the last sentence of § 103 to abolish the test it believed this Court announced in the controversial phrase "flash of creative genius," used in *Cuno Corp.* v. *Automatic Devices Corp.,* 314 U. S. 84 (1941).[7]

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[7] The sentence in which the phrase occurs reads: "[T]he new device, however useful it may be, must reveal the flash of creative genius, not merely the skill of the calling." At p. 91. Although some writers and lower courts found in the language connotations as to the frame of mind of the inventors, none were so intended. The opinion approved *Hotchkiss* specifically, and the reference to "flash of creative genius" was but a rhetorical embellishment of language going back to 1833. Cf. "exercise of genius," *Shaw* v. *Cooper,* 7 Pet. 292; "inventive genius," *Reckendorfer* v. *Faber,* 92 U. S. 347 (1876); *Concrete Appliances Co.* v. *Gomery,* 269 U. S. 177; "flash of thought," *Densmore* v. *Scofield,* 102 U. S. 375 (1880); "intuitive genius," *Potts* v. *Creager,* 155 U. S. 597 (1895). Rather than establishing a more exacting standard, *Cuno* merely rhetorically restated the requirement that the subject matter sought to be patented must be beyond the skill of the calling. It was the device, not

It is contended, however, by some of the parties and by several of the *amici* that the first sentence of § 103 was intended to sweep away judicial precedents and to lower the level of patentability. Others contend that the Congress intended to codify the essential purpose reflected in existing judicial precedents—the rejection of insignificant variations and innovations of a commonplace sort—and also to focus inquiries under § 103 upon nonobviousness, rather than upon "invention," as a means of achieving more stability and predictability in determining patentability and validity.

The Reviser's Note to this section,[8] with apparent reference to *Hotchkiss,* recognizes that judicial requirements as to "lack of patentable novelty [have] been followed since at least as early as 1850." The note indicates that the section was inserted because it "may have some stabilizing effect, and also to serve as a basis for the addition at a later time of some criteria which may be worked out." To this same effect are the reports of both Houses, *supra,* which state that the first sentence

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the invention, that had to reveal the "flash of creative genius." See Boyajian, The Flash of Creative Genius, An Alternative Interpretation, 25 J. Pat. Off. Soc. 776, 780, 781 (1943); *Pacific Contact Laboratories, Inc.* v. *Solex Laboratories, Inc.,* 209 F. 2d 529, 533; *Brown & Sharpe Mfg. Co.* v. *Kar Engineering Co.,* 154 F. 2d 48, 51–52; *In re Shortell,* 31 C. C. P. A. (Pat.) 1062, 1069, 142 F. 2d 292, 295–296.

[8] "There is no provision corresponding to the first sentence explicitly stated in the present statutes, but the refusal of patents by the Patent Office, and the holding of patents invalid by the courts, on the ground of lack of invention or lack of patentable novelty has been followed since at least as early as 1850. This paragraph is added with the view that an explicit statement in the statute may have some stabilizing effect, and also to serve as a basis for the addition at a later time of some criteria which may be worked out.

"The second sentence states that patentability as to this requirement is not to be negatived by the manner in which the invention was made, that is, it is immaterial whether it resulted from long toil and experimentation or from a flash of genius."

of the section "paraphrases language which has often been used in decisions of the courts, and the section is added to the statute for uniformity and definiteness."

We believe that this legislative history, as well as other sources,[9] shows that the revision was not intended by Congress to change the general level of patentable invention. We conclude that the section was intended merely as a codification of judicial precedents embracing the *Hotchkiss* condition, with congressional directions that inquiries into the obviousness of the subject matter sought to be patented are a prerequisite to patentability.

V.

Approached in this light, the § 103 additional condition, when followed realistically, will permit a more practical test of patentability. The emphasis on nonobviousness is one of inquiry, not quality, and, as such, comports with the constitutional strictures.

While the ultimate question of patent validity is one of law, *A. & P. Tea Co.* v. *Supermarket Corp., supra,* at 155, the § 103 condition, which is but one of three conditions, each of which must be satisfied, lends itself to several basic factual inquiries. Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circum-

[9] See Efforts to Establish a Statutory Standard of Invention, Study No. 7, Senate Subcommittee on Patents, Trademarks, and Copyrights, 85th Cong., 1st Sess. (Committee Print, 1958); Hearings, Subcommittee No. 3, House Committee on the Judiciary, on H. R. 3760, 82d Cong., 1st Sess. (1951).

stances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy. See Note, Subtests of "Nonobviousness": A Nontechnical Approach to Patent Validity, 112 U. Pa. L. Rev. 1169 (1964).

This is not to say, however, that there will not be difficulties in applying the nonobviousness test. What is obvious is not a question upon which there is likely to be uniformity of thought in every given factual context. The difficulties, however, are comparable to those encountered daily by the courts in such frames of reference as negligence and scienter, and should be amenable to a case-by-case development. We believe that strict observance of the requirements laid down here will result in that uniformity and definiteness which Congress called for in the 1952 Act.

While we have focused attention on the appropriate standard to be applied by the courts, it must be remembered that the primary responsibility for sifting out unpatentable material lies in the Patent Office. To await litigation is—for all practical purposes—to debilitate the patent system. We have observed a notorious difference between the standards applied by the Patent Office and by the courts. While many reasons can be adduced to explain the discrepancy, one may well be the free rein often exercised by Examiners in their use of the concept of "invention." In this connection we note that the Patent Office is confronted with a most difficult task. Almost 100,000 applications for patents are filed each year. Of these, about 50,000 are granted and the backlog now runs well over 200,000. 1965 Annual Report of the Commissioner of Patents 13–14. This is itself a compelling reason for the Commissioner to strictly adhere to the 1952 Act as interpreted here. This would, we believe, not only expedite disposition but

bring about a closer concurrence between administrative and judicial precedent.[10]

Although we conclude here that the inquiry which the Patent Office and the courts must make as to patentability must be beamed with greater intensity on the requirements of § 103, it bears repeating that we find no change in the general strictness with which the overall test is to be applied. We have been urged to find in § 103 a relaxed standard, supposedly a congressional reaction to the "increased standard" applied by this Court in its decisions over the last 20 or 30 years. The standard has remained invariable in this Court. Technology, however, has advanced—and with remarkable rapidity in the last 50 years. Moreover, the ambit of applicable art in given fields of science has widened by disciplines unheard of a half century ago. It is but an evenhanded application to require that those persons granted the benefit of a patent monopoly be charged with an awareness of these changed conditions. The same is true of the less technical, but still useful arts. He who seeks to build a better mousetrap today has a long path to tread before reaching the Patent Office.

VI.

We now turn to the application of the conditions found necessary for patentability to the cases involved here:

A. *The Patent in Issue in No. 11,* Graham *v.* John Deere Co.

This patent, No. 2,627,798 (hereinafter called the '798 patent) relates to a spring clamp which permits plow shanks to be pushed upward when they hit obstructions

[10] The President has appointed a Commission on the Patent System. Executive Order No. 11215, 30 Fed. Reg. 4661 (April 10, 1965). It is hoped that its studies may develop more efficient administrative procedures and techniques that will further expedite dispositions and at the same time insure the strict application of appropriate tests of patentability.

in the soil, and then springs the shanks back into normal position when the obstruction is passed over. The device, which we show diagrammatically in the accompanying sketches (Appendix, Fig. 1), is fixed to the plow frame as a unit. The mechanism around which the controversy centers is basically a hinge. The top half of it, known as the upper plate (marked 1 in the sketches), is a heavy metal piece clamped to the plow frame (2) and is stationary relative to the plow frame. The lower half of the hinge, known as the hinge plate (3), is connected to the rear of the upper plate by a hinge pin (4) and rotates downward with respect to it. The shank (5), which is bolted to the forward end of the hinge plate (at 6), runs beneath the plate and parallel to it for about nine inches, passes through a stirrup (7), and then continues backward for several feet curving down toward the ground. The chisel (8), which does the actual plowing, is attached to the rear end of the shank. As the plow frame is pulled forward, the chisel rips through the soil, thereby plowing it. In the normal position, the hinge plate and the shank are kept tight against the upper plate by a spring (9), which is atop the upper plate. A rod (10) runs through the center of the spring, extending down through holes in both plates and the shank. Its upper end is bolted to the top of the spring while its lower end is hooked against the underside of the shank.

When the chisel hits a rock or other obstruction in the soil, the obstruction forces the chisel and the rear portion of the shank to move upward. The shank is pivoted (at 11) against the rear of the hinge plate and pries open the hinge against the closing tendency of the spring. (See sketch labeled "Open Position," Appendix, Fig. 1.) This closing tendency is caused by the fact that, as the hinge is opened, the connecting rod is pulled downward and the spring is compressed. When the obstruc-

tion is passed over, the upward force on the chisel disappears and the spring pulls the shank and hinge plate back into their original position. The lower, rear portion of the hinge plate is constructed in the form of a stirrup (7) which brackets the shank, passing around and beneath it. The shank fits loosely into the stirrup (permitting a slight up and down play). The stirrup is designed to prevent the shank from recoiling away from the hinge plate, and thus prevents excessive strain on the shank near its bolted connection. The stirrup also girds the shank, preventing it from fishtailing from side to side.

In practical use, a number of spring-hinge-shank combinations are clamped to a plow frame, forming a set of ground-working chisels capable of withstanding the shock of rocks and other obstructions in the soil without breaking the shanks.

Background of the Patent.

Chisel plows, as they are called, were developed for plowing in areas where the ground is relatively free from rocks or stones. Originally, the shanks were rigidly attached to the plow frames. When such plows were used in the rocky, glacial soils of some of the Northern States, they were found to have serious defects. As the chisels hit buried rocks, a vibratory motion was set up and tremendous forces were transmitted to the shank near its connection to the frame. The shanks would break. Graham, one of the petitioners, sought to meet that problem, and in 1950 obtained a patent, U. S. No. 2,493,811 (hereinafter '811), on a spring clamp which solved some of the difficulties. Graham and his companies manufactured and sold the '811 clamps. In 1950, Graham modified the '811 structure and filed for a patent. That patent, the one in issue, was granted in 1953. This suit against competing plow manufacturers resulted from charges by petitioners that several of respondents' devices infringed the '798 patent.

The Prior Art.

Five prior patents indicating the state of the art were cited by the Patent Office in the prosecution of the '798 application. Four of these patents, 10 other United States patents and two prior-use spring-clamp arrangements not of record in the '798 file wrapper were relied upon by respondents as revealing the prior art. The District Court and the Court of Appeals found that the prior art "as a whole in one form or another contains all of the mechanical elements of the 798 Patent." One of the prior-use clamp devices not before the Patent Examiner—Glencoe—was found to have "all of the elements."

We confine our discussion to the prior patent of Graham, '811, and to the Glencoe clamp device, both among the references asserted by respondents. The Graham '811 and '798 patent devices are similar in all elements, save two: (1) the stirrup and the bolted connection of the shank to the hinge plate do not appear in '811; and (2) the position of the shank is reversed, being placed in patent '811 above the hinge plate, sandwiched between it and the upper plate. The shank is held in place by the spring rod which is hooked against the bottom of the hinge plate passing through a slot in the shank. Other differences are of no consequence to our examination. In practice the '811 patent arrangement permitted the shank to wobble or fishtail because it was not rigidly fixed to the hinge plate; moreover, as the hinge plate was below the shank, the latter caused wear on the upper plate, a member difficult to repair or replace.

Graham's '798 patent application contained 12 claims. All were rejected as not distinguished from the Graham '811 patent. The inverted position of the shank was specifically rejected as was the bolting of the shank to the hinge plate. The Patent Office examiner found these to be "matters of design well within the expected skill of

the art and devoid of invention." Graham withdrew the original claims and substituted the two new ones which are substantially those in issue here. His contention was that wear was reduced in patent '798 between the shank and the heel or rear of the upper plate.[11] He also emphasized several new features, the relevant one here being that the bolt used to connect the hinge plate and shank maintained the upper face of the shank in continuing and constant contact with the underface of the hinge plate.

Graham did not urge before the Patent Office the greater "flexing" qualities of the '798 patent arrangement which he so heavily relied on in the courts. The sole element in patent '798 which petitioners argue before us is the interchanging of the shank and hinge plate and the consequences flowing from this arrangement. The contention is that this arrangement—which petitioners claim is not disclosed in the prior art—permits the shank to flex under stress for its *entire* length. As we have sketched (see sketch, "Graham '798 Patent" in Appendix, Fig. 2), when the chisel hits an obstruction the resultant force (A) pushes the rear of the shank upward and the shank pivots against the rear of the hinge plate at (C). The natural tendency is for that portion of the shank between the pivot point and the bolted connection (*i. e.*, between C and D) to bow downward and away from the hinge plate. The maximum dis-

[11] In '811, where the shank was above the hinge plate, an upward movement of the chisel forced the shank up against the underside of the rear of the upper plate. The upper plate thus provided the fulcrum about which the hinge was pried open. Because of this, as well as the location of the hinge pin, the shank rubbed against the heel of the upper plate causing wear both to the plate and to the shank. By relocating the hinge pin and by placing the hinge plate between the shank and the upper plate, as in '798, the rubbing was eliminated and the wear point was changed to the hinge plate, a member more easily removed or replaced for repair.

tance (B) that the shank moves away from the plate is slight—for emphasis, greatly exaggerated in the sketches. This is so because of the strength of the shank and the short—nine inches or so—length of that portion of the shank between (C) and (D). On the contrary, in patent '811 (see sketch, "Graham '811 Patent" in Appendix, Fig. 2), the pivot point is the upper plate at point (c); and while the tendency for the shank to bow between points (c) and (d) is the same as in '798, the shank is restricted because of the underlying hinge plate and cannot flex as freely. In practical effect, the shank flexes only between points (a) and (c), and not along the entire length of the shank, as in '798. Petitioners say that this difference in flex, though small, effectively absorbs the tremendous forces of the shock of obstructions whereas prior art arrangements failed.

The Obviousness of the Differences.

We cannot agree with petitioners. We assume that the prior art does not disclose such an arrangement as petitioners claim in patent '798. Still we do not believe that the argument on which petitioners' contention is bottomed supports the validity of the patent. The tendency of the shank to flex is the same in all cases. If free-flexing, as petitioners now argue, is the crucial difference above the prior art, then it appears evident that the desired result would be obtainable by not boxing the shank within the confines of the hinge.[12] The only other effective place available in the arrangement was to attach it below the hinge plate and run it through a

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[12] Even petitioners' expert testified to that effect:

"Q. Given the same length of the forward portion of the clamp . . . you would anticipate that the magnitude of flex [in '798] would be precisely the same or substantially the same as in 811, wouldn't you?

"A. I would think so."

stirrup or bracket that would not disturb its flexing qualities. Certainly a person having ordinary skill in the prior art, given the fact that the flex in the shank could be utilized more effectively if allowed to run the entire length of the shank, would immediately see that the thing to do was what Graham did, *i. e.*, invert the shank and the hinge plate.

Petitioners' argument basing validity on the free-flex theory raised for the first time on appeal is reminiscent of *Lincoln Engineering Co.* v. *Stewart-Warner Corp.*, 303 U. S. 545 (1938), where the Court called such an effort "an afterthought. No such function . . . is hinted at in the specifications of the patent. If this were so vital an element in the functioning of the apparatus it is strange that all mention of it was omitted." At p. 550. No "flexing" argument was raised in the Patent Office. Indeed, the trial judge specifically found that "flexing is not a claim of the patent in suit . . ." and would not permit interrogation as to flexing in the accused devices. Moreover, the clear testimony of petitioners' experts shows that the flexing advantages flowing from the '798 arrangement are not, in fact, a significant feature in the patent.[13]

We find no nonobvious facets in the '798 arrangement. The wear and repair claims were sufficient to overcome

[13] "Q. . . . Do you regard the small degree of flex in the forward end of the shank that lies between the pivot point and the point of spring attachment to be of any significance or any importance to the functioning of a device such as 798? A. Unless you are approaching the elastic limit, I think this flexing will reduce the maximum stress at the point of pivot there, where the maximum stress does occur. I think it will reduce that. I don't know how much.

"Q. Do you think it is a substantial factor, a factor of importance in the functioning of the structure? A. Not a great factor, no."

The same expert previously testified similarly in *Jeoffroy Mfg., Inc.* v. *Graham*, 219 F. 2d 511.

the patent examiner's original conclusions as to the validity of the patent. However, some of the prior art, notably Glencoe, was not before him. There the hinge plate is below the shank but, as the courts below found, all of the elements in the '798 patent are present in the Glencoe structure. Furthermore, even though the position of the shank and hinge plate appears reversed in Glencoe, the mechanical operation is identical. The shank there pivots about the underside of the stirrup, which in Glencoe is *above* the shank. In other words, the stirrup in Glencoe serves exactly the same function as the heel of the hinge plate in '798. The mere shifting of the wear point to the heel of the '798 hinge plate from the stirrup of Glencoe—itself a part of the hinge plate—presents no operative mechanical distinctions, much less nonobvious differences.

B. *The Patent in Issue in No. 37,* Calmar, Inc. *v.* Cook Chemical Co., *and in No. 43,* Colgate-Palmolive Co. *v.* Cook Chemical Co.

The single patent [14] involved in these cases relates to a plastic finger sprayer with a "hold-down" lid used as a built-in dispenser for containers or bottles packaging liquid products, principally household insecticides. Only the first two of the four claims in the patent are involved here and we, therefore, limit our discussion to them. We do not set out those claims here since they are printed in 220 F. Supp., at 417–418.

In essence the device here combines a finger-operated pump sprayer, mounted in a container or bottle by means of a container cap, with a plastic overcap which screws over the top of and depresses the sprayer (see Appendix,

[14] The patent is U. S. No. 2,870,943 issued in 1959 to Cook Chemical Co. as assignee of Baxter I. Scoggin, Jr., the inventor. In No. 37, Calmar is the manufacturer of an alleged infringing device, and, in No. 43, Colgate is a customer of Calmar and user of its device.

Fig. 3). The pump sprayer passes through the container cap and extends down into the liquid in the container; the overcap fits over the pump sprayer and screws down on the outside of a collar mounting or retainer which is molded around the body of the sprayer. When the overcap is screwed down on this collar mounting a seal is formed by the engagement of a circular ridge or rib located above the threads on the collar mounting with a mating shoulder located inside the overcap above its threads.[15] The overcap, as it is screwed down, depresses the pump plunger rendering the pump inoperable and when the seal is effected, any liquid which might seep into the overcap through or around the pump is prevented from leaking out of the overcap. The overcap serves also to protect the sprayer head and prevent damage to it during shipment or merchandising. When the overcap is in place it does not reach the cap of the container or bottle and in no way engages it since a slight space is left between those two pieces.

The device, called a shipper-sprayer in the industry, is sold as an integrated unit with the overcap in place enabling the insecticide manufacturer to install it on the container or bottle of liquid in a single operation in an automated bottling process. The ultimate consumer simply unscrews and discards the overcap, the pump plunger springs up and the sprayer is ready for use.

The Background of the Patent.

For many years manufacturers engaged in the insecticide business had faced a serious problem in developing sprayers that could be integrated with the containers or bottles in which the insecticides were marketed. Originally, insecticides were applied through the use of tin

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[15] Our discussion here relates to the overcap seal. The container itself is sealed in the customary way through the use of a container gasket located between the container and the container cap.

sprayers, not supplied by the manufacturer. In 1947, Cook Chemical, an insecticide manufacturer, began to furnish its customers with plastic pump dispensers purchased from Calmar. The dispenser was an unpatented finger-operated device mounted in a perforated cardboard holder and hung over the neck of the bottle or container. It was necessary for the ultimate consumer to remove the cap of the container and insert and attach the sprayer to the latter for use.

Hanging the sprayer on the side of the container or bottle was both expensive and troublesome. Packaging for shipment had to be a hand operation, and breakage and pilferage as well as the loss of the sprayer during shipment and retail display often occurred. Cook Chemical urged Calmar to develop an integrated sprayer that could be mounted directly in a container or bottle during the automated filling process and that would not leak during shipment or retail handling. Calmar did develop some such devices but for various reasons they were not completely successful. The situation was aggravated in 1954 by the entry of Colgate-Palmolive into the insecticide trade with its product marketed in aerosol spray cans. These containers, which used compressed gas as a propellent to dispense the liquid, did not require pump sprayers.

During the same year Calmar was acquired by the Drackett Company. Cook Chemical became apprehensive of its source of supply for pump sprayers and decided to manufacture its own through a subsidiary, Bakan Plastics, Inc. Initially, it copied its design from the unpatented Calmar sprayer, but an officer of Cook Chemical, Scoggin, was assigned to develop a more efficient device. By 1956 Scoggin had perfected the shipper-sprayer in suit and a patent was granted in 1959 to Cook Chemical as his assignee. In the interim Cook Chemical began to use Scoggin's device and also mar-

keted it to the trade. The device was well received and soon became widely used.

In the meanwhile, Calmar employed two engineers, Corsette and Cooprider, to perfect a shipper-sprayer and by 1958 it began to market its SS–40, a device very much similar to Scoggin's. When the Scoggin patent issued, Cook Chemical charged Calmar's SS–40 with infringement and this suit followed.

The Opinions of the District Court and the Court of Appeals.

At the outset it is well to point up that the parties have always disagreed as to the scope and definition of the invention claimed in the patent in suit. Cook Chemical contends that the invention encompasses a unique combination of admittedly old elements and that patentability is found in the result produced. Its expert testified that the invention was "the first commercially successful, inexpensive integrated shipping closure pump unit which permitted automated assembly with a container of household insecticide or similar liquids to produce a practical, ready-to-use package which could be shipped without external leakage and which was so organized that the pump unit with its hold-down cap could be itself assembled and sealed and then later assembled and sealed on the container without breaking the first seal." Cook Chemical stresses the long-felt need in the industry for such a device; the inability of others to produce it; and its commercial success—all of which, contends Cook, evidences the nonobvious nature of the device at the time it was developed. On the other hand, Calmar says that the differences between Scoggin's shipper-sprayer and the prior art relate only to the design of the overcap and that the differences are so inconsequential that the device as a whole would have been obvious at the time of its invention to a person having ordinary skill in the art.

Both courts accepted Cook Chemical's contentions. While the exact basis of the District Court's holding is uncertain, the court did find the subject matter of the patent new, useful and nonobvious. It concluded that Scoggin "had produced a sealed and protected sprayer unit which the manufacturer need only screw onto the top of its container in much the same fashion as a simple metal cap." 220 F. Supp., at 418. Its decision seems to be bottomed on the finding that the Scoggin sprayer solved the long-standing problem that had confronted the industry.[16] The Court of Appeals also found validity in the "novel 'marriage' of the sprayer with the insecticide container" which took years in discovery and in "the immediate commercial success" which it enjoyed. While finding that the individual elements of the invention were "not novel per se" the court found "nothing in the prior art suggesting Scoggin's unique combination of these old features . . . as would solve the . . . problems which for years beset the insecticide industry." It concluded that "the . . . [device] meets the exacting standard required for a combination of old elements to rise to the level of patentable invention by fulfilling the long-felt need with an economical, efficient, utilitarian apparatus which achieved novel results and immediate commercial success." 336 F. 2d, at 114.

The Prior Art.

Only two of the five prior art patents cited by the Patent Office Examiner in the prosecution of Scoggin's application are necessary to our discussion, *i. e.*, Lohse

[16] "By the same reasoning, may it not also be said that if [the device] solved a long-sought need, it was likewise novel? If it meets the requirements of being new, novel and useful, it was the subject of invention, although it may have been a short step, nevertheless it was the last step that ended the journey. The last step is the one that wins and he who takes it when others could not, is entitled to patent protection." 220 F. Supp., at 421.

U. S. Patent No. 2,119,884 (1938) and Mellon U. S. Patent No. 2,586,687 (1952). Others are cited by Calmar that were not before the Examiner, but of these our purposes require discussion of only the Livingstone U. S. Patent No. 2,715,480 (1953). Simplified drawings of each of these patents are reproduced in the Appendix, Figs. 4–6, for comparison and description.

The Lohse patent (Fig. 4) is a shipper-sprayer designed to perform the same function as Scoggin's device. The differences, recognized by the District Court, are found in the overcap seal which in Lohse is formed by the skirt of the overcap engaging a washer or gasket which rests upon the upper surface of the container cap. The court emphasized that in Lohse "[t]here are no seals above the threads and below the sprayer head." 220 F. Supp., at 419.

The Mellon patent (Fig. 5), however, discloses the idea of effecting a seal above the threads of the overcap. Mellon's device, likewise a shipper-sprayer, differs from Scoggin's in that its overcap screws directly on the container, and a gasket, rather than a rib, is used to effect the seal.

Finally, Livingstone (Fig. 6) shows a seal above the threads accomplished without the use of a gasket or washer.[17] Although Livingstone's arrangement was designed to cover and protect pouring spouts, his sealing feature is strikingly similar to Scoggin's. Livingstone uses a tongue and groove technique in which the tongue, located on the upper surface of the collar, fits into a groove on the inside of the overcap. Scoggin employed the rib and shoulder seal in the identical position and with less efficiency because the Livingstone technique

[17] While the sealing feature was not specifically claimed in the Livingstone patent, it was disclosed in the drawings and specifications. Under long-settled law the feature became public property. *Miller* v. *Brass Co.*, 104 U. S. 350, 352 (1882).

is inherently a more stable structure, forming an interlock that withstands distortion of the overcap when subjected to rough handling. Indeed, Cook Chemical has now incorporated the Livingstone closure into its own shipper-sprayers as had Calmar in its SS–40.

The Invalidity of the Patent.

Let us first return to the fundamental disagreement between the parties. Cook Chemical, as we noted at the outset, urges that the invention must be viewed as the overall combination, or—putting it in the language of the statute—that we must consider the subject matter sought to be patented taken as a whole. With this position, taken in the abstract, there is, of course, no quibble. But the history of the prosecution of the Scoggin application in the Patent Office reveals a substantial divergence in respondent's present position.

As originally submitted, the Scoggin application contained 15 claims which in very broad terms claimed the entire combination of spray pump and overcap. No mention of, or claim for, the sealing features was made. All 15 claims were rejected by the Examiner because (1) the applicant was vague and indefinite as to what the invention was, and (2) the claims were met by Lohse. Scoggin canceled these claims and submitted new ones. Upon a further series of rejections and new submissions, the Patent Office Examiner, after an office interview, at last relented. It is crystal clear that after the first rejection, Scoggin relied entirely upon the sealing arrangement as the exclusive patentable difference in his combination. It is likewise clear that it was on that feature that the Examiner allowed the claims. In fact, in a letter accompanying the final submission of claims, Scoggin, through his attorney, stated that "agreement was reached between the Honorable Examiner and applicant's attorney relative to *limitations* which must be in the claims in

order to define novelty over the previously applied disclosure of Lohse when considered in view of the newly cited patents of Mellon and Darley, Jr." (Italics added.)

Moreover, those limitations were specifically spelled out as (1) the use of a rib seal and (2) an overcap whose lower edge did not contact the container cap. Mellon was distinguished, as was the Darley patent, *infra,* n. 18, on the basis that although it disclosed a hold-down cap with a seal located above the threads, it did not disclose a rib seal disposed in such position as to cause the lower peripheral edge of the overcap "to be maintained out of contacting relationship with [the container] cap . . . when . . . [the overcap] was screwed [on] tightly . . . ." Scoggin maintained that the "obvious modification" of Lohse in view of Mellon would be merely to place the Lohse gasket above the threads with the lower edge of the overcap remaining in tight contact with the container cap or neck of the container itself. In other words, the Scoggin invention was limited to the use of a rib—rather than a washer or gasket—and the existence of a slight space between the overcap and the container cap.

It is, of course, well settled that an invention is construed not only in the light of the claims, but also with reference to the file wrapper or prosecution history in the Patent Office. *Hogg* v. *Emerson,* 11 How. 587 (1850); *Crawford* v. *Heysinger,* 123 U. S. 589 (1887). Claims as allowed must be read and interpreted with reference to rejected ones and to the state of the prior art; and claims that have been narrowed in order to obtain the issuance of a patent by distinguishing the prior art cannot be sustained to cover that which was previously by limitation eliminated from the patent. *Powers-Kennedy Co.* v. *Concrete Co.,* 282 U. S. 175, 185–186 (1930); *Schriber Co.* v. *Cleveland Trust Co.,* 311 U. S. 211, 220–221 (1940).

Here, the patentee obtained his patent only by accepting the limitations imposed by the Examiner. The claims were carefully drafted to reflect these limitations and Cook Chemical is not now free to assert a broader view of Scoggin's invention. The subject matter as a whole reduces, then, to the distinguishing features clearly incorporated into the claims. We now turn to those features.

As to the space between the skirt of the overcap and the container cap, the District Court found:

> "Certainly without a space so described, there could be no inner seal within the cap, but such a space is not new or novel, but it is necessary to the formation of the seal within the hold-down cap.
>
> "*To me this language is descriptive of an element of the patent but not a part of the invention.* It is too simple, really, to require much discussion. In this device the hold-down cap was intended to perform two functions—to hold down the sprayer head and to form a solid tight seal between the shoulder and the collar below. In assembling the element it is necessary to provide this space in order to form the seal." 220 F. Supp., at 420. (Italics added.)

The court correctly viewed the significance of that feature. We are at a loss to explain the Examiner's allowance on the basis of such a distinction. Scoggin was able to convince the Examiner that Mellon's cap contacted the bottle neck while his did not. Although the drawings included in the Mellon application show that the cap might touch the neck of the bottle when fully screwed down, there is nothing—absolutely nothing—which indicates that the cap was designed at any time to *engage* the bottle neck. It is palpably evident that Mellon embodies a seal formed by a gasket com-

pressed between the cap and the bottle neck. It follows that the cap in Mellon will not seal if it does not bear down on the gasket and this would be impractical, if not impossible, under the construction urged by Scoggin before the Examiner. Moreover, the space so strongly asserted by Cook Chemical appears quite plainly on the Livingstone device, a reference not cited by the Examiner.

The substitution of a rib built into a collar likewise presents no patentable difference above the prior art. It was fully disclosed and dedicated to the public in the Livingstone patent. Cook Chemical argues, however, that Livingstone is not in the *pertinent* prior art because it relates to liquid containers having pouring spouts rather than pump sprayers. Apart from the fact that respondent made no such objection to similar references cited by the Examiner,[18] so restricted a view of the applicable prior art is not justified. The problems confronting Scoggin and the insecticide industry were not insecticide problems; they were mechanical closure problems. Closure devices in such a closely related art as pouring spouts for liquid containers are at the very least pertinent references. See, II Walker on Patents § 260 (Deller ed. 1937).

Cook Chemical insists, however, that the development of a workable shipper-sprayer eluded Calmar, who had long and unsuccessfully sought to solve the problem. And, further, that the long-felt need in the industry for a device such as Scoggin's together with its wide commercial success supports its patentability. These legal in-

[18] In addition to Livingstone and Mellon, the Examiner cited Slade, U. S. Patent No. 2,844,290 (hold-down cap for detergent cans having a pouring spout); Nilson, U. S. Patent No. 2,118,222 (combined cap and spout for liquid dispensing containers); Darley, Jr., U. S. Patent No. 1,447,712 (containers for toothpaste, cold creams and other semi-liquid substances).

ferences or subtests do focus attention on economic and motivational rather than technical issues and are, therefore, more susceptible of judicial treatment than are the highly technical facts often present in patent litigation. See Judge Learned Hand in *Reiner* v. *I. Leon Co.*, 285 F. 2d 501, 504 (1960). See also Note, Subtests of "Nonobviousness": A Nontechnical Approach to Patent Validity, 112 U. Pa. L. Rev. 1169 (1964). Such inquiries may lend a helping hand to the judiciary which, as Mr. Justice Frankfurter observed, is "most ill-fitted to discharge the technological duties cast upon it by patent legislation. *Marconi Wireless Co.* v. *United States,* 320 U. S. 1, 60 (1943). They may also serve to "guard against slipping into use of hindsight," *Monroe Auto Equipment Co.* v. *Heckethorn Mfg. & Sup. Co.*, 332 F. 2d 406, 412 (1964), and to resist the temptation to read into the prior art the teachings of the invention in issue.

However, these factors do not, in the circumstances of this case, tip the scales of patentability. The Scoggin invention, as limited by the Patent Office and accepted by Scoggin, rests upon exceedingly small and quite nontechnical mechanical differences in a device which was old in the art. At the latest, those differences were rendered apparent in 1953 by the appearance of the Livingstone patent, and unsuccessful attempts to reach a solution to the problems confronting Scoggin made before that time became wholly irrelevant. It is also irrelevant that no one apparently chose to avail himself of knowledge stored in the Patent Office and readily available by the simple expedient of conducting a patent search—a prudent and nowadays common preliminary to well organized research. *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485 (1900). To us, the limited claims of the Scoggin patent are clearly evident from the prior art as it stood at the time of the invention.

We conclude that the claims in issue in the Scoggin patent must fall as not meeting the test of § 103, since the differences between them and the pertinent prior art would have been obvious to a person reasonably skilled in that art.

The judgment of the Court of Appeals in No. 11 is affirmed. The judgment of the Court of Appeals in Nos. 37 and 43 is reversed and the cases remanded to the District Court for disposition not inconsistent with this opinion.

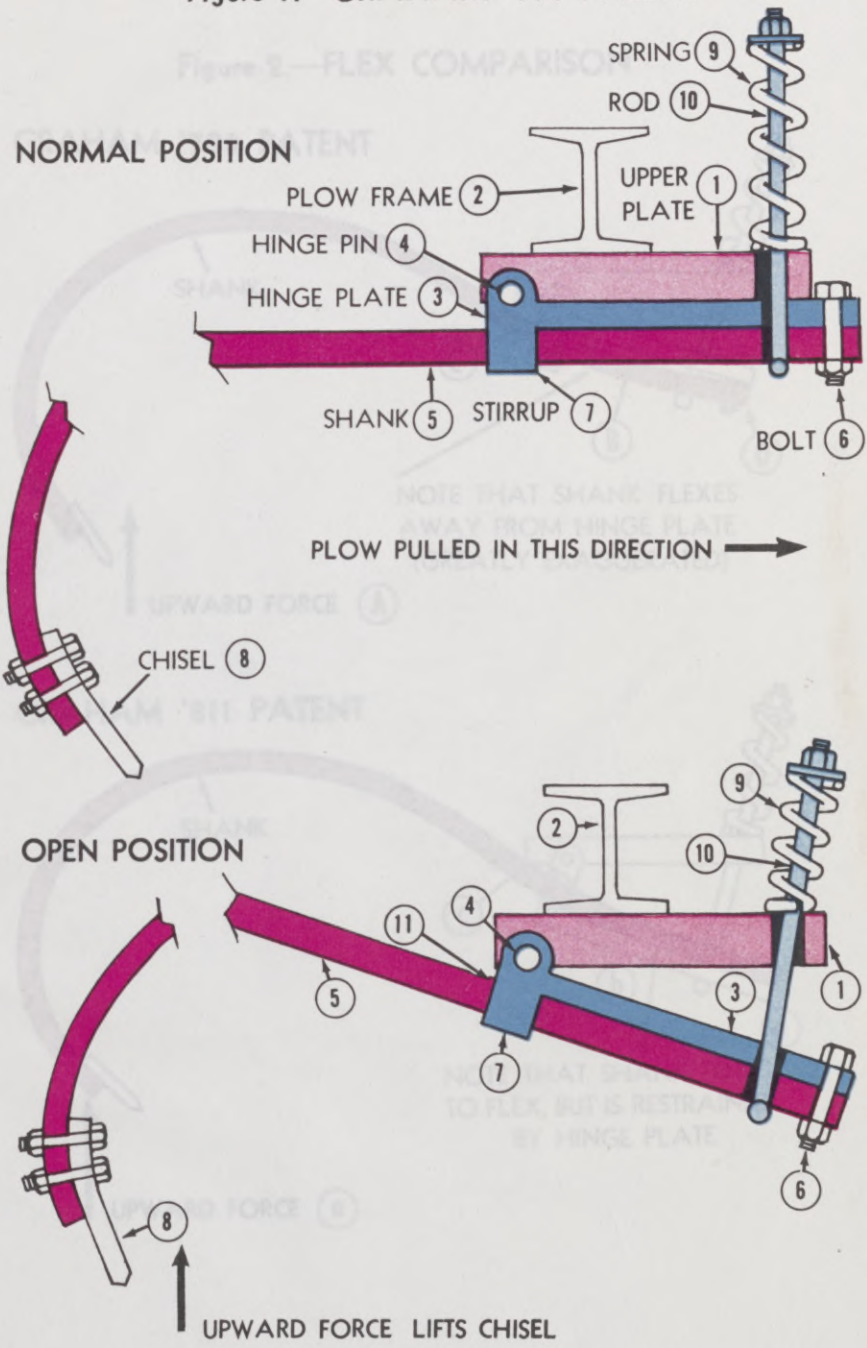
It is so ordered.

MR. JUSTICE STEWART took no part in the consideration or decision of Nos. 37 and 43.

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

[Turn page for Appendix.]

Figure 1.—GRAHAM '798 PATENT



206-856 O - 66 (Face blank p. 38) No. 1

Figure 1.—GRAHAM '798 PATENT

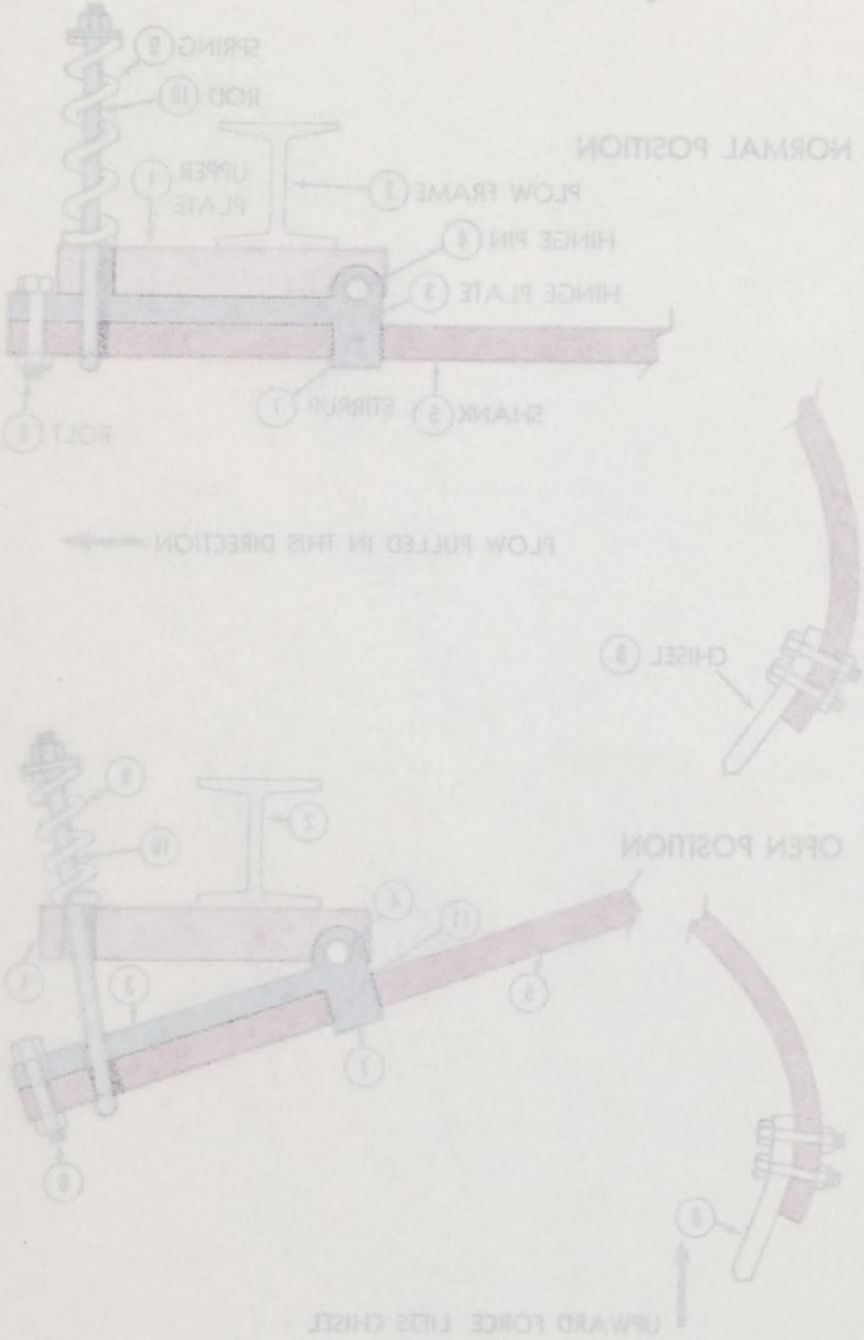
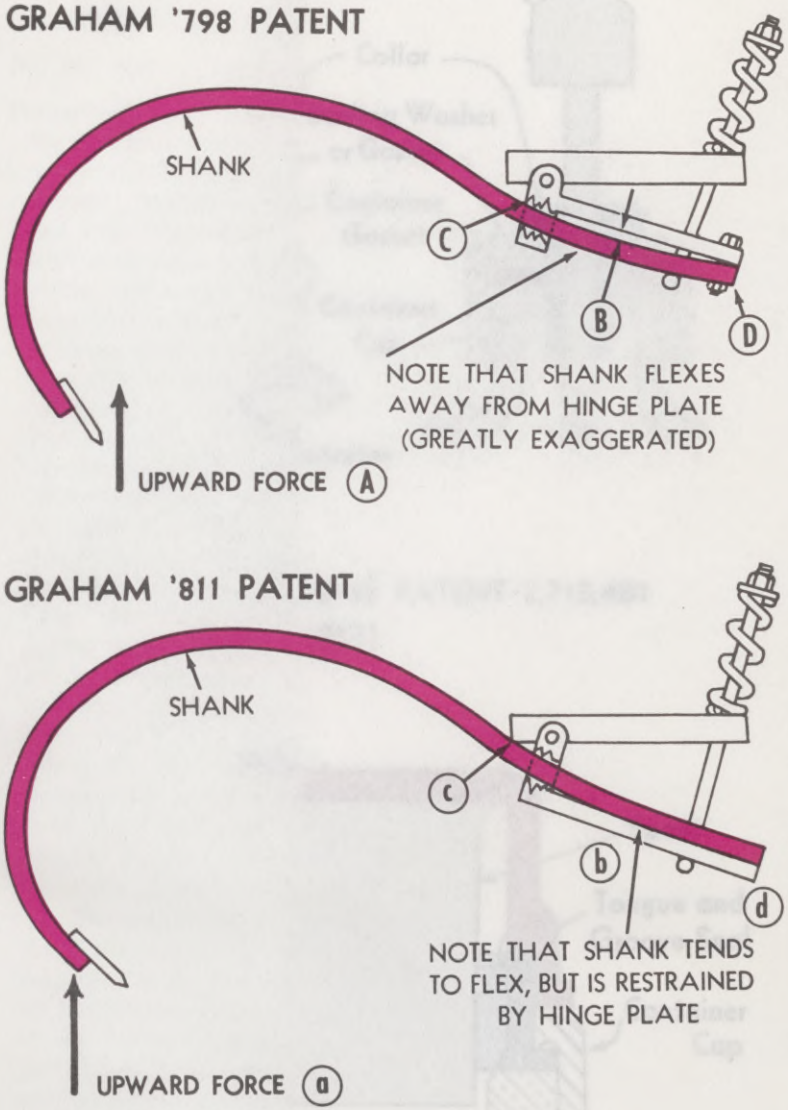


Figure 2.—FLEX COMPARISON



GRAHAM '798 PATENT
SHANK
C
B
D
NOTE THAT SHANK FLEXES
AWAY FROM HINGE PLATE
(GREATLY EXAGGERATED)
A
UPWARD FORCE
GRAHAM '811 PATENT
SHANK
C
b
d
NOTE THAT SHANK TENDS
TO FLEX, BUT IS RESTRAINED
BY HINGE PLATE
B
UPWARD FORCE

FIG. 3. SCOGGIN PATENT 2,870,943
(The Patent in Issue)

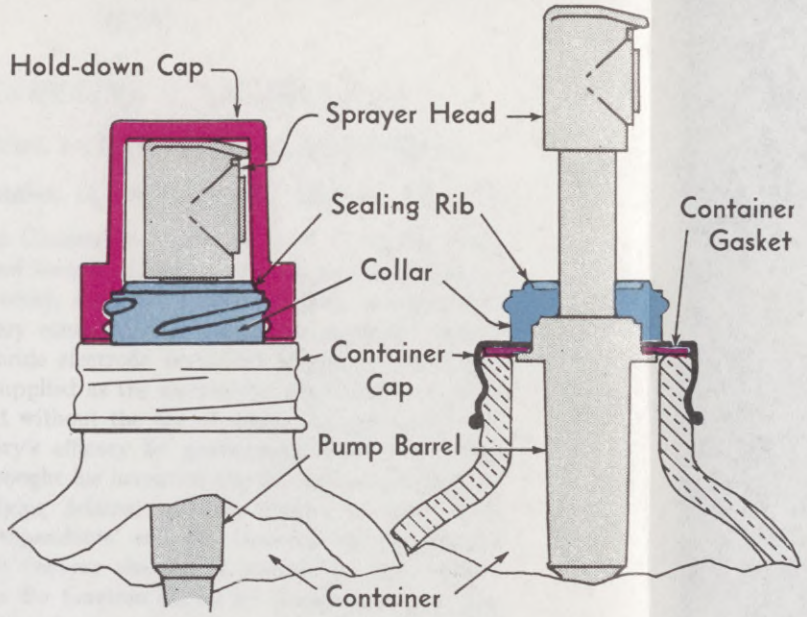


FIG. 4. LOHSE PATENT 2,119,884
(Prior art 1938)

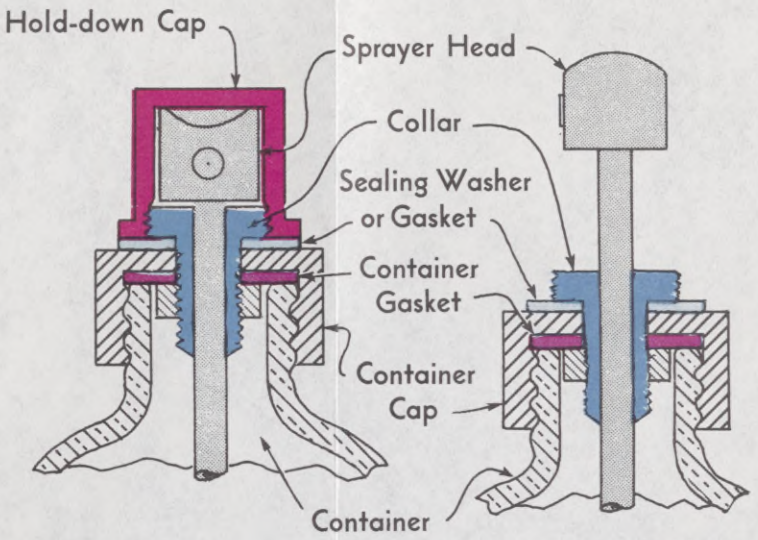


FIG. 5. MELLON PATENT 2,586,687
(Prior art 1952)

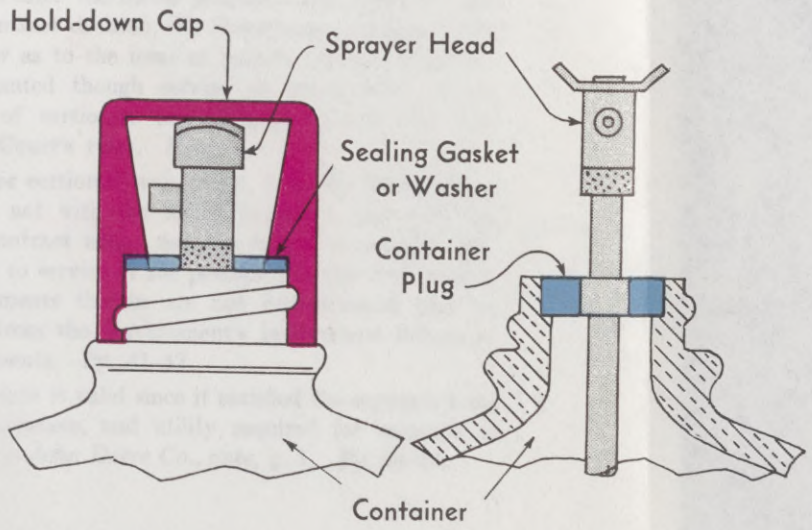
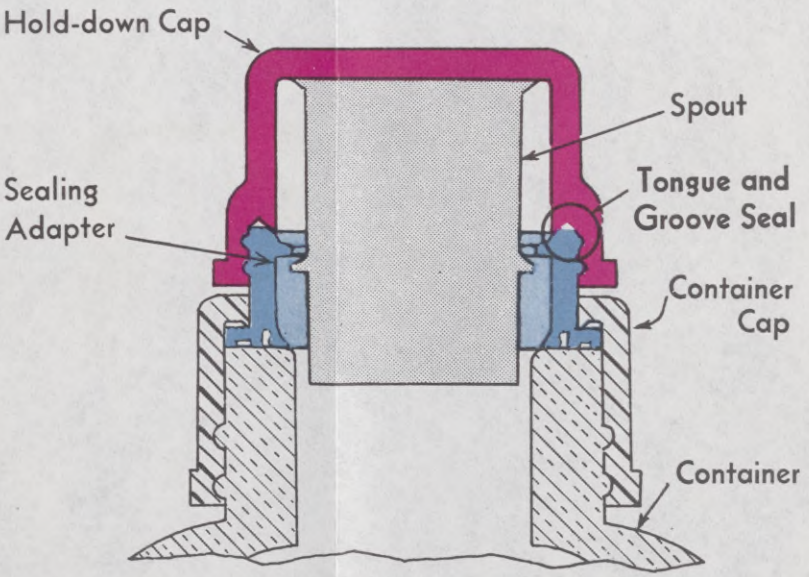


FIG. 6. LIVINGSTONE PATENT 2,715,480
(Prior art 1953)



206-856 O - 66 (Face blank p. 38) No. 3

UNITED STATES *v.* ADAMS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 55. Argued October 14, 1965.—Decided February 21, 1966.

Respondents sued the Government under 28 U. S. C. § 1498 charging infringement and breach of contract to compensate for use of a wet battery on which a patent had been issued to respondent Adams. The battery consisted of a magnesium electrode (anode) and a cuprous chloride electrode (cathode) placed in a container with water to be supplied as the electrolyte, providing a constant voltage and current without the use of acids. Despite initial disbelief in the battery's efficacy by government experts to whose attention Adams brought his invention the Government ultimately (but without notifying Adams) put the battery to many uses. In opposition to respondents' suit the Government claimed the device unpatentable because the use of magnesium and cuprous chloride to perform the function shown by Adams had been previously well known in the art and their combination represented no significant change compared to the prior art wet battery designs such as those using a zinc anode and silver chloride cathode for which magnesium and cuprous chloride were known substitutes. The Court of Claims adopted the Trial Commissioner's finding that the patent was valid and infringed by some of the accused devices. Six months later, following respondents' motion to amend the judgment, that court found no breach of contract. More than 90 days after the initial judgment but less than that period after the contract decision, the Government sought a time extension for review as to the issue of patent validity. Such review was later granted though service on respondents of the petition for writ of certiorari was delayed beyond the time prescribed by this Court's rules. *Held:*

1. The petition for certiorari was timely, since the 90-day filing period commenced, not with the initial judgment, but with the judgment on the contract issue; nor did failure to comply with the Court's rules as to service of the petition bar this review since the service requirements therein are not jurisdictional, and no prejudice resulted from the Government's inadvertent failure to meet those requirements. Pp. 41–42.

2. The Adams patent is valid since it satisfied the separate tests of novelty, nonobviousness, and utility required for issuance of a patent. *Graham* v. *John Deere Co., ante,* p. 1. Pp. 48–52.

3. The Adams battery was novel. Pp. 48–51.

(a) The fact that it was water-activated set it apart from the prior art. *Sinclair & Carroll Co.* v. *Interchemical Corp.*, 325 U. S. 327, distinguished. Pp. 48–50.

(b) The combination of magnesium and cuprous chloride was novel in the light of the prior art. P. 50.

(c) The use of magnesium for zinc and cuprous chloride for silver chloride did not involve merely equivalent substitutes, as is evidenced by the fact that the Adams battery had different operating characteristics from those of the batteries relied upon by the Government. Pp. 50–51.

4. The Adams battery was nonobvious. Pp. 51–52.

(a) Though each of the battery's elements was well known in the prior art, to combine them as Adams did required that a person reasonably skilled in that art ignore that open-circuit batteries which heated in normal use were not practical and that water-activated batteries were successful only when combined with electrolytes harmful to the use of magnesium. Pp. 51–52.

(b) Noted experts had expressed initial disbelief in the Adams battery. P. 52.

(c) In a crowded art replete with a century and a half of advance the Patent Office could find no reference to cite against the Adams application. P. 52.

165 Ct. Cl. 576, 330 F. 2d 622, affirmed.

Assistant Attorney General Douglas argued the cause for the United States. With him on the brief were *Acting Solicitor General Spritzer, Sherman L. Cohn* and *Edward Berlin.*

John A. Reilly argued the cause and filed a brief for respondents.

Mr. Justice Clark delivered the opinion of the Court.

This is a companion case to No. 11, *Graham* v. *John Deere Co.*, decided this day along with Nos. 37 and 43, *Calmar, Inc.* v. *Cook Chemical Co.* and *Colgate-Palmolive Co.* v. *Cook Chemical Co.* The United States seeks review of a judgment of the Court of Claims, holding valid and infringed a patent on a wet battery issued to

Adams. This suit under 28 U. S. C. § 1498 (1964 ed.) was brought by Adams and others holding an interest in the patent against the Government charging both infringement and breach of an implied contract to pay compensation for the use of the invention. The Government challenged the validity of the patent, denied that it had been infringed or that any contract for its use had ever existed. The Trial Commissioner held that the patent was valid and infringed in part but that no contract, express or implied, had been established. The Court of Claims adopted these findings, initially reaching only the patent questions, 165 Ct. Cl. 576, 330 F. 2d 622, but subsequently, on respondents' motion to amend the judgment, deciding the contract claims as well. 165 Ct. Cl., at 598. The United States sought certiorari on the patent validity issue only. We granted the writ, along with the others, in order to settle the important issues of patentability presented by the four cases. 380 U. S. 949. We affirm.

I.

While this case is controlled on the merits by No. 11, *Graham, ante,* p. 1, respondents have raised threshold issues as to our jurisdiction which require separate handling. They say that the petition for certiorari came too late, contending that the 90-day period for filing began with the date of the initial judgment rather than the date of the decision on the contract issue, citing *F. T. C.* v. *Minneapolis-Honeywell Co.,* 344 U. S. 206 (1952). We cannot agree; first, because that case did not involve a timely motion to amend the judgment [1] and, secondly, because here the Government's liability was inextricably

[1] Where a timely motion is filed, the time in such cases runs from the date of the order overruling the motion. See *Department of Banking* v. *Pink,* 317 U. S. 264, 267 (1942); *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 177 (1944); *Forman* v. *United States,* 361 U. S. 416, 426 (1960).

linked with the alleged contract action which was not determined until the latter judgment.

Nor is there merit in respondents' contention that the Government failed to comply with the requirements of our Rules 21 (1) and 33 as to service, since these requirements are not jurisdictional, no prejudice resulted and the failure was inadvertent.

We turn now to the merits.

II.

The Patent in Issue and Its Background.

The patent under consideration, U. S. No. 2,322,210, was issued in 1943 upon an application filed in December 1941 by Adams. It relates to a nonrechargeable, as opposed to a storage, electrical battery. Stated simply, the battery comprises two electrodes—one made of magnesium, the other of cuprous chloride—which are placed in a container. The electrolyte, or battery fluid, used may be either plain or salt water.

The specifications of the patent state that the object of the invention is to provide constant voltage and current without the use of acids, conventionally employed in storage batteries, and without the generation of dangerous fumes. Another object is "to provide a battery which is relatively light in weight with respect to capacity" and which "may be manufactured and distributed to the trade in a dry condition and rendered serviceable by merely filling the container with water." Following the specifications, which also set out a specific embodiment of the invention, there appear 11 claims. Of these, principal reliance has been placed upon Claims 1 and 10, which read:

> "1. A battery comprising a liquid container, a magnesium electropositive electrode inside the container and having an exterior terminal, a fused cuprous chloride electronegative electrode, and a terminal connected with said electronegative electrode."

"10. In a battery, the combination of a magnesium electropositive electrode, and an electronegative electrode comprising cuprous chloride fused with a carbon catalytic agent."

For several years prior to filing his application for the patent, Adams had worked in his home experimenting on the development of a wet battery. He found that when cuprous chloride and magnesium were used as electrodes in an electrolyte of either plain water or salt water an improved battery resulted.

The Adams invention was the first practical, water-activated, constant potential battery which could be fabricated and stored indefinitely without any fluid in its cells. It was activated within 30 minutes merely by adding water. Once activated, the battery continued to deliver electricity at a voltage which remained essentially constant regardless of the rate at which current was withdrawn. Furthermore, its capacity for generating current was exceptionally large in comparison to its size and weight. The battery was also quite efficient in that substantially its full capacity could be obtained over a wide range of currents. One disadvantage, however, was that once activated the battery could not be shut off; the chemical reactions in the battery continued even though current was not withdrawn. Nevertheless, these chemical reactions were highly exothermic, liberating large quantities of heat during operation. As a result, the battery performed with little effect on its voltage or current in very low temperatures. Relatively high temperatures would not damage the battery. Consequently, the battery was operable from 65° below zero Fahrenheit to 200° Fahrenheit. See findings at 165 Ct. Cl., at 591–592, 330 F. 2d, at 632.

Less than a month after filing for his patent, Adams brought his discovery to the attention of the Army and Navy. Arrangements were quickly made for demon-

strations before the experts of the United States Army Signal Corps. The Signal Corps scientists who observed the demonstrations and who conducted further tests themselves did not believe the battery was workable. Almost a year later, in December 1942, Dr. George Vinal, an eminent government expert with the National Bureau of Standards, still expressed doubts. He felt that Adams was making "unusually large claims" for "high watt hour output per unit weight," and he found "far from convincing" the graphical data submitted by the inventor showing the battery's constant voltage and capacity characteristics. He recommended, "Until the inventor can present more convincing data about the performance of his [battery] cell, I see no reason to consider it further."

However, in November 1943, at the height of World War II, the Signal Corps concluded that the battery was feasible. The Government thereafter entered into contracts with various battery companies for its procurement. The battery was found adaptable to many uses. Indeed, by 1956 it was noted that "[t]here can be no doubt that the addition of water activated batteries to the family of power sources has brought about developments which would otherwise have been technically or economically impractical." See Tenth Annual Battery Research and Development Conference, Signal Corps Engineering Laboratories, Fort Monmouth, N. J., p. 25 (1956). Also, see Finding No. 24, 165 Ct. Cl., at 592, 330 F. 2d, at 632.

Surprisingly, the Government did not notify Adams of its changed views nor of the use to which it was putting his device, despite his repeated requests. In 1955, upon examination of a battery produced for the Government by the Burgess Company, he first learned of the Government's action. His request for compensation was denied in 1960, resulting in this suit.

III.

The Prior Art.

The basic idea of chemical generation of electricity is, of course, quite old. Batteries trace back to the epic discovery by the Italian scientist Volta in 1795, who found that when two dissimilar metals are placed in an electrically conductive fluid an electromotive force is set up and electricity generated. Essentially, the basic elements of a chemical battery are a pair of electrodes of different electrochemical properties and an electrolyte which is either a liquid (in "wet" batteries) or a moist paste of various substances (in the so-called "dry-cell" batteries). Various materials which may be employed as electrodes, various electrolyte possibilities and many combinations of these elements have been the object of considerable experiment for almost 175 years. See generally, Vinal, Primary Batteries (New York 1950).

At trial, the Government introduced in evidence 24 patents and treatises as representing the art as it stood in 1938, the time of the Adams invention.[2] Here, however, the Government has relied primarily upon only six of these references [3] which we may summarize as follows.

The Niaudet treatise describes the Marie Davy cell invented in 1860 and De La Rue's variations on it. The battery comprises a zinc anode and a silver chloride cathode. Although it seems to have been capable of working in an electrolyte of pure water, Niaudet says the battery was of "little interest" until De La Rue used a solution of ammonium chloride as an electrolyte. Niaudet also states that "[t]he capital advantage of this bat-

[2] The references are listed in the opinion of the Court of Claims, 165 Ct. Cl., at 590, 330 F. 2d, at 631.

[3] Niaudet, Elementary Treatise on Electric Batteries (Fishback translation 1880); Hayes U. S. Patent No. 282,634 (1883); Wood U. S. Patent No. 1,696,873 (1928); Codd, Practical Primary Cells (London 1929); Wensky British Patent No. 49 of 1891; and Skrivanoff British Patent No. 4,341 (1880).

tery, as in all where zinc with sal ammoniac [ammonium chloride solution] is used, consists in the absence of any local or internal action as long as the electric circuit is open; in other words, this battery does not work upon itself." Hayes likewise discloses the De La Rue zinc-silver chloride cell, but with certain mechanical differences designed to restrict the battery from continuing to act upon itself.

The Wood patent is relied upon by the Government as teaching the substitution of magnesium, as in the Adams patent, for zinc. Wood's patent, issued in 1928, states: "It would seem that a relatively high voltage primary cell would be obtained by using . . . magnesium as the . . . [positive] electrode and I am aware that attempts have been made to develop such a cell. As far as I am aware, however, these have all been unsuccessful, and it has been generally accepted that magnesium could not be commercially utilized as a primary cell electrode." Wood recognized that the difficulty with magnesium electrodes is their susceptibility to chemical corrosion by the action of acid or ammonium chloride electrolytes. Wood's solution to this problem was to use a "neutral electrolyte containing a strong soluble oxidizing agent adapted to reduce the rate of corrosion of the magnesium electrode on open circuit." There is no indication of its use with cuprous chloride, nor was there any indication that a magnesium battery could be water-activated.

The Codd treatise is also cited as authority for the substitution of magnesium. However, Codd simply lists magnesium in an electromotive series table, a tabulation of electrochemical substances in descending order of their relative electropositivity. He also refers to magnesium in an example designed to show that various substances are more electropositive than others, but the discussion involves a cell containing an acid which would destroy magnesium within minutes. In short, Codd indicates, by inference, only that magnesium is a theoretically

desirable electrode by virtue of its highly electropositive character. He does not teach that magnesium could be combined in a water-activated battery or that a battery using magnesium would have the properties of the Adams device. Nor does he suggest, as the Government indicates, that cuprous chloride could be substituted for silver chloride. He merely refers to the cuprous *ion*—a generic term which includes an infinite number of copper compounds—and in no way suggests that cuprous chloride could be employed in a battery.

The Government then cites the Wensky patent which was issued in Great Britain in 1891. The patent relates to the use of cuprous chloride as a depolarizing agent. The specifications of his patent disclose a battery comprising zinc and copper electrodes, the cuprous chloride being added as a salt in an electrolyte solution containing zinc chloride as well. While Wensky recognized that cuprous chloride could be used in a constant-current cell, there is no indication that he taught a water-activated system or that magnesium could be incorporated in his battery.

Finally, the Skrivanoff patent depended upon by the Government relates to a battery designed to give intermittent, as opposed to continuous, service. While the patent claims magnesium as an electrode, it specifies that the electrolyte to be used in conjunction with it must be a solution of "alcoline, chloro-chromate, or a permanganate strengthened with sulphuric acid." The cathode was a copper or carbon electrode faced with a paste of "phosphoric acid, amorphous phosphorous, metallic copper in spangles, and cuprous chloride." This paste is to be mixed with hot sulfuric acid before applying to the electrode. The Government's expert testified in trial that he had no information as to whether the cathode, as placed in the battery, would, after having been mixed with the other chemicals prescribed, actually

contain cuprous chloride. Furthermore, respondents' expert testified, without contradiction, that he had attempted to assemble a battery made in accordance with Skrivanoff's teachings, but was met first with a fire when he sought to make the cathode, and then with an explosion when he attempted to assemble the complete battery.

IV.

The Validity of the Patent.

The Government challenges the validity of the Adams patent on grounds of lack of novelty under 35 U. S. C. § 102 (a) (1964 ed.) as well as obviousness under 35 U. S. C. § 103 (1964 ed.). As we have seen in *Graham* v. *John Deere Co., ante,* p. 1, novelty and nonobviousness—as well as utility—are separate tests of patentability and all must be satisfied in a valid patent.

The Government concludes that wet batteries comprising a zinc anode and silver chloride cathode are old in the art; and that the prior art shows that magnesium may be substituted for zinc and cuprous chloride for silver chloride. Hence, it argues that the "combination of magnesium and cuprous chloride in the Adams battery was not patentable because it represented either no change or an insignificant change as compared to prior battery designs." And, despite "the fact that, wholly unexpectedly, the battery showed certain valuable operating advantages over other batteries [these advantages] would certainly not justify a patent on the essentially old formula."

There are several basic errors in the Government's position. First, the fact that the Adams battery is water-activated sets his device apart from the prior art. It is true that Claims 1 and 10, *supra,* do not mention a water electrolyte, but, as we have noted, a stated object of the invention was to provide a battery rendered serviceable by the mere addition of water. While the claims of a

patent limit the invention, and specifications cannot be utilized to expand the patent monopoly, *Burns* v. *Meyer,* 100 U. S. 671, 672 (1880); *McCarty* v. *Lehigh Valley R. Co.,* 160 U. S. 110, 116 (1895), it is fundamental that claims are to be construed in the light of the specifications and both are to be read with a view to ascertaining the invention, *Seymour* v. *Osborne,* 11 Wall. 516, 547 (1871); *Schriber-Schroth Co.* v. *Cleveland Trust Co.,* 311 U. S. 211 (1940); *Schering Corp.* v. *Gilbert,* 153 F. 2d 428 (1946). Taken together with the stated object of disclosing a water-activated cell, the lack of reference to any electrolyte in Claims 1 and 10 indicates that water alone could be used. Furthermore, of the 11 claims in issue, three of the narrower ones include references to specific electrolyte solutions comprising water and certain salts. The obvious implication from the absence of any mention of an electrolyte—a necessary element in any battery—in the other eight claims reinforces this conclusion. It is evident that respondents' present reliance upon this feature was not the afterthought of an astute patent trial lawyer. In his first contact with the Government less than a month after the patent application was filed, Adams pointed out that "no acids, alkalines or any other liquid other than plain water is used in this cell. Water does not have to be distilled. . . ." Letter to Charles F. Kettering (January 7, 1942), R., pp. 415, 416. Also see his letter to the Department of Commerce (March 28, 1942), R., p. 422. The findings, approved and adopted by the Court of Claims, also fully support this conclusion.

Nor is *Sinclair & Carroll Co.* v. *Interchemical Corp.,* 325 U. S. 327 (1945), apposite here. There the patentee had developed a rapidly drying printing ink. All that was needed to produce such an ink was a solvent which evaporated quickly upon heating. Knowing that the boiling point of a solvent is an indication of its rate of

evaporation, the patentee merely made selections from a list of solvents and their boiling points. This was no more than "selecting the last piece to put into the last opening in a jig-saw puzzle." 325 U. S., at 335. Indeed, the Government's reliance upon *Sinclair & Carroll* points up the fallacy of the underlying premise of its case. The solvent in *Sinclair & Carroll* had no functional relation to the printing ink involved. It served only as an inert carrier. The choice of solvent was dictated by known, required properties. Here, however, the Adams battery is shown to embrace elements having an interdependent functional relationship. It begs the question, and overlooks the holding of the Commissioner and the Court of Claims, to state merely that magnesium and cuprous chloride were individually known battery components. If such a combination is novel, the issue is whether bringing them together as taught by Adams was obvious in the light of the prior art.

We believe that the Court of Claims was correct in concluding that the Adams battery is novel. Skrivanoff disclosed the use of magnesium in an electrolyte completely different from that used in Adams. As we have mentioned, it is even open to doubt whether cuprous chloride was a functional element in Skrivanoff. In view of the unchallenged testimony that the Skrivanoff formulation was both dangerous and inoperable, it seems anomalous to suggest that it is an anticipation of Adams. An inoperable invention or one which fails to achieve its intended result does not negative novelty. *Smith* v. *Snow*, 294 U. S. 1, 17 (1935). That in 1880 Skrivanoff may have been able to convince a foreign patent examiner to issue a patent on his device has little significance in the light of the foregoing.

Nor is the Government's contention that the electrodes of Adams were mere substitutions of pre-existing battery designs supported by the prior art. If the use of mag-

nesium for zinc and cuprous chloride for silver chloride were merely equivalent substitutions, it would follow that the resulting device—Adams'—would have equivalent operating characteristics. But it does not. The court below found, and the Government apparently admits, that the Adams battery "wholly unexpectedly" has shown "certain valuable operating advantages over other batteries" while those from which it is claimed to have been copied were long ago discarded. Moreover, most of the batteries relied upon by the Government were of a completely different type designed to give intermittent power and characterized by an absence of internal action when not in use. Some provided current at voltages which declined fairly proportionately with time.[4] Others were so-called standard cells which, though producing a constant voltage, were of use principally for calibration or measurement purposes. Such cells cannot be used as sources of power.[5] For these reasons we find no equivalency.[6]

We conclude the Adams battery was also nonobvious. As we have seen, the operating characteristics of the Adams battery have been shown to have been unexpected and to have far surpassed then-existing wet batteries. Despite the fact that each of the elements of the Adams battery was well known in the prior art, to combine

[4] It is interesting to note in this connection that in testing the Adams cell the Signal Corps compared it with batteries of this type. The graphical results of the comparison are shown in respondents' brief, p. 51.

[5] The standard text in the art states: "The best answer to the oft-repeated question: 'How much current can I draw from my standard cell?' is 'None.'" Vinal, Primary Batteries, p. 212 (New York 1950); see also Ruben U. S. Patent No. 1,920,151 (1933).

[6] In their motion to dismiss the writ of certiorari as improvidently granted, respondents asserted that the Government was estopped to claim equivalency of cuprous chloride and silver chloride. We find no merit in this contention and, therefore, deny the motion.

them as did Adams required that a person reasonably skilled in the prior art must ignore that (1) batteries which continued to operate on an open circuit and which heated in normal use were not practical; and (2) water-activated batteries were successful only when combined with electrolytes detrimental to the use of magnesium. These long-accepted factors, when taken together, would, we believe, deter any investigation into such a combination as is used by Adams. This is not to say that one who merely finds new uses for old inventions by shutting his eyes to their prior disadvantages thereby discovers a patentable innovation. We do say, however, that known disadvantages in old devices which would naturally discourage the search for new inventions may be taken into account in determining obviousness.

Nor are these the only factors bearing on the question of obviousness. We have seen that at the time Adams perfected his invention noted experts expressed disbelief in it. Several of the same experts subsequently recognized the significance of the Adams invention, some even patenting improvements on the same system. Fischbach et al., U. S. Patent No. 2,636,060 (1953). Furthermore, in a crowded art replete with a century and a half of advancement, the Patent Office found not one reference to cite against the Adams application. Against the subsequently issued improvement patents to Fischbach, *supra,* and to Chubb, U. S. Reissue Patent No. 23,883 (1954), it found but three references prior to Adams—none of which are relied upon by the Government.

We conclude that the Adams patent is valid. The judgment of the Court of Claims is affirmed.

It is so ordered.

Mr. Justice White dissents.

Mr. Justice Fortas took no part in the consideration or decision of this case.

LINN *v.* UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, ET AL.

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

No. 45. Argued November 18, 1965.—Decided February 21, 1966.

Petitioner, an official of the employer, filed this civil libel action under state law against an employee, a union, and two of its officers, alleging that statements in leaflets circulated in connection with a campaign to organize the employees, applied to him, were "false, defamatory and untrue" and libelous *per se*. The suit was filed in federal court on the basis of diversity of citizenship. A dismissal motion was made on the ground that the NLRB had exclusive jurisdiction of the subject matter. The employer had previously filed unfair labor practice charges with the NLRB's Regional Director, asserting that the leaflets and other material restrained and coerced the employees in violation of § 8 (b) (1) (A) of the National Labor Relations Act. The Regional Director refused to issue a complaint, finding that the leaflets were circulated by respondent employee, who was not a member or agent of the union, and that the union was not responsible for their distribution. The Board's General Counsel sustained the ruling. The District Court dismissed the libel complaint holding that the alleged conduct "would arguably constitute an unfair labor practice under Section 8 (b)" of the Act, and that *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, compelled dismissal on pre-emption grounds. The Court of Appeals affirmed, assuming without deciding that the statements were "false, malicious, clearly libelous and damaging" though "relevant to the union's campaign." *Held:* Where a party to a labor dispute circulates false and defamatory statements during a union organizing campaign the court has jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him. Pp. 55–67.

(a) The States need not yield jurisdiction to the Federal Government where the activity regulated is but a peripheral concern of the Act or touches local interests so deeply rooted that it cannot be assumed that Congress, absent contrary direction, had deprived States of the power to act. *San Diego Building Trades Council, supra*. Pp. 59–60.

(b) While the NLRB tolerates intemperate, abusive and inaccurate statements made by a union during organizing efforts, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false. P. 61.

(c) The exercise of state jurisdiction limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false, would reflect an overriding state interest in protecting its residents and would be a "merely peripheral concern" of the Act. Pp. 61–62.

(d) Section 8 (c) of the Act manifests congressional intent to encourage free debate on labor-management issues; but malicious utterance of defamatory statements cannot be condoned and malicious libel enjoys no protection in any context. Pp. 62–63.

(e) The fact that defamation arises during a labor dispute does not give the NLRB exclusive jurisdiction thereof, as the malicious publication of libelous statements does not of itself constitute an unfair labor practice. P. 63.

(f) The NLRB is concerned with the effect on a representation election, while state remedies are designed to compensate the victim. Pp. 63–64.

(g) To prevent interference with effective administration of national labor policy the availability of state remedies for libel is limited to instances where the defamatory statements were circulated maliciously and caused damage to the complainant. Pp. 64–65.

(h) The availability of a state judicial remedy for malicious libel will not impinge upon the national labor policy by causing employers and unions to spurn the administrative remedies offered by the NLRB; both remedies, which are not inconsistent, will be available in appropriate cases. Pp. 66–67.

337 F. 2d 68, reversed and remanded.

Donald F. Welday argued the cause for petitioner. With him on the brief was *Donald F. Welday, Jr.*

Winston L. Livingston argued the cause for respondents. With him on the brief were *Harold A. Cranefield* and *Nancy Jean Van Lopik.*

Solicitor General Marshall argued the cause for the United States, as *amicus curiae,* by special leave of Court,

urging reversal. With him on the brief were *Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Laurence S. Gold.*

Paul L. Jaffe filed a brief for Schnell Tool & Die Corp. et al., as *amici curiae.*

MR. JUSTICE CLARK delivered the opinion of the Court.

The case before us presents the question whether, and to what extent, the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. § 141 *et seq.* (1964 ed.), bars the maintenance of a civil action for libel instituted under state law by an official of an employer subject to the Act, seeking damages for defamatory statements published during a union organizing campaign by the union and its officers. The District Court dismissed the complaint on the ground that the National Labor Relations Board had exclusive jurisdiction over the subject matter. It held that such conduct "would arguably constitute an unfair labor practice under Section 8 (b)" of the Act and that *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959), compelled a dismissal on pre-emption grounds. The Court of Appeals affirmed, 337 F. 2d 68, assuming without deciding that the statements in question were "false, malicious, clearly libelous and damaging to plaintiff Linn, albeit they were relevant to the union's campaign." At p. 69. We granted certiorari, 381 U. S. 923. We conclude that where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him. The judgment is, therefore, reversed.

I.

Petitioner Linn, an assistant general manager of Pinkerton's National Detective Agency, Inc., filed this

suit against the respondent union, two of its officers and a Pinkerton employee, Leo J. Doyle. The complaint alleged that, during a campaign to organize Pinkerton's employees in Detroit, the respondents had circulated among the employees leaflets which stated *inter alia:*

> "(7) Now we find out that Pinkerton's has had a large volume of work in Saginaw they have had it for years.
>
> "United Plant Guard Workers now has evidence
>
> "A. That Pinkerton has 10 jobs in Saginaw, Michigan.
>
> "B. Employing 52 men.
>
> "C. Some of these jobs are 10 yrs. old!
>
> "(8) Make you feel kind sick & foolish.
>
> "(9) The men in Saginaw were deprived of their *right to vote* in three N. L. R. B. elections. Their names were not summitted [*sic*]. These guards were voted into the Union in 1959! These Pinkerton guards were *robbed* of pay increases. The Pinkerton manegers [*sic*] were *lying* to us—all the time the contract was in effect. No doubt the Saginaw men will file criminal charges. Somebody may go to Jail!"

The complaint further alleged that Linn was one of the managers referred to in the leaflet, and that the statements in the leaflet were "wholly false, defamatory and untrue" as respondents well knew. It did not allege any actual or special damage but prayed for the recovery of $1,000,000 on the ground that the accusations were libelous *per se.* Federal jurisdiction was based on diversity of citizenship.

All respondents, save Doyle, moved to dismiss, asserting that the subject matter was within the exclusive jurisdiction of the Board. The record indicates that prior to the institution of this action Pinkerton had filed unfair labor practice charges with the Regional Director

of the Board, alleging that the distribution of the leaflets, as well as other written material, had restrained and coerced Pinkerton's employees in the exercise of their § 7 rights, in violation of § 8 (b)(1)(A) of the Act. The Regional Director refused to issue a complaint. Finding that the leaflets were circulated by Doyle, who was "not an officer or member of the charged union, nor was there any evidence that he was acting as an agent of such union," he concluded that the union was not responsible for the distribution of the leaflets and that the charge was, therefore, "wholly without basis." This ruling was sustained by the General Counsel of the Board some two months after this suit was filed.

In an unpublished opinion the District Judge dismissed the complaint holding, as we have already noted, that even if the union were responsible for distributing the material the case was controlled by *Garmon, supra.* The Court of Appeals affirmed, limiting its holding "to a suit for libelous statements growing out of and relevant to a union's campaign to organize the employees of an employer subject to the National Labor Relations Act." At 72.

II.

The question before us has been a recurring one in both state and federal tribunals,[1] involving the extent to which the National Labor Relations Act, as amended, supersedes state law with respect to libels published during labor disputes. Its resolution entails accommodation of the federal interest in uniform regulation of labor relations with the traditional concern and responsibility of the State to protect its citizens against defamatory

[1] *E. g., Brantley* v. *Devereaux,* 237 F. Supp. 156 (D. C. E. D. S. C. 1965); *Meyer* v. *Joint Council 53, Int'l Bro. of Teamsters,* 416 Pa. 401, 206 A. 2d 382, petition for cert. dismissed under Rule 60, 382 U. S. 897 (1965). *Blum* v. *International Assn. of Machinists,* 42 N. J. 389, 201 A. 2d 46 (1964).

attacks. The problem is aggravated by the fact that the law in many States presumes damages from the publication of certain statements characterized as actionable *per se*.[2] Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable *per se* in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language. *Cafeteria Union* v. *Angelos*, 320 U. S. 293, 295 (1943). It is therefore necessary to determine whether libel actions in such circumstances might interfere with the national labor policy.

Our task is rendered more difficult by the failure of the Congress to furnish precise guidance in either the language of the Act or its legislative history.[3] As Mr.

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[2] We adopt this terminology to avoid confusion with the concept of libel *per se*, applied in many States simply to designate words whose defamatory nature appears without consideration of extrinsic facts. Although Linn's complaint alleges that the leaflets were "libelous per se," his failure to specify the manner in which their publication harmed him indicates that he meant to rely on the presumption of damages. Under our present holding Linn must show that he was injured by the circulation of the statements; this necessarily includes proof that the words had a defamatory meaning.

[3] The Congress has declared in the Act that employees have the right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activity for mutual aid and protection. § 7. In § 8 (a) Congress has made it an unfair labor practice for an employer to restrain or coerce employees in the exercise of § 7 rights. Likewise, § 8 (b) protects these rights against interference by a labor organization or its agents. And § 8 (c) provides that the expression of any views or opinions "shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." In addition, § 9 (c) (1) authorizes the

Justice Jackson said for a unanimous Court in *Garner* v. *Teamsters Union,* 346 U. S. 485, 488 (1953): "The . . . Act . . . leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."

The Court has dealt with specific pre-emption problems arising under the National Labor Relations Act on many occasions, going back as far as *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740 (1942). However, in framing the pre-emption question before us we need look primarily to *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959). There in most meticulous language this Court spelled out the "extent to which the variegated laws of the several States are displaced by a single, uniform, national rule . . . ." At 241. The Court emphasized that it was for the Board and the Congress to define the "precise and closely limited demarcations that can be adequately fashioned only by legislation and administration," while "[o]ur task is confined to dealing with classes of situations." At 242. In this respect, the Court concluded that the States need not yield jurisdiction "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." At 243–244. In short, as we said in *Plumbers' Union* v. *Borden,* 373 U. S. 690, 693–694 (1963):

> "[I]n the absence of an overriding state interest such as that involved in the maintenance of domestic

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Board, under certain conditions, to conduct representation elections and certify the results thereof. Finally, § 10 grants the Board exclusive power to enforce the prohibitions of the Act.

> peace, state courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of the litigation is arguably subject to the protections of § 7 or the prohibitions of § 8 of the National Labor Relations Act. This relinquishment of state jurisdiction . . . is essential 'if the danger of state interference with national policy is to be averted,' . . . and is as necessary in a suit for damages as in a suit seeking equitable relief. Thus the first inquiry, in any case in which a claim of federal preemption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance."

We note that the Board has given frequent consideration to the type of statements circulated during labor controversies, and that it has allowed wide latitude to the competing parties.[4] It is clear that the Board does not "police or censor propaganda used in the elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements." *Stewart-Warner Corp.*, 102 N. L. R. B. 1153, 1158 (1953). It will set aside an election only where a material fact has been misrepresented in the representation campaign; opportunity for reply has been lacking; and the misrepresentation has had an impact on the free choice of the employees participating in the election. *Hollywood Ceramics Co.*, 140 N. L. R. B. 221, 223–224 (1962); *F. H. Snow Canning Co.*, 119 N. L. R. B. 714, 717–718 (1957). Likewise, in a number of cases, the Board has concluded that epithets such as "scab," "unfair," and "liar" are com-

[4] See Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 66 (1964).

monplace in these struggles and not so indefensible as to remove them from the protection of § 7, even though the statements are erroneous and defame one of the parties to the dispute. Yet the Board indicated that its decisions would have been different had the statements been uttered with actual malice, "a deliberate intention to falsify" or "a malevolent desire to injure." *E. g., Bettcher Mfg. Corp.*, 76 N. L. R. B. 526 (1948); *Atlantic Towing Co.*, 75 N. L. R. B. 1169, 1170–1173 (1948). In sum, although the Board tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false. See *Maryland Drydock Co.* v. *Labor Board*, 183 F. 2d 538 (C. A. 4th Cir. 1950). In such case the one issuing such material forfeits his protection under the Act. *Walls Manufacturing Co.*, 137 N. L. R. B. 1317, 1319 (1962).

In the light of these considerations it appears that the exercise of state jurisdiction here would be a "merely peripheral concern of the Labor Management Relations Act," provided it is limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false. Moreover, we believe that "an overriding state interest" in protecting its residents from malicious libels should be recognized in these circumstances. This conclusion is buttressed by our holding in *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656 (1954), where Mr. Justice Burton writing for the Court held:

> "To the extent . . . that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been

> eliminated. The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived." At 665.

In *United Automobile Workers* v. *Russell,* 356 U. S. 634 (1958), we again upheld state jurisdiction to entertain a compensatory and punitive damage action by an employee for malicious interference with his lawful occupation. In each of these cases the "type of conduct" involved, *i. e.,* "intimidation and threats of violence," affected such compelling state interests as to permit the exercise of state jurisdiction. *Garmon, supra,* at 248. We similarly conclude that a State's concern with redressing malicious libel is "so deeply rooted in local feeling and responsibility" that it fits within the exception specifically carved out by *Garmon.*

We acknowledge that the enactment of § 8 (c) manifests a congressional intent to encourage free debate on issues dividing labor and management.[5] And, as we stated in another context, cases involving speech are to be considered "against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964). Such considerations likewise

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[5] The wording of the statute indicates, however, that § 8 (c) was not designed to serve this interest by immunizing all statements made in the course of a labor controversy. Rather, § 8 (c) provides that the "expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 61 Stat. 142 (1947), 29 U. S. C. § 158 (c) (1964 ed.). It is more likely that Congress adopted this section for a narrower purpose, *i. e.,* to prevent the Board from attributing anti-union

weigh heavily here; the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. But it must be emphasized that malicious libel enjoys no constitutional protection in any context. After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses.

III.

Nor should the fact that defamation arises during a labor dispute give the Board exclusive jurisdiction to remedy its consequences. The malicious publication of libelous statements does not in and of itself constitute an unfair labor practice. While the Board might find that an employer or union violated § 8 by deliberately making false statements, or that the issuance of malicious statements during an organizing campaign had such a profound effect on the election as to require that it be set aside, it looks only to the coercive or misleading nature of the statements rather than their defamatory quality. The injury that the statement might cause to an individual's reputation—whether he be an employer or union official—has no relevance to the Board's function. Cf. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261 (1940). The Board can award no damages, impose no penalty, or give any other relief to the defamed individual.

On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his

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motive to an employer on the basis of his past statements. See H. R. Rep. No. 510, 80th Cong., 1st Sess., 45 (1947). Comparison with the express protection given union members to criticize the management of their unions and the conduct of their officers, 73 Stat. 523 (1959), 29 U. S. C. § 411 (a)(2) (1964 ed.), strengthens this interpretation of congressional intent.

reputation. The Board's lack of concern with the "personal" injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption.[6] As stressed by THE CHIEF JUSTICE in his dissenting opinion in *Russell, supra:*

> "The unprovoked infliction of personal injuries during a period of labor unrest is neither to be expected nor to be justified, but economic loss inevitably attends work stoppages. Furthermore, damages for personal injuries may be assessed without regard to the merits of the labor controversy . . . ." At 649.

Judicial condemnation of the alleged attack on Linn's character would reflect no judgment upon the objectives of the union. It would not interfere with the Board's jurisdiction over the merits of the labor controversy.

But it has been insisted that not only would the threat of state libel suits dampen the ardor of labor debate and truncate the free discussion envisioned by the Act, but that such suits might be used as weapons of economic coercion. Moreover, in view of the propensity of juries to award excessive damages for defamation, the availability of libel actions may pose a threat to the stability of labor unions and smaller employers. In order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy the possibility of such consequences must be minimized. We therefore limit the availability of state remedies for libel

[6] The fact that the Board has no authority to grant effective relief aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands. The function of libel suits in preventing violence has long been recognized. Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 933 (1956). But as to criminal libel suits see *Garrison* v. *Louisiana,* 379 U. S. 64 (1964).

to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage.

The standards enunciated in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), are adopted by analogy, rather than under constitutional compulsion. We apply the malice test to effectuate the statutory design with respect to pre-emption. Construing the Act to permit recovery of damages in a state cause of action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against abuse of libel actions and unwarranted intrusion upon free discussion envisioned by the Act.

As we have pointed out, certain language characteristic of labor disputes may be held actionable *per se* in some state courts. These categories of libel have developed without specific reference to labor controversies. However, even in those jurisdictions, the amount of damages which may be recovered depends upon evidence as to the severity of the resulting harm. This is a salutary principle. We therefore hold that a complainant may not recover except upon proof of such harm, which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law.[7] The fact that courts are generally not in close contact with the pressures of labor disputes makes it especially necessary that this rule be followed. If the amount of damages awarded is exces-

[7] The Government, as *amicus curiae*, has urged us to go further. It would limit liability to "grave" defamations—those which accuse the defamed person of having engaged in criminal, homosexual, treasonable, or other infamous conduct. We cannot agree. This would impose artificial characterizations that would encroach too heavily upon state jurisdiction.

sive, it is the duty of the trial judge to require a remittitur or a new trial. Likewise, the defamed party must establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages.[8]

Since the complaint here does not make the specific allegations that we find necessary in such actions, leave should be given Linn on remand to amend his complaint, if he so desires, to meet these requirements. In the event of a new trial he, of course, bears the burden of proof of such allegations.

IV.

Finally, it has been argued that permitting state action here would impinge upon national labor policy because the availability of a judicial remedy for malicious libel would cause employers and unions to spurn appropriate administrative sanctions for contemporaneous violations of the Act. We disagree. When the Board and state law frown upon the publication of malicious libel, albeit for different reasons, it may be expected that the injured party will request both administrative and judicial relief. The Board would not be ignored since its sanctions alone can adjust the equilibrium disturbed by an unfair labor practice. If a malicious libel contributed to union victory in a closely fought election, few employers would be satisfied with simply damages for "personal" injury caused by the defamation. An unsuccessful union would also seek to set the election results aside as the fruits of an employer's malicious libel. And a union may be expected to request similar relief for defamatory statements which contribute to the victory of a competing union.

[8] It should be noted that punitive damages were awarded in *Laburnum* and *Russell*. In both instances there was proof of compensatory injury resulting from the defendants' violence.

Nor would the courts and the Board act at cross purposes since, as we have seen, their policies would not be inconsistent.

As was said in *Garrison* v. *Louisiana,* 379 U. S. 64, 75: "[T]he 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." We believe that under the rules laid down here it can be appropriately redressed without curtailment of state libel remedies beyond the actual needs of national labor policy. However, if experience shows that a greater curtailment, even a total one, should be necessary to prevent impairment of that policy, the Court will be free to reconsider today's holding. We deal here not with a constitutional issue but solely with the degree to which state remedies have been pre-empted by the Act.

Reversed and remanded.

MR. JUSTICE BLACK, dissenting.

The Court holds that an individual participant on the employer's side of a labor dispute can sue the union for libel on account of charges made by the union in the heat of the dispute. By the same token I assume that under the Court's holding, individual labor union members now have the right to sue their employers when they say naughty things during labor disputes. This new Court-made law tosses a monkey wrench into the collective bargaining machinery Congress set up to try to settle labor disputes, and at the same time exalts the law of libel to an even higher level of importance in the regulation of day-to-day life in this country.

When Congress passed the National Labor Relations Act, it must have known, as almost all people do, that in labor disputes both sides are masters of the arts of

vilification, invective and exaggeration. In passing this law Congress indicated no purpose to try to purify the language of labor disputes or force the disputants to say nice things about one another. Nor do I believe Congress intended to leave participants free to sue one another for libel for insults they hurl at one another in the heat of battle. The object of the National Labor Relations Act was to bring about agreements by collective bargaining, not to add fuel to the fire by encouraging libel suits with their inevitable irritations and dispute-prolonging tendencies. Yet it is difficult to conceive of an element more certain to create irritations guaranteed to prevent fruitful collective bargaining discussions than the threat or presence of a large monetary judgment gained in a libel suit generating anger and a desire for vengeance on the part of one or the other of the bargaining parties. I think, therefore, that libel suits are not only "arguably" but inevitably in conflict with the basic purpose of the Act to settle disputes peaceably—not to aggravate them, but to end them. For this reason I would affirm the judgment of the two lower courts.

Moreover, we held in *Thornhill* v. *Alabama,* 310 U. S. 88, 102, that "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." Discussion is not free, however, within the meaning of our First Amendment, if that discussion may be penalized by judgments for damages in libel actions. See the concurring opinions of MR. JUSTICE DOUGLAS and myself in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, and *Garrison* v. *Louisiana,* 379 U. S. 64, and my opinion in *Rosenblatt* v. *Baer, post,* p. 94. It is rather strange for this Court to import its novel ideas on libel suits into the area of labor controversies where the effect is bound to

abridge the freedom of the parties to discuss their disputes and to settle them through peaceful negotiations. It is strange because one of the hopes of those responsible for modern collective bargaining was that peaceful settlements among the parties working by themselves under the aegis of federal law would be substituted for the old-time labor feuds too frequently accompanied by bitter strife and wasteful, dangerous conflicts verging on private war. Because libel suits in my judgment are inconsistent with both the Constitution of the United States and the policies of the Act, I dissent from the holding of the Court reversing the judgment below.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

In my opinion, the Court's decision in the present case opens a major breach in the wall which has heretofore confined labor disputes to the area and weaponry defined by federal labor law, except where violence or intimidation is involved. By arming the disputants with the weapon of libel suits and the threat of punitive damages the Court jeopardizes the measure of stability painstakingly achieved in labor-management relations. It introduces a potentially disruptive device into the comprehensive structure created by Congress for resolving these disputes. In so doing, the Court not only sanctions an arrangement inconsistent with the intent of Congress, but, I think, departs from its own decisions narrowly limiting the occasions on which the disputants may, outside of the statutory framework, litigate issues arising in labor disputes.

In my judgment, the structure provided by Congress for the handling of labor-management controversies precludes any court from entertaining a libel suit between parties to a labor dispute or their agents where the allegedly defamatory statement is confined to matters

which are part of the fabric of the dispute. The present controversy is just such a case.

Petitioner Linn is an officer of the employer sought to be organized by respondent union. The allegedly defamatory statements, set out in the opinion of the Court, relate to management conduct during the course of the dispute. The leaflets in question allegedly accuse management of lying both to the NLRB and to employees in order to deprive some employees of their right to vote in NLRB elections and to certain pay increases.

As an illustration of the kind of hyperbole characteristic of labor-management strife, this "libel" is hardly incendiary. To the experienced eye, it is pale and anemic when compared with the rich and colorful charges freely exchanged in the heat of many labor disputes.[1]

In response to such a pallid "libel," the Court today holds that petitioner, perceiving himself the target of a purportedly false and defamatory statement, may sue the union and several of its officers for damages—so long as he pleads that the statement is defamatory, was made with malice, and caused some injury to him. Should he succeed in clearing the hurdles thus set in his path, he may recover not only compensation for his "injuries," but punitive or exemplary damages as well. These requirements that petitioner plead and prove both malice and special damages—arising from what I regard as the Court's well-founded concern that libel suits might otherwise "pose a threat to the stability of labor unions and smaller employers"—may be cold comfort to the potential defendant in a libel suit. "Malice," which the Court defines as a deliberate intention to falsify or a malevolent

[1] Compare, for example, the considerably more imaginative use of vituperation reflected in the allegedly defamatory statement in *United Steelworkers of America* v. *R. H. Bouligny, Inc.*, 382 U. S. 145. A description of the statement is found in Brief for Respondent, p. 2 (No. 19, O. T. 1965).

desire to injure, is, after all, a largely subjective standard, responsive to the ingenuity of trial counsel and the predilections of judge and jury. And "injury" resulting from words is not limited to tangible trauma. These requirements afford dubious defense on a battlefield from which the qualified umpire—the NLRB—has been removed. In a libel suit, the outcome is determined by standards alien to the subject matter of labor relations, by considerations which do not take into account the complex and subtle values that are at stake, and by a jury unfamiliar with the quality of rhetoric customary in labor disputes. The outcome, in fact, is more apt to reflect immediate community attitudes toward unionization than appreciation for the underlying, long-term perplexities of the interplay of management and labor in a democratic society.

Until today, the decisions of this Court have consistently held that the federal structure for resolving labor disputes may not be breached or encumbered by state remedies where the tortious conduct allegedly involved is either protected or prohibited by federal labor legislation, or even "arguably subject to" federal law [2]—and despite the inability of the NLRB to redress the pecuniary harm suffered by the victim. In *Garner* v. *Teamsters Union,* 346 U. S. 485, the Court held that state courts may not enjoin peaceful picketing where plaintiff's grievance is within the jurisdiction of the NLRB. In *Guss* v. *Utah Labor Board,* 353 U. S. 1, the Court held that even where the NLRB declines to exercise its conceded jurisdiction over a labor dispute "affecting commerce," a parallel remedy before a state board

[2] Suits to enforce collective bargaining agreements have been held to arise under 29 U. S. C. § 185 (a) (1964 ed.) and hence are not within the reach of the pre-emption doctrine. See *Smith* v. *Evening News Assn.,* 371 U. S. 195; Sovern, Section 301 and the Primary Jurisdiction of the NLRB, 76 Harv. L. Rev. 529 (1963).

is nonetheless pre-empted. And in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, the Court concluded that state courts may not award damages for peaceful picketing, although the conduct involved was only "arguably subject" to the federal statute and despite the NLRB's decision not to exercise jurisdiction.[3] See also *Liner* v. *Jafco, Inc.*, 375 U. S. 301; *Plumbers' Union* v. *Borden*, 373 U. S. 690; *Local 438, Constr. Laborers* v. *Curry*, 371 U. S. 542. Today marks the first departure from what has become a well-established rule that only where the public's compelling interest in preventing violence or the threat of violence is involved can the exclusiveness of the federal structure for resolving labor disputes be breached. As was said in *Garmon*, 359 U. S., at 247: "Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." The majority's opinion fails to make clear why the participant's interest in protecting his reputation from the sting of words uttered as part of a labor dispute is a compelling concern which this Court must allow the States to protect, while his interest in preserving his economic well-being from illegal picketing is not.

By narrowly restricting the permissible exceptions to the general rule of pre-emption and by excluding generally the right to compensation for purely private wrongs, the Court has contributed to the Nation's success in domesticating the potentially explosive warfare between labor and management. The decision announced today

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[3] Subsequent to *Garmon* and *Guss*, Congress has explicitly removed the obstacles to state-court treatment of labor disputes as to which the NLRB has declined to exercise jurisdiction on the ground of insufficient effect on interstate commerce. 29 U. S. C. § 164 (c) (2) (1964 ed.).

threatens the degree of equilibrium which has been achieved. I think that the Court's decision both underestimates the damage libel suits may inflict on the equilibrium, and overestimates the effectiveness of the restraint which will result from superimposed requirements of malice and special damages.

I find support for my view in the evidence as to the intent of Congress. As the majority concedes, Congress has in unmistakable terms recognized the importance of labor-management dialogue untrammelled by fear of retribution for strong utterances. It has manifested awareness that lusty speech provides a useful safety valve for the tensions which often accompany these controversies. For example, Congress has provided that an unfair labor practice charge may not be based on the "expressing of any views, argument, or opinion . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U. S. C. § 158 (c) (1964 ed.).[4] And one of its statutes, 29 U. S. C. § 411 (a)(2) (1964 ed.), has been construed to prevent unions from disciplining members who utter defamatory statements during the course of internal union disputes. *Salzhandler* v. *Caputo,* 316 F. 2d 445 (C. A. 2d Cir.), cert. denied, 375 U. S. 946; *Cole* v. *Hall,* 339 F. 2d 881 (C. A. 2d Cir.); *Stark* v. *Twin City Carpenters Dist. Council,* 219 F. Supp. 528 (D. C. D. Minn.). Where Congress wishes to create an exception to the general rule of exclusive NLRB jurisdiction, it does so explicitly. See 29 U. S. C. § 187 (1964 ed.), authorizing suits for damages arising out of violations of

[4] Although libelous statements cannot serve as the predicate for an unfair labor practice charge, like any other misleading statement they may in certain circumstances induce the NLRB to set aside the results of an election. See Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 82–84 (1964).

29 U. S. C. § 158, and 29 U. S. C. § 164, authorizing judicial remedies where the NLRB declines to assert jurisdiction under 29 U. S. C. § 151 (1964 ed.).

The foregoing considerations do not apply to the extent that the use of verbal weapons during labor disputes is not confined to any issue in the dispute, or involves a person who is neither party to nor agent of a party to the dispute. In such instances, perhaps the courts ought to be free to redress whatever private wrong has been suffered. But this is not such a case. The fact that the Court today rules that, after appropriate amendment of the complaint, a libel action may be maintained on the basis of the circumscribed accusation contained in the leaflet in question demonstrates how very substantial is the breach opened in the wall which has heretofore insulated labor disputes from the vagaries of lawsuits.[5] I would affirm the decision below.

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[5] Resort to libel suits as an auxiliary weapon in resolving labor disputes presents much more than an abstract threat. For evidence of a growing tendency to invoke these suits see the list of such cases recently pending in the Fourth Circuit alone in Brief for Petitioner, p. 15, *United Steelworkers of America* v. *R. H. Bouligny, Inc., supra;* and those discussed at pp. 18–39 of the Appendix to the brief filed by respondents in Nos. 89 and 94, O. T. 1965, and in the present case as *amici curiae*.

Syllabus.

ROSENBLATT *v.* BAER.

CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE.

No. 38. Argued October 20, 1965.—Decided February 21, 1966.

Respondent, the former supervisor of a county recreation area who was employed by and responsible to the three county Commissioners, brought this civil libel action in a New Hampshire state court against petitioner whose newspaper column allegedly criticized the fiscal management of the area under respondent's regime and asked the questions, "What happened to all the money last year? and every other year?" Respondent offered extrinsic proofs that the column imputed mismanagement and peculation during respondent's tenure on the theories (1) that the jury could award respondent damages if it found that the column cast suspicion indiscriminately on the former small management group whether or not it attributed the misconduct specifically to respondent and (2) that the column was read as specifically referring to respondent as the person responsible for the area's financial affairs. The jury was instructed that "an implication of crime to one or some of a small group that casts suspicion on all is actionable," and that defamatory comment was justified if made without malice and represented fair comment on matters of public interest, "malice" being defined to include "ill will, evil motive, intention to injure . . ." and the jury was permitted to find that negligent misstatement of fact would defeat petitioner's privilege of free expression. The jury awarded respondent damages and the State Supreme Court affirmed, finding no bar in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, which had been decided after the trial. *Held:*

1. An otherwise impersonal attack on governmental operations cannot be used to establish defamation of those administering such operations absent evidence that the implication of wrongdoing was read as specifically directed at the plaintiff, whether he is considered a public official or a member of a group responsible for governmental operations, and whether or not others were also implicated. The trial judge's instruction was erroneous to the extent that it authorized the jury to award respondent damages without regard to evidence that the asserted implication of the

column was made with specific reference to him. *New York Times, supra,* followed. Pp. 79–83.

2. A government employee having or appearing to the public to have substantial responsibility for or control over the conduct of governmental affairs is a "public official" and as such under *New York Times, supra,* and *Garrison* v. *Louisiana,* 379 U. S. 64, cannot recover damages for defamatory comment about his official conduct unless he proves actual malice, *i. e.,* that such comment is made with knowledge of its falsity or with reckless disregard of whether it is true or false. Pp. 84–86.

(a) Whether a person is a "public official" as that term is used in *New York Times* is not determined under state-law standards. P. 84.

(b) The term "public official" should be interpreted in the light of the compelling interest in debate on public issues and about those persons who are in a position to resolve those issues, though it is not necessary here, any more than it was in *New York Times,* to delineate the precise scope of the term. P. 85.

(c) The protections which the law of defamation affords must be limited by the constitutional protections for public discussion. P. 86.

3. Since *New York Times* had not been decided at the time of the trial of this case, respondent should be allowed to adduce proof that his claim falls outside the rule of that decision or that petitioner's comment was made with malice as defined therein, and on retrial it will be for the trial judge in the first instance to determine if the proofs show that respondent was a "public official." Pp. 87–88.

106 N. H. 26, 203 A. 2d 773, reversed and remanded.

Arthur H. Nighswander argued the cause for petitioner. With him on the brief were *Hugh H. Bownes* and *Conrad E. Snow.*

Stanley M. Brown argued the cause and filed a brief for respondent.

Osmond K. Fraenkel, Edward J. Ennis and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A jury in New Hampshire Superior Court awarded respondent damages in this civil libel action based on one of petitioner's columns in the Laconia Evening Citizen. Respondent alleged that the column contained defamatory falsehoods concerning his performance as Supervisor of the Belknap County Recreation Area, a facility owned and operated by Belknap County. In the interval between the trial and the decision of petitioner's appeal by the New Hampshire Supreme Court, we decided *New York Times Co.* v. *Sullivan,* 376 U. S. 254. We there held that consistent with the First and Fourteenth Amendments a State cannot award damages to a public official for defamatory falsehood relating to his official conduct unless the official proves actual malice—that the falsehood was published with knowledge of its falsity or with reckless disregard of whether it was true or false. The New Hampshire Supreme Court affirmed the award, finding *New York Times* no bar. 106 N. H. 26, 203 A. 2d 773. We granted certiorari and requested the parties to brief and argue, in addition to the questions presented in the petition for certiorari, the question whether respondent was a "public official" under *New York Times* and under our decision in *Garrison* v. *Louisiana,* 379 U. S. 64. 380 U. S. 941.

The Recreation Area was used principally as a ski resort but also for other recreational activities. Respondent was employed by and directly responsible to the Belknap County Commissioners, three elected officials in charge of the county government. During the 1950's, a public controversy developed over the way respondent and the Commissioners operated the Area; some protested that respondent and the Commissioners had not developed the

Area's full potential, either as a resort for local residents or as a tourist attraction that might contribute to the county's taxes. The discussion culminated in 1959, when the New Hampshire Legislature enacted a law transferring control of the Area to a special five-man commission.[1] At least in part to give this new regime a fresh start, respondent was discharged.

Petitioner regularly contributed an unpaid column to the Laconia Evening Citizen. In it he frequently commented on political matters. As an outspoken proponent of the change in operations at the Recreation Area, petitioner's views were often sharply stated, and he had indicated disagreement with the actions taken by respondent and the County Commissioners. In January 1960, during the first ski season under the new management, some six months after respondent's discharge, petitioner published the column that respondent alleges libeled him. In relevant part, it reads:

> "Been doing a little listening and checking at Belknap Recreation Area and am thunderstruck by what am learning.
>
> "This year, a year without snow till very late, a year with actually few very major changes in procedure; the difference in cash income simply fantastic, almost unbelievable.
>
> "On any sort of comparative basis, the Area this year is doing literally hundreds of per cent BETTER than last year.
>
> "When consider that last year was excellent snow year, that season started because of more snow, months earlier last year, one can only ponder following question:
>
> "What happened to all the money last year? and every other year? What magic has Dana Beane

[1] N. H. Laws 1959, c. 399.

[Chairman of the new commission] and rest of commission, and Mr. Warner [respondent's replacement as Supervisor] wrought to make such tremendous difference in net cash results?"

I.

The column on its face contains no clearly actionable statement. Although the questions "What happened to all the money last year? and every other year?" could be read to imply peculation, they could also be read, in context, merely to praise the present administration. The only persons mentioned by name are officials of the new regime; no reference is made to respondent, the three elected commissioners, or anyone else who had a part in the administration of the Area during respondent's tenure. Persons familiar with the controversy over the Area might well read it as complimenting the luck or skill of the new management in attracting increased patronage and producing a "tremendous difference in net cash results" despite less favorable snow; indeed, witnesses for petitioner testified that they so read the column.

Respondent offered extrinsic proofs to supply a defamatory meaning. These proofs were that the column greatly exaggerated any improvement under the new regime, and that a large part of the community understood it to say that the asserted improvements were not explicable by anything the new management had done. Rather, his witnesses testified, they read the column as imputing mismanagement and peculation during respondent's tenure. Respondent urged two theories to support a recovery based on that imputation.

II.

The first was that the jury could award him damages if it found that the column cast suspicion indiscrimi-

nately on the small number of persons who composed the former management group, whether or not it found that the imputation of misconduct was specifically made of and concerning him.[2] This theory of recovery was open to respondent under New Hampshire law; the trial judge explicitly instructed the jury that "an imputation of impropriety or a crime to one or some of a small group that casts suspicion upon all is actionable." [3] The question is presented, however, whether that theory of recovery is precluded by our holding in *New York Times* that, in the absence of sufficient evidence that the attack focused on the plaintiff, an otherwise impersonal attack on governmental operations cannot be utilized to establish a libel of those administering the operations. 376 U. S., at 290–292.

The plaintiff in *New York Times* was one of the three elected Commissioners of the City of Montgomery, Alabama. His duties included the supervision of the police department. The statements in the advertisement upon which he principally relied as referring to him were that "truckloads of police . . . ringed the Alabama State College Campus" after a demonstration on the State Capitol steps, and that Dr. Martin Luther King had been "arrested . . . seven times." These statements were false in that although the police had been "deployed near the campus," they had not actually "ringed" it and had not gone there in connection with a State Capitol demonstration, and in that Dr. King had been arrested only

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[2] The article purports to compare performance of the ski Area under the direction of unnamed persons during the prior year with performance of the Area under the direction of an identified group—a group which includes not only the new manager of the Area, but the new commissioners as well.

[3] See generally Lewis, The Individual Member's Right to Recover for a Defamation Leveled at the Group, 17 U. Miami L. Rev. 519, 523–525 (1963).

four times. We held that evidence that Sullivan as Police Commissioner was the supervisory head of the Police Department was constitutionally insufficient to show that the statements about police activity were "of and concerning" him; we rejected as inconsistent with the First and Fourteenth Amendments the proposition followed by the Alabama Supreme Court in the case that "[i]n measuring the performance or deficiencies of . . . groups, praise or criticism is usually attached to the official in complete control of the body," 273 Ala. 656, 674–675, 144 So. 2d 25, 39. To allow the jury to connect the statements with Sullivan on that presumption alone was, in our view, to invite the spectre of prosecutions for libel on government, which the Constitution does not tolerate in any form. 376 U. S., at 273–276, 290–292.[4] We held "that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations." 376 U. S., at 292. There must be evidence showing that the attack was read as specifically directed at the plaintiff.

Were the statement at issue in this case an explicit charge that the Commissioners and Baer or the entire Area management were corrupt, we assume without deciding that any member of the identified group might recover.[5] The statement itself might be sufficient evidence that the attack was specifically directed at each individual. Even if a charge and reference were merely implicit, as is alleged here, but a plaintiff could show by extrinsic proofs that the statement referred to him, it would be no defense to a suit by one member of an

[4] See Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191, 207–210.

[5] Such recovery would, of course, be subject to a showing of actual malice if the individual were a "public official" within the meaning of *New York Times*.

identifiable group engaged in governmental activity that another was also attacked. These situations are distinguishable from the present case; here, the jury was permitted to infer both defamatory content and reference from the challenged statement itself, although the statement on its face is only an impersonal discussion of government activity. To the extent the trial judge authorized the jury to award respondent a recovery without regard to evidence that the asserted implication of the column was made specifically of and concerning him, we hold that the instruction was erroneous.[6] Here, no explicit charge of peculation was made; no assault on the previous management appears. The jury was permitted to award damages upon a finding merely that respondent was one of a small group acting for an organ of government, only some of whom were implicated, but all of whom were tinged with suspicion. In effect, this permitted the jury to find liability merely on the basis of his relationship to the government agency, the operations of which were the subject of discussion. It is plain that the elected Commissioners, also members of that group,

[6] It might be argued that the charge instructed the jury to award recovery only if it found that the libel was aimed at Mr. Baer or if it found the libel aimed at Mr. Baer, along with a few others. Such a charge might not be objectionable; we do not mean to suggest that the fact that more than one person is libeled by a statement is a defense to suit by a member of the group. However, we cannot read the charge as being so limited. The jury was told:

"an imputation of impropriety or a crime to one or some of a small group that casts suspicion upon all is actionable. It is sufficient if Mr. Baer . . . proves . . . that he was one of a group upon whom *suspicion was cast* . . . ; but Mr. Baer has the burden of showing that the defamation, if you find that there was one, either was directed to him or *could have been* as one of a small group." (Emphasis supplied.)

The latitude allowed the jury to find defamatory reference in this apparently impersonal discussion of government affairs was thus too broad.

would have been barred from suit on this theory under *New York Times*. They would be required to show specific reference. Whether or not respondent was a public official, as a member of the group he bears the same burden.[7] A theory that the column cast indiscriminate suspicion on the members of the group responsible for the conduct of this governmental operation is tantamount to a demand for recovery based on libel of government, and therefore is constitutionally insufficient. Since the trial judge's instructions were erroneous in this respect, the judgment must be reversed.

III.

Respondent's second theory, supported by testimony of several witnesses, was that the column was read as referring specifically to him, as the "man in charge" at the Area, personally responsible for its financial affairs. Even accepting respondent's reading, the column manifestly discusses the conduct of operations of government.[8] The subject matter may have been only of local interest, but at least here, where publication was addressed primarily to the interested community, that fact is constitutionally irrelevant. The question is squarely presented whether the "public official" designation under *New York Times* applies.

If it does, it is clear that the jury instructions were improper. Under the instructions, the jury was permit-

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[7] See *Gilberg* v. *Goffi*, 21 App. Div. 2d 517, 251 N. Y. S. 2d 823 (1964), aff'd, 15 N. Y. 2d 1023, 207 N. E. 2d 620 (1965); Comment, 114 U. Pa. L. Rev. 241 (1965).

[8] The New Hampshire court fully recognized that this was the subject of the column. It instructed the jury:

"You are entitled, I think, to find that the public had a right to be informed about any difficulties or discrepancies in income or thievery at this public area. It's in the public domain. It's public property . . . . Keep in mind that the public has a right to know how their public affairs are being conducted . . . ."

ted to find that negligent misstatement of fact would defeat petitioner's privilege. That test was rejected in *Garrison,* 379 U. S., at 79, where we said, "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." The trial court also charged that "[d]efamatory matter which constitutes comment rather than fact is justified if made without malice and represented fair comment on matters of public interest," and defined malice to include "ill will, evil motive, intention to injure . . . ." This definition of malice is constitutionally insufficient where discussion of public affairs is concerned; "[w]e 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." *Garrison,* 379 U. S., at 74.

Turning, then, to the question whether respondent was a "public official" within *New York Times,* we reject at the outset his suggestion that it should be answered by reference to state-law standards. States have developed definitions of "public official" for local administrative purposes, not the purposes of a national constitutional protection.[9] If existing state-law standards reflect the purposes of *New York Times,* this is at best accidental. Our decision in *New York Times,* moreover, draws its force from the constitutional protections afforded free expression. The standards that set the scope of its principles cannot therefore be such that "the constitutional limits of free expression in the Nation would vary with state lines." *Pennekamp* v. *Florida,* 328 U. S. 331, 335.[10]

[9] See, *e. g.,* Opinion of the Justices, 73 N. H. 621, 62 A. 969 (1906).

[10] For similar reasons, we reject any suggestion that our references in *New York Times,* 376 U. S., at 282, 283, n. 23, and *Garrison,* 379

We remarked in *New York Times* that we had no occasion "to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included." 376 U. S., at 283, n. 23. No precise lines need be drawn for the purposes of this case. The motivating force for the decision in *New York Times* was twofold. We expressed "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, *and* that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U. S., at 270. (Emphasis supplied.) There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.[11]

U. S., at 74, to *Barr* v. *Matteo*, 360 U. S. 564, mean that we have tied the *New York Times* rule to the rule of official privilege. The public interests protected by the *New York Times* rule are interests in discussion, not retaliation, and our reference to *Barr* should be taken to mean no more than that the scope of the privilege is to be determined by reference to the functions it serves. See Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 Cornell L. Q. 581, 590–591 (1964).

[11] Compare, *e. g.*, *Clancy* v. *Daily News Corp.*, 202 Minn. 1, 277 N. W. 264 (1938); *Tanzer* v. *Crowley Publishing Corp.*, 240 App.

This conclusion does not ignore the important social values which underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of *New York Times* is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation. Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present [12] and the *New York Times* malice standards apply.[13]

Div. 203, 268 N. Y. Supp. 620 (1934); *Poleski* v. *Polish Am. Publishing Co.*, 254 Mich. 15, 235 N. W. 841 (1931); 1 Harper & James, Torts § 5.26, pp. 449–450 (1956); Prosser, Torts § 110, p. 815 (3d ed. 1964); Noel, Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875, 896–897, 901–902 (1949); Comment, 113 U. Pa. L. Rev. 284, 288 (1964); Note, 18 Vand. L. Rev. 1429, 1445 (1965).

[12] We are treating here only the element of public position, since that is all that has been argued and briefed. We intimate no view whatever whether there are other bases for applying the *New York Times* standards—for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern. Cf. *Salinger* v. *Cowles,* 195 Iowa 873, 889, 191 N. W. 167, 173–174 (1922); *Peck* v. *Coos Bay Times Publishing Co.*, 122 Ore. 408, 420–421, 259 P. 307, 311–312 (1927); *Coleman* v. *MacLennan,* 78 Kan. 711, 723–724, 98 P. 281, 285–286 (1908); *Pauling* v. *News Syndicate Co.*, 335 F. 2d 659, 671 (C. A. 2d Cir. 1964).

[13] It is suggested that this test might apply to a night watchman accused of stealing state secrets. But a conclusion that the *New York Times* malice standards apply could not be reached merely

As respondent framed his case, he may have held such a position. Since *New York Times* had not been decided when his case went to trial, his presentation was not shaped to the "public official" issue. He did, however, seek to show that the article referred particularly to him. His theory was that his role in the management of the Area was so prominent and important that the public regarded him as the man responsible for its operations, chargeable with its failures and to be credited with its successes. Thus, to prove the article referred to him, he showed the importance of his role; the same showing, at the least, raises a substantial argument that he was a "public official." [14]

The record here, however, leaves open the possibility that respondent could have adduced proofs to bring his claim outside the *New York Times* rule. Moreover, even if the claim falls within *New York Times,* the record suggests respondent may be able to present a jury question of malice as there defined. Because the trial here was had before *New York Times,* we have concluded that we should not foreclose him from attempting retrial of his

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because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.

[14] It is not seriously contended, and could not be, that the fact respondent no longer supervised the Area when the column appeared has decisional significance here. To be sure, there may be cases where a person is so far removed from a former position of authority that comment on the manner in which he performed his responsibilities no longer has the interest necessary to justify the *New York Times* rule. But here the management of the Area was still a matter of lively public interest; propositions for further change were abroad, and public interest in the way in which the prior administration had done its task continued strong. The comment, if it referred to respondent, referred to his performance of duty as a county employee.

action. We remark only that, as is the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show respondent to be a "public official." [15]

The judgment is reversed and the case remanded to the New Hampshire Supreme Court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE CLARK concurs in the result.

MR. JUSTICE DOUGLAS, concurring.

In *New York Times Co.* v. *Sullivan,* 376 U. S. 254, we dealt with elected officials.[1] We now have the question as to how far its principles extend or how far down the hierarchy we should go.

The problems presented are considerable ones. Maybe the key man in a hierarchy is the night watchman responsible for thefts of state secrets. Those of us alive in the 1940's and 1950's witnessed the dreadful ordeal of people in the public service being pummelled by those inside and outside government, with charges that were false, abusive, and damaging to the extreme. Many of them, unlike the officials in *New York Times* who ran for election, rarely had opportunity for rejoinder.

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[15] 1 Harper & James, Torts § 5.29 (1956); Prosser, Torts § 110, p. 823 (3d ed. 1964), Restatement, Torts § 619. Such a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions. Cf. *Speiser* v. *Randall,* 357 U. S. 513, 525; *New York Times,* 376 U. S., at 285.

[1] And cf. *Farmers Union* v. *WDAY,* 360 U. S. 525, holding that a radio station is not liable for defamatory statements made in a speech broadcast over such station under § 315 (a) of the Federal Communications Act of 1934 by a candidate for public office.

Yet if free discussion of public issues is the guide, I see no way to draw lines that exclude the night watchman, the file clerk, the typist, or, for that matter, anyone on the public payroll. And how about those who contract to carry out governmental missions? Some of them are as much in the public domain as any so-called officeholder. And how about the dollar-a-year man, whose prototype was publicized in *United States* v. *Mississippi Valley Generating Co.*, 364 U. S. 520? [2] And the industrialists who raise the price of a basic commodity? Are not steel and aluminum in the public domain? And the labor leader who combines trade unionism with bribery and racketeering? Surely the public importance of collective bargaining puts labor as well as management into the public arena so far as the present constitutional issue is concerned.[3]

The Court in *Thornhill* v. *Alabama*, 310 U. S. 88, 101–102, put the issue as follows:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace

[2] He in fact received no compensation from the Government, but was given $10 per day in lieu of subsistence, plus transportation expenses. See 364 U. S., at 533.

[3] Cf. *Linn* v. *United Plant Guard Workers*, *ante*, p. 53, where the principle of *New York Times Co.* v. *Sullivan*, *supra*, is extended, via the path of pre-emption, to the field of labor relations.

all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

If the term "public official" were a constitutional term, we would be stuck with it and have to give it content. But the term is our own; and so long as we are fashioning a rule of free discussion of public issues, I cannot relate it only to those who, by the Court's standard, are deemed to hold public office.

The question in final analysis is the extent to which the Due Process Clause of the Fourteenth Amendment has displaced the libel laws of the States. I do not suppose anyone would have thought in those terms at the time the Amendment was adopted. But constitutional law is not frozen as of a particular moment of time. It was indeed not until 1931 that this Court squarely held that the First Amendment was applicable to the States by reason of the Fourteenth (*Stromberg* v. *California,* 283 U. S. 359, 368–369)—*New York Times* being merely an application and extension of that principle. But since freedom of speech is now the guideline, do state libel laws have any place at all in our constitutional system, at least when it comes to public issues? If freedom of speech is the guide, why is it restricted to speech addressed to the larger public matters and not applicable to speech at the lower levels of science, the humanities, the professions, agriculture, and the like?

In my view the First Amendment would bar Congress from passing any libel law, the Alien and Sedition Act (1 Stat. 596) to the contrary notwithstanding. Some think that due process as applied to the States is a watered-down federal version as respects the guarantees in the Bill of Rights that are incorporated into the Fourteenth Amendment. See, *e. g., Roth* v. *United States,* 354 U. S. 476, 501 (separate opinion); *Beauharnais* v. *Illinois,* 343 U. S. 250, 287 (dissenting opinion).

That has been the minority view, the majority maintaining that there is no difference. If there is no difference and if I am right in assuming Congress could not constitutionally pass a libel law, then the question is whether a public *issue,* not a public official, is involved.[4]

The case is therefore for me in a different posture than the one discussed by the Court. I would prefer to dismiss the writ as improvidently granted.[5] To facilitate our work,[6] however, I have decided to join Part II of the Court's opinion, as well as MR. JUSTICE BLACK'S separate opinion, and to concur in the judgment.

MR. JUSTICE STEWART, concurring.

The Constitution does not tolerate actions for libel on government. State defamation laws, therefore, whether

[4] There is the view that the "most absolute construction of the First Amendment, as applied to the states by the Fourteenth, would permit a line to be drawn between the spurious common law of seditious libel and the genuine common law of civil liability for defamation of private character." Brant, The Bill of Rights: Its Origin and Meaning 502–503 (1965). But that *ipse dixit* overlooks our decisons which, without defining the outer limits, establish that the First Amendment applies to *both.* Compare *New York Times Co.* v. *Sullivan, supra,* with *Garrison* v. *Louisiana,* 379 U. S. 64.

[5] The complaint was drawn and the trial conducted in conformity with the defamation law as it existed prior to *New York Times.* Whether the complaint can be amended to conform to the theory of liability announced in *New York Times* is wholly a matter of state law. See N. H. Rev. Stat. Ann. § 514:9 (1955). Whether there can be a new trial is also wholly a matter of state law. See N. H. Rev. Stat. Ann. § 526:1 (1955). Whether respondent is a "public official" in the *New York Times* sense is not ascertainable from the record. We do not even know whether he took an oath of office. So far as we know, he may have been a hybrid in the nature of an independent contractor. Moreover, the oral argument and the briefs were not squarely addressed to the larger and profoundly important questions stirred by this litigation.

[6] Cf. Mr. Justice Rutledge in *Screws* v. *United States,* 325 U. S. 91, 113, 134.

civil or criminal, cannot constitutionally be converted into laws against seditious libel. Our decisions in the *New York Times* and *Garrison* cases turned upon that fundamental proposition.[1] What the Court says today seems to me fully consonant with those decisions, and I join the Court's opinion and judgment.

It is a fallacy, however, to assume that the First Amendment is the only guidepost in the area of state defamation laws. It is not. As the Court says, "important social values . . . underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation."

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

We use misleading euphemisms when we speak of the *New York Times* rule as involving "uninhibited, robust, and wide-open" debate, or "vehement, caustic, and sometimes unpleasantly sharp" criticism.[2] What the *New York Times* rule ultimately protects is defamatory falsehood. No matter how gross the untruth, the *New York Times* rule deprives a defamed public official of any hope for legal redress without proof that the lie was a knowing one, or uttered in reckless disregard of the truth.

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[1] *New York Times Co.* v. *Sullivan*, 376 U. S. 254; *Garrison* v. *Louisiana*, 379 U. S. 64.

[2] See *New York Times Co.* v. *Sullivan*, 376 U. S., at 270.

That rule should not be applied except where a State's law of defamation has been unconstitutionally converted into a law of seditious libel.[3] The First and Fourteenth Amendments have not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars.[4] The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

Moreover, the preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere

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[3] This is not to say that there do not exist situations where for other reasons state defamation laws may be similarly limited. See *Linn* v. *United Plant Guard Workers, ante,* p. 53.

[4] Irving Brant has recently made the point well:

"Civil actions for slander and libel developed in early ages as a substitute for the duel and a deterrent to murder. They lie within the genuine orbit of the common law, and in the distribution of American sovereignty they fall exclusively within the jurisdiction of the states. The First Amendment further assures their exclusion from the federal domain. The Fourteenth Amendment, by absorbing the First, unquestionably gives the Supreme Court authority to block state use of civil suits as a substitute for laws of seditious libel. But considering the differences in derivation, in purpose, in value to society, and in the natural location of power, there seems to be no compelling constitutional reason to bar private suits. The most absolute construction of the First Amendment, as applied to the states by the Fourteenth, would permit a line to be drawn between the spurious common law of seditious libel and the genuine common law of civil liability for defamation of private character. It is the misuse of civil liability that offends the Constitution." Brant, The Bill of Rights: Its Origin and Meaning 502–503 (1965).

personal interests. Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society.

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

Respondent Baer managed the financial affairs of a ski recreation center owned and operated by Belknap County, New Hampshire. Petitioner Rosenblatt, an unpaid columnist for a local newspaper, published a column criticizing the past management of the center. Baer thought the column implied dishonest manipulations in his handling of the finances for the center. Charging this he sued Rosenblatt for libel and obtained a verdict for $31,500 which the Supreme Court of New Hampshire affirmed. This Court, relying on *New York Times Co.* v. *Sullivan,* 376 U. S. 254, and *Garrison* v. *Louisiana,* 379 U. S. 64, reverses that judgment and remands to the state court under conditions expressed in its opinion that will allow a new trial and another judgment against Rosenblatt. I concur in the reversal but dissent from leaving the case open for a new trial believing that for reasons stated in the concurring opinions of MR. JUSTICE DOUGLAS and myself in the *New York Times* and *Garrison* cases a libel judgment against Rosenblatt is forbidden by the First Amendment which the Fourteenth made applicable to the States.

I think the publication here, discussing the way an agent of government does his governmental job, is the very kind that the First Amendment was adopted primarily to protect. The article here sued on as libelous discusses the use of the public's money to take care of the public's business by a paid agent of the public. Unconditional freedom to criticize the way such public functions are performed is in my judgment necessarily included in the guarantees of the First Amendment.

And the right to criticize a public agent engaged in public activities cannot safely, and should not, depend upon whether or not that agent is arbitrarily labeled a "public official." Nor should the right to criticize depend upon how high a position in government a public agent may occupy. Indeed a large percentage of public moneys expended is distributed by local agents handling local funds as the respondent in this case did. To be faithful to the First Amendment's guarantees, this Court should free private critics of public agents from fear of libel judgments for money just as it has freed critics from fear of pains and penalties inflicted by government.

This case illustrates I think what a short and inadequate step this Court took in the *New York Times* case to guard free press and free speech against the grave dangers to the press and the public created by libel actions. Half-million-dollar judgments for libel damages like those awarded against the New York Times will not be stopped by requirements that "malice" be found, however that term is defined. Such a requirement is little protection against high emotions and deep prejudices which frequently pervade local communities where libel suits are tried. And this Court cannot and should not limit its protection against such press-destroying judgments by reviewing the evidence, findings, and court rulings only on a case-by-case basis. The only sure way to protect speech and press against these threats is to recognize that libel laws are abridgments of speech and press and therefore are barred in both federal and state courts by the First and Fourteenth Amendments. I repeat what I said in the *New York Times* case that "An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment."

Finally, since this case is to be sent back and a new trial may follow, I add one further thought. The Court

indicates that in a retrial it will be for the trial judge "in the first instance" to decide whether respondent is a "public official." Statements like this have a way of growing and I fear that the words "in the first instance" will soon be forgotten. When that happens the rule will be that the Federal Constitution forbids States to let juries decide essentially jury questions in libel cases. After a long fight in England Fox's Libel Act of 1792 was passed and it provided that juries should be the judges of both the law and the facts in libel cases. This was heralded by all lovers of freedom of speech and press as a victory for freedom. This rule was particularly approved in this country where in 1735 John Peter Zenger was prosecuted in a highly publicized trial for criticizing the government of New York. In that case the Chief Justice of the Province of New York got rid of two lawyers who dared defend Zenger by disbarring them. The lawyer who finally defended Zenger, Andrew Hamilton, won imperishable fame in this country by his boldness in telling the jury that they, not the judge, had the right to say whether or not the defendant was guilty. Zenger was acquitted. 17 How. St. Tr. 675. Many of the States familiar with this oppressive practice of denying the jury and granting the judge power to determine the guilt of a defendant in libel cases wrote in their constitutions special provisions to protect the right to trial by jury in such cases. I regret to see the Court take a single step in the direction of holding that a judge rather than the jury is to have the determination of any fact in libel cases. Compare *Jackson* v. *Denno,* 378 U. S. 368.

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

I agree with the Court's opinion except for Part II, in which a section of the trial court's charge is character-

ized as depending upon a "theory" of "impersonal" libel, which we held constitutionally impermissible in *New York Times Co.* v. *Sullivan,* 376 U. S. 254.

In *New York Times,* in addition to establishing a constitutional standard governing actions for defamation of public officials, we went on to examine the evidence in that particular case. We found that "it was incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning' respondent." 376 U. S., at 288. The statements in question, in general terms, attributed misconduct to the police of Montgomery, Alabama, during civil rights activities. The plaintiff in the libel suit, the Commissioner of Public Affairs, pressed his action not on the theory that the statements referred to him, but instead "solely on the unsupported assumption that, because of his official position," the statements must be taken as indicating that he had been involved in the misconduct. 376 U. S., at 289. The Supreme Court of Alabama held that "[i]n measuring the performance or deficiencies of . . . groups [such as the police], praise or criticism is usually attached to the official in complete control of the body," 273 Ala. 656, at 674–675, 144 So. 2d 25, at 39, and allowed the action by the Commissioner.

In setting aside the state judgment we noted that this proposition had "disquieting implications for criticism of governmental conduct," 376 U. S., at 291, for it permitted any general statement criticizing some governmental activity to be transmuted into a cause of action for personal libel by the official in charge of that activity. We stated that the liberty of expression embodied in the Fourteenth Amendment forbade a State from permitting "an otherwise impersonal attack on governmental operations" to be used as the basis of "a libel of an official responsible for those operations." 376 U. S., at 292.

This salutary principle has been applied, I believe incorrectly, to the facts of this case. It is true that, on its face, the alleged libel here seems to discuss only the conduct of governmental operations, *viz.*, the comparative improvement in the management of the ski area. However, the theory on which respondent based his claim is that the rhetorical question, "What happened to all the money last year? and every other year?" was read as accusing him of peculation or culpable mismanagement. The trial court and the Supreme Court of New Hampshire, as well as this Court, have found this a permissible reading of the newspaper article.

The charge of the trial court did not leave the jury free to convert an "impersonal" into a "personal" libel. The court merely instructed the jury that *if* it interpreted the article as an accusation of misconduct the jury could find for the plaintiff if either he alone was found to be libeled, or he was one of a small group of persons so libeled.* This is conventional tort law. "[I]f the group

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*The trial judge charged the jury as follows:

"An insinuation of a crime is actionable as a positive assertion if the meaning is reasonably plain and clear, and the putting of the words in the form of a question does not change the liability of the defendant if the form and sense of the question is defamatory or derogatory. Now, an imputation of impropriety or a crime to one or some of a small group that casts suspicion upon all is actionable. It is sufficient if Mr. Baer, the plaintiff here, proves on the balance of probabilities by his evidence that he was one of a group upon whom suspicion was cast, and the fact that others in this group might also have been libeled is not a defense; but Mr. Baer has the burden of showing that the defamation, if you find that there was one, either was directed to him or could have been as one of a small group." R. Vol. V, pp. 148–149.

. . . . .

"Now, as to any part of the article which you, if you do, find defamatory, and that Mr. Baer was intended, or he with a few others was intended, he and a small group, if you find that it was derogatory of him and charged him with a crime, held him up to

is small enough numerically or sufficiently restricted geographically so that people reasonably think the defamatory utterance was directed to or intended to include the plaintiff, there may be a recovery." 1 Harper & James, Torts § 5.7, at 367 (1956). See also Prosser, Torts § 106, at 767–768 (1964); Riesman, Democracy and Defamation: Control of Group Libel, 42 Col. L. Rev. 727, 759–760 (1942). The Restatement of Torts § 564, Comment *c* (1938), includes this aspect of defamation in language very similar to that of the charge in this case:

> "The size of the class may be so small as to indicate that the plaintiff is the person intended or at least to cast such grave suspicion upon him as to be defamatory of him. Thus, a statement that all members of a school board or a city council are corrupt is sufficiently definite to constitute a defamatory publication of each member thereof. If, however, the group or class disparaged is a large one, some particular circumstances must point to the plaintiff as the person defamed. Thus, a statement that all lawyers are dishonest or that all ministers are liars is not defamatory of any particular lawyer or minister unless the surrounding circumstances indicate that he was the person intended."

This and the trial court's formulation can scarcely be thought too indefinite, for they reflect standards successfully applied over the years in numerous state cases. See, *e. g., Gross* v. *Cantor,* 270 N. Y. 93, 200 N. E. 592; cases cited in Harper & James, *supra,* § 5.7, at 367; and Prosser, *supra,* § 106, at 767–768. The rule is an eminently sound one.

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scorn and ridicule, that he was the fellow, either singly or in a small group, then you can go on to consider—and you should—whether the publication was privileged or justified . . . ." R. Vol. V, pp. 151–152.

As to the facts at hand, it seems to be agreed—apart of course from the public-official "malice" rule which would apply in any event—that if the article in question is read by the jury as an accusation of wrongdoing by Baer, he has a good cause of action in libel. I see no reason why that cause of action should fail if the jury finds that the article was read as accusing the three Commissioners along with Baer. This is a very different case from *New York Times,* where the alleged libel concerned not an identified small group responsible for the running of a particular public enterprise, but a criticism of "the police" generally in the discharge of their duties. It seems manifest that in instructing the jury as to a "small group," the trial judge was not allowing the plaintiff to transform impersonal governmental criticism into an individual cause of action, but was simply referring to this traditional tort doctrine that more than one person can be libeled by the same statement. I cannot understand why a statement which a jury is permitted to read as meaning "*A* is a thief" should become absolutely privileged if it is read as meaning "*A, B, C,* and *D* are thieves."

Without receding in any way from our ruling in *New York Times* that impersonal criticism of government cannot be made a basis for a libel action by an official who heads the branch or agency involved, I dissent from the Court's conclusion that this is such a case. In all other respects I join the Court's opinion.

MR. JUSTICE FORTAS, dissenting.

I would vacate the writ in this case as improvidently granted. The trial below occurred before this Court's decision in *New York Times Co.* v. *Sullivan,* 376 U. S. 254. As a result, the factual record in this case was not shaped in light of the principles announced in *New York Times.* Particularly in this type of case it is important to observe

the practice of relating our decisions to factual records. They serve to guide our judgment and to help us measure theory against the sharp outlines of reality. Especially where our decision furnishes a necessarily Procrustean bed for state law, I think, with all respect, that we should insist upon a relevant factual record. A subsequent trial may conceivably help respondent, but it will be too late to be of assistance to us.

LOUISVILLE & NASHVILLE RAILROAD CO. *v.* UNITED STATES ET AL.

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

No. 792. Decided February 21, 1966.

244 F. Supp. 337, affirmed.

H. G. Breetz, W. L. Grubbs, M. D. Jones and *Joseph L. Lenihan* for appellant.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and *Leonard S. Goodman* for the United States et al. *Edward J. Hickey, Jr., James L. Highsaw, Jr.,* and *Robert E. Hogan* for appellee Railway Labor Executives' Association.

PER CURIAM.

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

McMORRIS *v.* CALIFORNIA.

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

No. 1036, Misc. Decided February 21, 1966.

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.

HEMPHILL ET UX., DBA CAPITOL SKATELAND *v.* WASHINGTON STATE TAX COMMISSION.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 812. Decided February 21, 1966.

65 Wash. 2d 889, 400 P. 2d 297, appeal dismissed.

Joel A. C. Rindal for appellants.

John J. O'Connell, Attorney General of Washington, *Timothy R. Malone,* Assistant Attorney General, and *H. Eugene Quinn,* Special 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.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 12, ET AL. *v.* DEACON.

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

No. 841. Decided February 21, 1966.

236 Cal. App. 2d 302, 46 Cal. Rptr. 11, appeal dismissed and certiorari denied.

Charles K. Hackler for appellants.

Appellee *pro se.*

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.

NOLAN *v.* RHODES, GOVERNOR OF OHIO, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

No. 836. Decided February 21, 1966.

251 F. Supp. 584, affirmed.

Kenneth G. Weinberg and *Stewart R. Jaffy* for appellant.

William B. Saxbe, Attorney General of Ohio, for appellees.

PER CURIAM.

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

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

HC&D MOVING & STORAGE CO., INC., ET AL. *v.* YAMANE, STATE TAX COLLECTOR.

APPEAL FROM THE SUPREME COURT OF HAWAII.

No. 855. Decided February 21, 1966.

48 Haw. 486, 405 P. 2d 382, appeal dismissed.

J. Garner Anthony for appellants.

PER CURIAM.

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

VITORATOS *v.* MAXWELL, WARDEN.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 1003, Misc. Decided February 21, 1966.

351 F. 2d 217, 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.

NIELSEN *v.* NEBRASKA STATE BAR ASSOCIATION.

APPEAL FROM THE SUPREME COURT OF NEBRASKA.

No. 1018, Misc. Decided February 21, 1966.

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.

DYSON *v.* MARYLAND.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 455, Misc. Decided February 21, 1966.

Certiorari granted; 238 Md. 398, 209 A. 2d 609; 238 Md. 546, 210 A. 2d 730, vacated and remanded.

Petitioner *pro se.*

Thomas B. Finan, Attorney General of Maryland, and *John W. Sause, Jr.,* Assistant Attorney General, for respondent.

PER CURIAM.

Upon consideration of the entire record and the consent of the Attorney General of Maryland, the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The motion to remand is also granted, the judgment of the Court of Appeals of Maryland is vacated and the case is remanded to that court for further consideration in light of its decisions in *Schowgurow* v. *Maryland,* 240 Md. 121, 213 A. 2d 475, and *Smith* v. *Maryland,* 240 Md. 464, 214 A. 2d 563. This disposition of the case is without prejudice to any other questions presented by the petition for a writ of certiorari.

BAXSTROM *v.* HEROLD, STATE HOSPITAL DIRECTOR.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 219. Argued December 9, 1965.—Decided February 23, 1966.

Petitioner, while a prisoner, was certified as insane by a prison physician and transferred to Dannemora State Hospital, an institution under the jurisdiction of the New York Department of Correction and used for prisoners declared mentally ill while serving sentence. Dannemora's director filed a petition in the Surrogate's Court stating that petitioner's sentence was expiring and requesting that he be civilly committed under § 384 of the N. Y. Correction Law. At the proceeding the State submitted medical evidence that petitioner was still mentally ill and in need of hospital care. The Surrogate stated that he had no objection to petitioner's transfer to a civil hospital under the jurisdiction of the Department of Mental Hygiene, but that under § 384 that decision was up to the latter Department. That Department had determined *ex parte* that petitioner was not suitable for care in a civil hospital. When petitioner's sentence expired his custody shifted to the Department of Mental Hygiene but he has since remained at Dannemora. Writs of habeas corpus in state courts were dismissed and petitioner's request that he be transferred to a civil hospital was denied as beyond the court's power. *Held:* Petitioner was denied equal protection of the laws by the statutory procedure whereby a person may be civilly committed at the expiration of a prison sentence without the jury review available to all others civilly committed in New York, and by his commitment to an institution maintained by the Department of Correction beyond the expiration of his prison term without the judicial determination that he is dangerously mentally ill such as that afforded to all those so committed except those nearing the end of a penal sentence. Pp. 110–115.

Judgment of the Appellate Division, Supreme Court of New York, Third Judicial Department, 21 App. Div. 2d 754, reversed and remanded to that court.

Leon B. Polsky argued the cause and filed a brief for petitioner.

Anthony J. Lokot, Assistant Attorney General of New York, argued the cause for respondent. With him on the brief were *Louis J. Lefkowitz,* Attorney General of New York, and *Ruth Kessler Toch,* Acting Solicitor General.

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

We granted certiorari in this case to consider the constitutional validity of the statutory procedure under which petitioner was committed to a mental institution at the expiration of his criminal sentence in a state prison.

Petitioner, Johnnie K. Baxstrom, was convicted of second degree assault in April 1959 and was sentenced to a term of two and one-half to three years in a New York prison. On June 1, 1961, he was certified as insane by a prison physician. He was then transferred from prison to Dannemora State Hospital, an institution under the jurisdiction and control of the New York Department of Correction and used for the purpose of confining and caring for male prisoners declared mentally ill while serving a criminal sentence. In November 1961, the director of Dannemora filed a petition in the Surrogate's Court of Clinton County stating that Baxstrom's penal sentence was about to terminate and requesting that he be civilly committed pursuant to § 384 of the New York Correction Law.

On December 6, 1961, a proceeding was held in the Surrogate's chambers. Medical certificates were submitted by the State which stated that, in the opinion of two of its examining physicians, Baxstrom was still mentally ill and in need of hospital and institutional care. Respondent, then assistant director at Dannemora, testified that in his opinion Baxstrom was still mentally ill. Baxstrom, appearing alone, was accorded

a brief opportunity to ask questions.[1] Respondent and the Surrogate both stated that they had no objection to his being transferred from Dannemora to a civil hospital under the jurisdiction of the Department of Mental Hygiene. But the Surrogate pointed out that he had no jurisdiction to determine that question—that under § 384 the decision was entirely up to the Department of Mental Hygiene. The Surrogate then signed a certificate which indicated he was satisfied that Baxstrom "may require mental care and treatment" in an institution for the mentally ill. The Department of Mental Hygiene had already determined *ex parte* that Baxstrom was not suitable for care in a civil hospital. Thus, on December 18, 1961, the date upon which Baxstrom's penal sentence expired, custody over him shifted from the Department of Correction to the Department of Mental Hygiene, but he was retained at Dannemora and has remained there to this date.

Thereafter, Baxstrom sought a writ of habeas corpus in a state court. An examination by an independent psychiatrist was ordered and a hearing was held at which the examining psychiatrist testified that, in his opinion, Baxstrom was still mentally ill. The writ was dismissed. In 1963, Baxstrom applied again for a writ of habeas corpus, alleging that his constitutional rights had been violated and that he was then sane, or if insane, he should be transferred to a civil mental hospital. Due to his indigence and his incarceration in Dannemora, Baxstrom could not produce psychiatric testimony to disprove the testimony adduced at the prior hearing. The writ was therefore dismissed. Baxstrom's alternative request for

[1] The State apparently permits counsel to be retained in such proceedings where the person can afford to hire his own attorney despite the fact that § 384 makes no provision for counsel to be present. See 1961 Op. N. Y. Atty. Gen. 180, 181. Baxstrom is indigent, however, and had no counsel at this hearing.

transfer to a civil mental hospital was again denied as being beyond the power of the court despite a statement by the State's attorney that he wished that Baxstrom would be transferred to a civil mental hospital. On appeal to the Appellate Division, Third Department, the dismissal of the writ was affirmed without opinion. 21 App. Div. 2d 754. A motion for leave to appeal to the Court of Appeals was denied. 14 N. Y. 2d 490. We granted certiorari. 381 U. S. 949.

We hold that petitioner was denied equal protection of the laws by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York. Petitioner was further denied equal protection of the laws by his civil commitment to an institution maintained by the Department of Correction beyond the expiration of his prison term without a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those, like Baxstrom, nearing the expiration of a penal sentence.

Section 384 of the New York Correction Law prescribes the procedure for civil commitment upon the expiration of the prison term of a mentally ill person confined in Dannemora.[2] Similar procedures are prescribed for civil

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[2] As it appeared when applied to petitioner in 1961, N. Y. Correction Law § 384 provided in part:

"1. Within thirty days prior to the expiration of the term of a prisoner confined in the Dannemora state hospital, when in the opinion of the director such prisoner continues insane, the director shall apply to a judge of a court of record for the certification of such person as provided in the mental hygiene law for the certification of a person not in confinement on a criminal charge. The court in which such proceedings are instituted shall if satisfied that such person may require care and treatment in an institution for the mentally ill, issue an order directing that such person be committed to the custody of the commissioner of mental hygiene to be

commitment of all other allegedly mentally ill persons. N. Y. Mental Hygiene Law §§ 70, 72. All persons civilly committed, however, other than those committed at the expiration of a penal term, are expressly granted the right to *de novo* review by jury trial of the question of their sanity under § 74 of the Mental Hygiene Law. Under this procedure any person dissatisfied with an order certifying him as mentally ill may demand full review by a jury of the prior determination as to his competency. If the jury returns a verdict that the person is sane, he must be immediately discharged. It follows that the State, having made this substantial review proceeding generally available on this issue, may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some.

The director contends that the State has created a reasonable classification differentiating the civilly insane from the "criminally insane," which he defines as those with dangerous or criminal propensities. Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. *Walters* v. *City of St. Louis,* 347 U. S. 231, 237. Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all.* For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the com-

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placed in an appropriate state institution of the department of mental hygiene or of the department of correction as may be designated for the custody of such person by agreement between the heads of the two departments."

mitment of a person who is nearing the end of a penal term from all other civil commitments.

The statutory procedure provided in § 384 of the New York Correction Law denied Baxstrom the equal protection of the laws in another respect as well. Under § 384 the judge need only satisfy himself that the person "may require care and treatment in an institution for the mentally ill." Having made such a finding, the decision whether to commit that person to a hospital maintained by the Department of Correction or to a civil hospital is completely in the hands of administrative officials.[3] Except for persons committed to Dannemora upon expiration of sentence under § 384, all others civilly committed to hospitals maintained by the Department of

[3] In this case, the administrative decision to retain Baxstrom in Dannemora was made before any hearing was afforded to Baxstrom and was made despite the otherwise unanimous conclusion by testifying psychiatrists, including an independent examining psychiatrist and respondent himself, that there was no reason why Baxstrom could not be transferred to a civil institution. The following is a portion of the transcript of the hearing before the Surrogate:

"The COURT: (Addressing Dr. Herold) Have you any objection if this man is transferred to a civil hospital if the Department of Mental Hygiene so decrees?

"Dr. HEROLD: None whatever.

"The COURT: And I, Sir, agree with you. I have no objection to his transfer if the Department of Mental Hygiene so finds.

"I hope that you will be transferred to a civil hospital.

"Good luck."

And at the first habeas corpus hearing:

"Q. Do you feel, Doctor, from your examination and examining the records of this man, he needs additional care? Is that correct?

"A. [Dr. Kerr] Yes, sir. May I say something at this point, sir?

"Q. Surely.

"A. Since Mr. Baxstrom's sentence has actually expired, sir, I would like to say that in my opinion there is no reason why he could not be treated in a civil mental hospital. I would simply like to say that for the record, sir.

"The COURT: All right."

Correction are committed only after judicial proceedings have been held in which it is determined that the person is so dangerously mentally ill that his presence in a civil hospital is dangerous to the safety of other patients or employees, or to the community.[4]

This statutory classification cannot be justified by the contention that Dannemora is substantially similar to other mental hospitals in the State and that commitment to one hospital or another is simply an administrative matter affecting no fundamental rights. The parties have described various characteristics of Dannemora to show its similarities and dissimilarities to civil hospitals in New York. As striking as the dissimilarities are, we need not make any factual determination as to the nature of Dannemora; the New York State Legislature has already made that determination. By statute, the hospital is under the jurisdiction of the Department of Correction and is used for the purpose of confining and caring for insane prisoners and persons, like Baxstrom, committed at the expiration of a penal term. N. Y. Correction Law § 375. Civil mental hospitals in New York, on the other hand, are under the jurisdiction and control of the Department of Mental Hygiene. Certain privileges of patients at Dannemora are restricted by statute. N. Y. Correction Law § 388. Moreover, as has

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[4] N. Y. Mental Hygiene Law §§ 85, 135. See also N. Y. Code Crim. Proc. §§ 662–b (3)(b), 872 (1)(b), as amended, N. Y. Laws 1965, c. 540, §§ 1, 2. Former § 412 of Correction Law, permitting commitment to Matteawan State Hospital of any patient who had previously been sentenced to a term of imprisonment, without the benefit of the proceeding accorded others under § 85 of the Mental Hygiene Law, was held unconstitutional as a denial of equal protection in *United States ex rel. Carroll* v. *McNeill,* 294 F. 2d 117 (C. A. 2d Cir. 1961), probable jurisdiction noted, 368 U. S. 951, vacated and dismissed as moot, 369 U. S. 149, and was repealed by N. Y. Laws 1965, c. 524. Even that provision required a showing that the person still manifested criminal tendencies.

been noted, specialized statutory procedures are prescribed for commitment to hospitals under the jurisdiction of the Department of Correction. While we may assume that transfer among like mental hospitals is a purely administrative function, where, as here, the State has created functionally distinct institutions, classification of patients for involuntary commitment to one of these institutions may not be wholly arbitrary.

The director argues that it is reasonable to classify persons in Baxstrom's class together with those found to be dangerously insane since such persons are not only insane but have proven criminal tendencies as shown by their past criminal records. He points to decisions of the New York Court of Appeals supporting this view. *People ex rel. Kamisaroff* v. *Johnston,* 13 N. Y. 2d 66, 192 N. E. 2d 11; *People ex rel. Brunson* v. *Johnston,* 15 N. Y. 2d 647, 204 N. E. 2d 200.

We find this contention untenable. Where the State has provided for a judicial proceeding to determine the dangerous propensities of all others civilly committed to an institution of the Department of Correction, it may not deny this right to a person in Baxstrom's position solely on the ground that he was nearing the expiration of a prison term.[5] It may or may not be that Baxstrom

[5] In oral argument, counsel for respondent suggested that the determination by the Department of Mental Hygiene to retain a person in Dannemora must be based not only on his past criminal record, but also on evidence that he is currently dangerous. Far from supporting the validity of the procedure, this only serves to further accent the arbitrary nature of the classification. Under this procedure, all civil commitments to an institution under the control of the Department of Correction require a determination that the person is presently dangerous; all persons so committed are entitled to a judicial proceeding to determine this fact except those awaiting expiration of sentence. Their fate is decided by unreviewable determinations of the Department of Mental Hygiene.

is presently mentally ill and such a danger to others that the strict security of a Department of Correction hospital is warranted. All others receive a judicial hearing on this issue. Equal protection demands that Baxstrom receive the same.

The capriciousness of the classification employed by the State is thrown sharply into focus by the fact that the full benefit of a judicial hearing to determine dangerous tendencies is withheld only in the case of civil commitment of one awaiting expiration of penal sentence. A person with a past criminal record is presently entitled to a hearing on the question whether he is dangerously mentally ill so long as he is not in prison at the time civil commitment proceedings are instituted. Given this distinction, all semblance of rationality of the classification, purportedly based upon criminal propensities, disappears.

In order to accord to petitioner the equal protection of the laws, he was and is entitled to a review of the determination as to his sanity in conformity with proceedings granted all others civilly committed under § 74 of the New York Mental Hygiene Law. He is also entitled to a hearing under the procedure granted all others by § 85 of the New York Mental Hygiene Law to determine whether he is so dangerously mentally ill that he must remain in a hospital maintained by the Department of Correction. The judgment of the Appellate Division of the Supreme Court, in the Third Judicial Department of New York is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice Black concurs in the result.

UNITED STATES *v.* EWELL ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA.

No. 29. Argued November 18, 1965.—Decided February 23, 1966.

Appellees were indicted on December 14, 1962, under 26 U. S. C. § 4705 (a) for selling narcotics without the requisite form. They pleaded guilty and were sentenced to the minimum statutory terms, one for five years and the other, as a second offender, for ten years. On July 17, 1963, the Seventh Circuit, in an unrelated case, held that an indictment under § 4705 (a) that does not allege the purchaser's name is defective and may be set aside. Appellees' motions to vacate their convictions were filed on November 6, 1963, and January 28, 1964, and were granted by the District Court on January 13 and April 13, 1964, respectively. They were immediately rearrested on new complaints and reindicted on March 26 and June 15, 1964. The indictments, charging the same sales originally alleged but naming the purchasers, contained three counts, charging violations of 26 U. S. C. § 4705 (a), 26 U. S. C. § 4704 (a) and 21 U. S. C. § 174. On July 13 and July 30, 1964, the District Court granted appellees' motions to dismiss the indictments on the ground that they had been denied their Sixth Amendment rights to a speedy trial, while rejecting their double jeopardy argument. In its petition for rehearing the Government advised that upon a plea or finding of guilty all counts except that under § 4704 (a) would be dismissed against the second-offender appellee, in which case the minimum statutory sentence would be five years rather than the ten years under § 4705 (a). The request for rehearing was denied and the Government appealed to this Court, limiting the appeal to that portion of the District Court's orders dismissing the count of the indictments charging violations of § 4704 (a). *Held:*

1. The mere passage of 19 months between the original arrests and the hearings on the later indictments is not *ipso facto* a violation of the Sixth Amendment's guarantee of a speedy trial. Pp. 120–121.

(a) The right to a speedy trial depends upon all the circumstances of the case, including the effect upon the rights of the accused and the rights of society. P. 120.

(b) Since the only important interval of time occurred as a result of the Seventh Circuit's decision in an unrelated case, the substantial interval between the original and subsequent indictments does not of itself violate the Sixth Amendment's guarantee. Pp. 120–121.

(c) When a defendant obtains a reversal of a prior, unsatisfied conviction he may be retried in the normal course of events. *United States* v. *Ball,* 163 U. S. 662; *United States* v. *Tateo,* 377 U. S. 463. P. 121.

2. That the Government is proceeding under § 4704 rather than § 4705 does not render the delay prejudicial and oppressive. Pp. 121–123.

(a) The new indictments were brought within the statute of limitations applicable to § 4704. P. 122.

(b) Appellees' claim of possible prejudice in defending themselves is insubstantial, speculative and premature. They mention no evidence that has been lost or witnesses who have disappeared. Pp. 122–123.

(c) The Government seeks to sustain the § 4704 charges, with the lesser minimum sentences, not to oppress, but to give the trial judge, if appellees are again convicted, the opportunity to take into account the time appellees have already spent in prison. P. 123.

3. Appellees' invocation of the Double Jeopardy Clause was properly rejected by the trial court. If the present indictments charge the same offense as the § 4705 offense for which appellees were previously convicted, they may, after their convictions have been vacated on their own motions, be retried under either § 4705 or § 4704; if the two offenses are not the same then the Double Jeopardy Clause by its terms does not prevent prosecution under § 4704. Pp. 124–125.

242 F. Supp. 166, 451, reversed and remanded.

Ralph S. Spritzer argued the cause for the United States. On the brief were *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer.*

David B. Lockton, by appointment of the Court, 382 U. S. 802, argued the cause and filed a brief for appellee Ewell.

MR. JUSTICE WHITE delivered the opinion of the Court.

Appellees Clarence Ewell and Ronald Dennis were indicted on December 14, 1962, for selling narcotics without the order form required by 26 U. S. C. § 4705 (a) (1964 ed.).[1] The indictments, each alleging a single sale, did not name the purchasers. After pleas of guilty on December 18 and December 19 they were sentenced to the minimum terms of imprisonment permitted by the statute, Dennis for five years and Ewell, as a second offender, for ten years.[2] On July 17, 1963, the Court of Appeals for the Seventh Circuit, in an unrelated case, held that a § 4705 (a) indictment that does not allege the name of the purchaser is defective and may be set aside under 28 U. S. C. § 2255 (1964 ed.). *Lauer* v. *United States,* 320 F. 2d 187.[3] Ewell's motion of November 6, 1963, to vacate his conviction, and Dennis' similar motion of January 28, 1964, were granted by the District Court on January 13 and April 13, 1964, respectively. Appellees were immediately rearrested on new complaints

[1] "It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate." 26 U. S. C. § 4705 (a).

[2] "Whoever commits an offense . . . described in section 4705 (a) . . . shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a second or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000." 26 U. S. C. § 7237 (b) (1964 ed.).

[3] That circuit has since overruled its *Lauer* decision. *Collins* v. *Markley,* 346 F. 2d 230 (*en banc*).

and reindicted, Ewell on March 26 and Dennis on June 15, 1964. These indictments, charging the same sales alleged in the original indictments but this time naming the purchasers, contained three counts: Count I charged violations of 26 U. S. C. § 4705 (a); Count II charged sales not in or from the original stamped packages in violation of 26 U. S. C. § 4704 (a) (1964 ed.);[4] Count III charged dealing in illegally imported narcotics in violation of 21 U. S. C. § 174 (1964 ed.).

On July 13 and July 30, 1964, respectively, the United States District Court for the Southern District of Indiana granted the motions of Ewell and Dennis to dismiss the indictments against them on the ground that they had been denied their Sixth Amendment rights to a speedy trial, while rejecting their other contention that they were also being placed in double jeopardy. In its petition for rehearing on the dismissal of the indictment against Ewell, the Government advised the court that upon a plea or finding of guilty, all counts except that under 26 U. S. C. § 4704 (a) would be dismissed against him, leaving a conviction upon which the minimum sentence would be only five years for a second offender,[5] in contrast to the minimum 10-year sentence which Ewell had previously received under § 4705 (a). The court denied the request for rehearing and the Government then appealed directly to this Court from the dismissal of the indictments against Ewell and Dennis. 18 U. S. C. § 3731 (1964 ed.). The Government has limited its appeal to that portion of the order of the District Court in each

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[4] "It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found." 26 U. S. C. § 4704 (a).

[5] 26 U. S. C. § 7237 (a) (1964 ed.).

case that dismissed the second count of each indictment, charging a violation of 26 U. S. C. § 4704 (a). We noted probable jurisdiction. 381 U. S. 909. We reverse.

We cannot agree that the passage of 19 months between the original arrests and the hearings on the later indictments itself demonstrates a violation of the Sixth Amendment's guarantee of a speedy trial.[6] This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself. However, in large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself. Therefore, this Court has consistently been of the view that "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." *Beavers* v. *Haubert,* 198 U. S. 77, 87. "Whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances. . . . The delay must not be purposeful or oppressive," *Pollard* v. *United States,* 352 U. S. 354, 361. "[T]he essential ingredient is orderly expedition and not mere speed." *Smith* v. *United States,* 360 U. S. 1, 10.

In this case, appellees were promptly indicted and convicted after their arrests in 1962 and were immediately rearrested and reindicted in due course after their § 2255

[6] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U. S. Const., Amendment VI.

motions were granted in 1964. Moreover, it was the decision in *Lauer* v. *United States, supra,* and the subsequent vacation of appellees' prior convictions that precipitated the later indictments. In these circumstances, the substantial interval between the original and subsequent indictments does not in itself violate the speedy trial provision of the Constitution.

It has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events. *United States* v. *Ball,* 163 U. S. 662, 671–672; *United States* v. *Tateo,* 377 U. S. 463, 465, 473–474. The rule of these cases, which dealt with the Double Jeopardy Clause, has been thought wise because it protects the societal interest in trying people accused of crime, rather than granting them immunization because of legal error at a previous trial, and because it enhances the probability that appellate courts will be vigilant to strike down previous convictions that are tainted with reversible error. *United States* v. *Tateo, supra,* at 466. These policies, so carefully preserved in this Court's interpretation of the Double Jeopardy Clause, would be seriously undercut by the interpretation given the Speedy Trial Clause by the court below. Indeed, such an interpretation would place a premium upon collateral rather than upon direct attack because of the greater possibility that immunization might attach.

Appellees themselves concede that *Ball* and *Tateo* are ample authority for retrial on charges under § 4705, despite their Sixth Amendment contentions.[7] But they

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[7] In *Tateo* the defendant had spent almost seven years in prison under a conviction that ultimately was overturned upon a collateral attack; yet when this Court remanded for a new trial there was no suggestion that his right to a speedy trial was being denied him. See also *Bayless* v. *United States,* 147 F. 2d 169, where it was held

urge us to prohibit prosecution in their cases because the Government is proceeding under § 4704 rather than § 4705 and because the passage of time has allegedly impaired their ability to defend themselves on this new and different charge, thereby rendering the delay prejudicial and oppressive.

We note, first, however, that the new indictments charging violations of § 4704 were brought well within the applicable statute of limitations, which is usually considered the primary guarantee against bringing overly stale criminal charges. Surely appellees could claim no automatic violation of their rights to a speedy trial if there had been no charges or convictions in 1962 but only the § 4704 indictment in 1964. In comparison with that situation, the indictments and convictions of 1962 might well have enhanced appellees' ability to defend themselves, for they were at the very least put on early notice that the Government intended to prosecute them for the specific sales with which they were then and are now charged.

Second, the appellees' claim of possible prejudice in defending themselves is insubstantial, speculative and premature. They mention no specific evidence which has actually disappeared or has been lost, no witnesses who are known to have disappeared. Although the present charges allege sales not in or from the original stamped packages, under § 4704, rather than sales without the purchaser's written order form, under § 4705, the charges are based on the same sales as were involved in the previous indictments. In this respect, it should be recalled that the problem of delay is the Government's

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that it does not violate the Speedy Trial Clause to retry a defendant who had been incarcerated for five years under a conviction that had been subsequently invalidated.

too, for it still carries the burden of proving the charges beyond a reasonable doubt.

Third, the new indictments occurred only after the vacation of the previous convictions; and the Government now seeks to sustain the § 4704 charges, which carry lesser minimum sentences than the charges under § 4705 (a), not to oppress, but to extend to the trial judge, if these appellees are again convicted, the clear opportunity to take due account of the time both Ewell and Dennis have already spent in prison. We find no oppressive or culpable governmental conduct inhering in these facts.

The District Court apparently considered retrial and reconviction to be oppressive because appellees had already spent substantial time in prison and because in its view the law would not permit time already served to be credited against the sentences which might be imposed upon reconviction. This, too, is a premature concern. The appellees have not yet been convicted on the second indictments; and if they were to be reconvicted on § 4705 or § 4704 counts it should not be assumed that the controlling statute would prevent a credit for time already served. However that may be, as matters now stand, the remaining charges the Government seeks to sustain are under § 4704, which carries a minimum sentence in the case of Ewell of five years, as compared with a minimum of 10 years under § 4705, and two years instead of five years in the case of Dennis. In these circumstances, there is every reason to expect the sentencing judge to take the invalid incarcerations into account in fashioning new sentences if appellees are again convicted.[8]

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[8] We likewise reject appellees' argument that the dismissal of their indictments on § 4704 can be sustained on the basis that they were

Appellees also invoke the Double Jeopardy Clause to sustain the dismissal of the indictments, a ground which we think the trial court correctly rejected. The Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." That clause, designed to prohibit double jeopardy as well as double punishment, is not properly invoked to bar a second prosecution unless the "same offence" is involved in both the first and the second trials. The identity of offenses is, therefore, a recurring issue in double jeopardy cases, but one which we need not face in this case. Here the Government is not attempting to prosecute a defendant for an allegedly different offense in the face of an acquittal or an unreversed conviction for another offense arising out of the same transaction. See *Abbate* v. *United States,* 359 U. S. 187, 196, separate opinion of MR. JUSTICE BRENNAN. Nor is there any question here of the Government's joining in one indictment more than one count allegedly charging the same crime. Compare *Blockburger* v. *United States,* 284 U. S. 299. Here, the Government seeks only to sustain one charge under § 4704. If the present indictments charge the same offense as the § 4705 offense for which appellees were previously convicted, they may clearly be retried on either § 4705 or § 4704 after their convictions have been vacated on their own motions. In these circumstances, where the appellees are subject to a second trial under

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denied their Sixth Amendment rights "to be informed of the nature and cause of the accusation . . . ." Appellees did not present this ground for granting their motion in the trial court, and as we read his opinion the trial judge did not base his ruling on that ground. In any event, the claim is not that the second indictments did not carry adequate notice of the charges, which they obviously did, but that the notice came much too late, a contention which we have already disposed of.

Ball and *Tateo*, the fact that § 4704, rather than § 4705, is charged does not in any manner expand the number of trials that may be brought against them. If the two offenses are not, however, the same, then the Double Jeopardy Clause by its own terms does not prevent the current prosecution under § 4704.[9]

Reversed and remanded.

MR. JUSTICE BRENNAN, concurring in the result.

I am unable to join the Court's opinion, because it could be read as implying approval of a course of government conduct that I find most oppressive. Appellees were indicted initially under only one of the three statutes which this Court held in *Gore* v. *United States*, 357 U. S. 386, over my dissent, might constitutionally be applied to a single narcotics sale. Their successful at-

[9] This situation is to be distinguished from *Green* v. *United States*, 355 U. S. 184, where the defendant was indicted upon a charge of first-degree murder and was ultimately convicted of second-degree murder. Upon his successful appeal of that conviction the Government attempted to reprosecute him for first-degree murder. This Court held that the Double Jeopardy Clause prevented that prosecution on the alternative grounds either that the jury had returned an implied verdict of acquittal on the first-degree murder charge or that the jury was dismissed, without the defendant's consent and after he had been placed in jeopardy on the charge of first-degree murder, without returning any express verdict on that charge. Neither of these grounds is applicable here because the sole charge in the first indictment was on § 4705.

This situation should also be distinguished from that presented in *Ciucci* v. *Illinois*, 356 U. S. 571, and *Hoag* v. *New Jersey*, 356 U. S. 464. Those cases involved only the question whether the Fourteenth Amendment prevents a State from bringing successive prosecutions against a defendant where each prosecution alleges the same statutory offense and the same general transaction by the defendant but names different victims.

tacks upon their sentences brought on these new indictments for all three statutory offenses. I can think of no plausible reasons for this tactic except to increase the pressure on appellees to plead guilty by raising the threat of cumulative sentences, or to punish them for asserting their rights to challenge their original sentences. The Government offered to abandon this tactic and limit prosecution to 26 U. S. C. § 4704 (1964 ed.) only on rehearing, after the prosecution seemed imperiled.

Government tactics of this kind raise very serious questions for me. Cf. *Green* v. *United States,* 355 U. S. 184; *Abbate* v. *United States,* 359 U. S. 187, 196–201 (separate opinion); Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L. J. 606 (1965). But I agree with the Court that, because the prosecution is now limited to § 4704, appellees have suffered no prejudice. I would not, however, as the Court seems to do, imply approval of the tactics the Government employed. Indeed, the Government informed us after argument that this problem is involved in another case, pending below, where an accused initially indicted for only one offense has been reindicted for three. It does not appear that the Government has limited the prosecution in that case to § 4704.

MR. JUSTICE FORTAS, with whom MR. JUSTICE DOUGLAS joins, dissenting.

I cannot agree that the District Court erred in dismissing the second indictment. Following vacation of the convictions under the original indictment, the Government was at liberty to reindict and retry appellees for the same offense.[1] I agree with the opinion of the Court

[1] *United States* v. *Tateo,* 377 U. S. 463; *United States* v. *Ball,* 163 U. S. 662; Note, Double Jeopardy: The Reprosecution Problem, 77 Harv. L. Rev. 1272, 1283–1285 (1964).

that, in the circumstances, this would not have deprived appellees of their Sixth Amendment right to a speedy trial.

But the Government did not merely reindict appellees for the identical offense. They were charged, on the basis of the same alleged sale of 400 milligrams of heroin, with violations of two additional narcotics statutes. Under the original one-count indictment charging a violation of 26 U. S. C. § 4705 (a) (1964 ed.), Dennis faced a sentence of from five to 20 years; Ewell, a second offender, 10 to 40 years. Under the new three-count indictment, the District Court may cumulate the sentences on the three counts and impose terms of from 12 to 50 years upon Dennis and from 25 to 100 years upon Ewell. Cumulative sentences are permitted by this Court's holding in *Gore* v. *United States,* 357 U. S. 386. But cf. Comment, Twice in Jeopardy, 75 Yale L. J. 262, 299–317 (1965). In my opinion, however, the Government may not, following vacation of a conviction, reindict a defendant for additional offenses arising out of the same transaction but not charged in the original indictment.

In a different setting this Court has vividly criticized the Government's attempt to penalize a successful appellant by retrying him on an aggravated basis. *Green* v. *United States,* 355 U. S. 184. Although the decision in *Green* was premised upon the Double Jeopardy Clause,[2] its teaching has another dimension. *Green* also demonstrates this Court's concern to protect the right of appeal

[2] In *Green,* the Court held that the Double Jeopardy Clause required reversal of a federal conviction for first-degree murder where, in a former trial on that charge, the defendant was convicted of the lesser offense of murder in the second degree. Cf. MR. JUSTICE BRENNAN's separate opinion in *Abbate* v. *United States,* 359 U. S. 187, 196–201, discussing the applicability of double jeopardy principles to successive prosecutions based on the same transaction but for allegedly different offenses.

in criminal cases.[3] It teaches that the Government, in its role as prosecutor, may not attach to the exercise of the right to appeal the penalty that if the appellant succeeds, he may be retried on another and more serious charge. MR. JUSTICE BLACK, speaking for the Court in *Green,* said: "The law should not, and in our judgment does not, place the defendant in such an incredible dilemma." 355 U. S., at 193.[4]

In the present case it appears that the purpose as well as the effect of the Government's action was to discourage the exercise of the right, conferred by statute, to seek review of criminal convictions. According to the District Court, the only reason advanced by the Government for the multiplication of charges against appellees was that the prosecutor wanted to discourage others convicted of narcotics offenses from attacking their convictions. As the District Judge put it, there was "the expressed concern of the prospective liberation of a number of similarly convicted narcotic felons." [5] 242 F. Supp.

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[3] Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L. J. 606, 629 (1965); Note, 77 Harv. L. Rev., at 1287. See *Fay* v. *Noia,* 372 U. S. 391, 440; *Draper* v. *Washington,* 372 U. S. 487; *Lane* v. *Brown,* 372 U. S. 477; *Douglas* v. *California,* 372 U. S. 353; *Smith* v. *Bennett,* 365 U. S. 708; *Burns* v. *Ohio,* 360 U. S. 252; *Griffin* v. *Illinois,* 351 U. S. 12.

[4] Cf. *State* v. *Wolf,* 46 N. J. 301, 216 A. 2d 586 (1966); *People* v. *Henderson,* 60 Cal. 2d 482, 497, 386 P. 2d 677, 687 (1963).

[5] On the authority of *Lauer* v. *United States,* 320 F. 2d 187 (C. A. 7th Cir.), appellees had obtained vacation of their convictions on the ground that since the indictment did not name the alleged purchaser of narcotics it failed properly to state an offense under 26 U. S. C. § 4705 (a). The Government has furnished the Court with information concerning five other individuals whose convictions were set aside under *Lauer* and who were then subjected to reprosecution under multiple-count indictments. Subsequently, *Lauer* was overruled by *Collins* v. *Markley,* 346 F. 2d 230 (C. A. 7th Cir.).

451, at 456. The prosecutor's concern is understandable, but the right to direct and collateral review is granted by law. The prosecutor may not consistently with the Due Process Clause boobytrap this right, either to punish or to frighten.

It is no answer to the foregoing that after—and only after—the District Court had dismissed the entire three-count indictment, the Government in support of its petition for rehearing advised the court that "upon a plea or finding of guilty" all counts except that under 26 U. S. C. § 4704 (a) (1964 ed.) would be dismissed. This belated offer, conditioned upon a conviction, did not absolve the Government. The Government continued to insist upon going to trial on an unsupportable indictment. Even in its Notice of Appeal to this Court, the Government asserted its right to try the appellees upon the entire "present indictment." Not until the Solicitor General filed the jurisdictional statement was it suggested that the Government would agree to action taken to dismiss two of the counts—and that suggestion was negatively phrased: the Government "would not question dismissal" of the counts alleging violation of § 4705 (a) and 21 U. S. C. § 174 (1964 ed.). I cannot agree that this backhanded concession warrants our reversing the District Court's dismissal of the three-count indictment. The indictment is the Government's responsibility. It must stand the test of lawfulness as the Government presents it. The Government cannot rest upon a faulty indictment, and defend it by indicating its willingness to acquiesce in surgery which it is apparently unready to initiate.

In my view, this reindictment, greatly exceeding the original indictment in its charges and threatened penalties, was not a lawful basis upon which to put appellees to their defense. Apart from considerations of the impermissible purpose as found by the District Court, this

technique has the necessary effect of unlawfully burdening and penalizing the exercise of the right to seek review of a criminal conviction under federal law. This, in my opinion, is forbidden by the Due Process Clause. I would affirm the decision of the District Court, without prejudice, if other factors permit, to reindictment within the limits of the original charge.

Syllabus.

BROWN ET AL. *v.* LOUISIANA.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 41. Argued December 6, 1965.—Decided February 23, 1966.

For the purpose of peaceably protesting the denial of their constitutional right to equal treatment in a public facility, petitioners, five Negroes, entered the public room of a regional library operated on a segregated basis by the Louisiana parishes where they lived and another parish. No one was in the library room except petitioners and the library assistant. Petitioner Brown requested a book. The library assistant, after checking, advised that the library did not have the book but that she would request it from the State Library and that Brown would be notified upon its receipt. (The book was mailed to him at a later date, with instructions to mail it back or deliver it to the library's "Blue" bookmobile, a facility reserved for Negroes only.) Thereafter the library assistant asked petitioners to leave. But, for the purpose of manifesting silent protest against the library's segregation policy, Brown sat down and the others stood near him. There was no noise or boisterous talking. The branch librarian also asked petitioners to leave but they remained. In about 10 or 15 minutes from the time petitioners entered the library the sheriff and deputies arrived, having been forewarned, asked petitioners to leave, and were told that they would not. The sheriff then arrested them. Subsequently petitioners were convicted for violating the Louisiana breach of the peace statute, which makes it a crime "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby" to crowd or congregate in a public building and fail or refuse to disperse or move on when ordered to do so by a law enforcement officer or other authorized person. *Held:* The decision below is reversed. Pp. 133–151.

MR. JUSTICE FORTAS, joined by THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS, concluded that:

1. There is not the slightest evidence to sustain application of the breach of the peace statute to petitioners, since there was nothing to indicate an intent by them to provoke a breach of the peace and there were no circumstances to indicate that such a breach might be occasioned, the demonstration having been peaceful, orderly, and unprovocative, and no patrons having been

present in the library. Petitioners' conduct was considerably less disruptive than in any of the preceding three situations in which this Court invalidated convictions under the same Louisiana statute or its predecessor, *Garner* v. *Louisiana*, 368 U. S. 157; *Taylor* v. *Louisiana*, 370 U. S. 154; and *Cox* v. *Louisiana*, 379 U. S. 536. Pp. 133–135, 139–140.

2. The rights of peaceable and orderly protest which petitioners were exercising under the First and Fourteenth Amendments are not confined to verbal expression but embrace other types of expression, including appropriate silent and reproachful presence, such as petitioners used here. Therefore, even if such action came within the statute, it would have to be held that the statute could not constitutionally reach petitioners' actions in the circumstances of this case. Pp. 141–142.

3. Regulation of libraries and other public facilities must be reasonable and nondiscriminatory and may not be used as a pretext for punishing those who exercise their constitutional rights. P. 143.

MR. JUSTICE BRENNAN concluded that:

The Louisiana breach of the peace statute is unconstitutional for overbreadth, as this Court held in *Cox* v. *Louisiana*, 379 U. S. 536. No intervening limiting construction or legislative revision of the statute and no circumstance of this case make that declaration of invalidity any less controlling here. Pp. 143–150.

MR. JUSTICE WHITE concluded that:

Petitioners' convictions must be reversed since on this record it is shown that they were making only normal and authorized use of the public library by remaining 10 minutes after ordering a book. Pp. 150–151.

Reversed.

Carl Rachlin argued the cause for petitioners. With him on the brief were *Robert F. Collins, Nils R. Douglas, Murphy W. Bell, Floyd McKissick* and *Marvin M. Karpatkin.*

Richard Kilbourne argued the cause for respondent. With him on the brief were *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Carroll Buck,* First Assistant Attorney General.

MR. JUSTICE FORTAS announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join.

This is the fourth time in little more than four years that this Court has reviewed convictions by the Louisiana courts for alleged violations, in a civil rights context, of that State's breach of the peace statute. In the three preceding cases the convictions were reversed. *Garner* v. *Louisiana,* 368 U. S. 157, decided in December 1961, involved sit-ins by Negroes at lunch counters catering only to whites. *Taylor* v. *Louisiana,* 370 U. S. 154, decided in June 1962, concerned a sit-in by Negroes in a waiting room at a bus depot, reserved "for whites only." *Cox* v. *Louisiana,* 379 U. S. 536, decided in January 1965, involved the leader of some 2,000 Negroes who demonstrated in the vicinity of a courthouse and jail to protest the arrest of fellow demonstrators. In each of these cases the demonstration was orderly. In each, the purpose of the participants was to protest the denial to Negroes of rights guaranteed them by state and federal constitutions and to petition their governments for redress of grievances. In none was there evidence that the participants planned or intended disorder. In none were there circumstances which might have led to a breach of the peace chargeable to the protesting participants.[1]

[1] Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence. See *Cox* v. *Louisiana, supra,* at 551–552; *Wright* v. *Georgia,* 373 U. S. 284, 293; cf. *Terminiello* v. *Chicago,* 337 U. S. 1. Compare *Feiner* v. *New York,* 340 U. S. 315, where one speaker was haranguing 75 or 80 "restless" listeners; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 ("fighting words"); cf. *Niemotko* v. *Maryland,* 340 U. S. 268, 289 (concurring opinion of Frankfurter, J.). See generally on the problem of the "heckler's veto," Kalven, The Negro and the First Amendment, pp. 140–160 (1965).

In *Garner* the Court found the record utterly barren of evidence to support convictions under Title 14, Article 103 (7) of the Louisiana Criminal Code, which then defined the crime of "disturbing the peace" in specific detail.[2] The record contained no evidence of boisterous or disorderly actions or of "passive conduct likely to cause a public disturbance." 368 U. S., at 173–174. In *Taylor,* which arose under the Louisiana statute as amended to read in its present form, see p. 138, *infra,* the Court in a *per curiam* opinion set aside the convictions despite evidence of "restlessness" among the white onlookers. Finally, in *Cox,* the Court held that the facts would not permit application of Louisiana's breach of the peace statute, despite the large scale of the demonstrations and the fact that petitioner's speech occasioned "grumbling" on the part of white onlookers. Petitioner and the demonstrators as a group, though "well behaved," were far from silent, 379 U. S., at 543, 546.[3] As an "addi-

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[2] The statute then read: "Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public:

"(1) Engaging in a fistic encounter; or

"(2) Using of any unnecessarily loud, offensive, or insulting language; or

"(3) Appearing in an intoxicated condition; or

"(4) Engaging in any act in a violent and tumultuous manner by any three or more persons; or

"(5) Holding of an unlawful assembly; or

"(6) Interruption of any lawful assembly of people; or

"(7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public."

[3] While it was not disputed that the demonstration was "orderly and well-controlled," the demonstrators clapped and sang and petitioner spoke in protest of arrests of certain other civil rights demonstrators. In addition to the breach of the peace charge, Cox was charged with obstructing public passageways and with demonstrating near a courthouse. Convictions on these grounds were also reversed. See 379 U. S. 536, 559.

tional reason" why the conviction could not be sustained, the Court, citing *Terminiello* v. *Chicago,* 337 U. S. 1, and *Edwards* v. *South Carolina,* 372 U. S. 229, held that were the statute to be defined and applied as the Louisiana Supreme Court had done, it would be unconstitutional because the vagueness and breadth of the definition "would allow persons to be punished merely for peacefully expressing unpopular views." 379 U. S., at 551. See *Edwards* v. *South Carolina, supra,* at 237.

Since the present case was decided under precisely the statute involved in *Cox* but before our decision in that case was announced, it might well be supposed that, without further ado, we would vacate and remand in light of *Cox.* But because the incident leading to the present convictions occurred in a public library and might be thought to raise materially different questions, we have heard argument and have considered the case *in extenso.*

The locus of the events was the Audubon Regional Library in the town of Clinton, Louisiana, Parish of East Feliciana. The front room of the building was used as a public library facility where patrons might obtain library services. It was a small room, containing two tables and one chair (apart from the branch assistant's desk and chairs), a stove, a card catalogue, and open book shelves. The room was referred to by the regional librarian, Mrs. Perkins, as "the adult reading-room, the adult service-room." The library permitted "registered borrowers" to "browse" among the books in the room or to borrow books. A "registered borrower" was one who could produce an identification card showing that he was registered by the Audubon Regional Library. Other space in the building included the headquarters of the regional library.

The Audubon Regional Library is operated jointly by the Parishes of East Feliciana, West Feliciana, and St. Helena. It has three branches and two bookmobiles.

The bookmobiles served 33 schools, both white and Negro, as well as "individuals." One of the bookmobiles was red, the other blue. The red bookmobile served only white persons. The blue bookmobile served only Negroes. It is a permissible inference that no Negroes used the branch libraries.[4]

The registration cards issued to Negroes were stamped with the word "Negro." A Negro in possession of such a card was entitled to borrow books, but only from the blue bookmobile. A white person could not receive service from the blue bookmobile. He would have to wait until the red bookmobile came around, or would have to go to a branch library.

This tidy plan was challenged on Saturday, March 7, 1964, at about 11:30 a. m. Five young Negro males, all residents of East or West Feliciana Parishes, went into the adult reading or service room of the Audubon Regional Library at Clinton. The branch assistant, Mrs. Katie Reeves, was alone in the room. She met the men "between the tables" and asked if she "could help." Petitioner Brown requested a book, "The Story of the Negro" by Arna Bontemps. Mrs. Reeves checked the card catalogue, ascertained that the Branch did not have the book, so advised Mr. Brown, and told him that she would request the book from the State Library, that he would be notified upon its receipt and that "he could either pick it up or it would be mailed to him." She told him that "his point of service was a bookmobile or it could be mailed to him." Mrs. Reeves testified that she expected that the men would then leave; they did not, and she asked them to leave. They did not. Petitioner Brown sat down and the others stood near him. They said nothing; there was no noise or boisterous talking.

[4] The inference finds support in testimony both of the sheriff and of Mrs. Laura Spears, a witness for the defense who was employed as the assistant in charge of the blue bookmobile.

Mrs. Reeves called Mrs. Perkins, the regional librarian, who was in another room. Mrs. Perkins asked the men to leave. They remained.

Neither Mrs. Reeves nor Mrs. Perkins had called the sheriff, but in "10 to 15 minutes" from the time of the arrival of the men at the library, the sheriff and deputies arrived. The sheriff asked the Negroes to leave. They said they would not. The sheriff then arrested them. The sheriff had been notified that morning that members of the Congress of Racial Equality "were going to sit-in" at the library. Ordinarily, the sheriff testified, CORE tells him when they are going to demonstrate or picket. The sheriff was standing at his "place of business" when he saw "these 5 colored males coming down the street." He saw them enter the library. He called the jail to notify his deputies, and he reached the library immediately after the deputies got there. When the sheriff arrived, there was no noise, no disturbance. He testified that he arrested them "for not leaving a public building when asked to do so by an officer."

The library obtained the requested book and mailed it to Mr. Brown on March 28, 1964. An accompanying card said, "You may return the book either by mail or to the Blue Bookmobile." The reference to the color of the vehicle was obviously not designed to facilitate identification of the library vehicle. The blue bookmobile is for Negroes and for Negroes only.

In the course of argument before this Court, counsel for both the State and petitioners stated that the Clinton Branch was closed after the incident of March 7. Counsel for the State also advised the court that the use of cards stamped "Negro" continues to be the practice of the regional library.

On March 25, 1964, Mr. Brown and his four companions were tried and found guilty. Brown was sentenced to pay $150 and costs, and in default thereof to spend

90 days in the parish jail. His companions were sentenced to $35 and costs, or 15 days in jail. The charge was that they had congregated together in the public library of Clinton, Louisiana, "with the intent to provoke a breach of the peace and under circumstances such that a breach of the peace might be occasioned thereby" and had failed and refused "to leave said premises when ordered to do so" by the librarian and by the sheriff.

The Louisiana breach of peace statute under which they were accused reads as follows: "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 . . . in . . . a . . . 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 . . . or any other authorized person . . . shall be guilty of disturbing the peace." [5]

Under Louisiana law, these convictions were not appealable. See *Garner* v. *Louisiana, supra,* at 161–162. Petitioners sought discretionary review by the Louisiana Supreme Court, which denied their application, finding no error. This Court granted certiorari, 381 U. S. 901, and we reverse.

We may briefly dispose of certain threshold problems. Petitioners cannot constitutionally be convicted merely because they did not comply with an order to leave the library. See *Shuttlesworth* v. *City of Birmingham,* 382 U. S. 87, 90–91; *Wright* v. *Georgia,* 373 U. S. 284, 291–293; *Johnson* v. *Virginia,* 373 U. S. 61; cf. *Cox* v. *Louisiana, supra,* at 579 (separate opinion of MR. JUSTICE BLACK). The statute itself reads in the conjunctive; it requires both the defined breach of peace *and* an order to move on. Without reference to the statute, it

[5] La. Rev. Stat. § 14:103.1 (Cum. Supp. 1962).

must be noted that petitioners' presence in the library was unquestionably lawful. It was a public facility, open to the public. Negroes could not be denied access since white persons were welcome. *Wright* v. *Georgia, supra,* at 292; *Watson* v. *City of Memphis,* 373 U. S. 526; *Johnson* v. *Virginia, supra.* Petitioners' deportment while in the library was unexceptionable. They were neither loud, boisterous, obstreperous, indecorous nor impolite. There is no claim that, apart from the continuation—for ten or fifteen minutes—of their presence itself, their conduct provided a basis for the order to leave, or for a charge of breach of the peace.

We come, then, to the barebones of the problem. Petitioners, five adult Negro men, remained in the library room for a total of ten or fifteen minutes. The first few moments were occupied by a ritualistic request for service and a response. We may assume that the response constituted service, and we need not consider whether it was merely a gambit in the ritual. This ceremony being out of the way, the Negroes proceeded to the business in hand. They sat and stood in the room, quietly, as monuments of protest against the segregation of the library. They were arrested and charged and convicted of breach of the peace under a specific statute.

If we compare this situation with that in *Garner,* we must inevitably conclude that here, too, there is not the slightest evidence which would or could sustain the application of the statute to petitioners. The statute requires a showing either of "intent to provoke a breach of the peace," or of "circumstances such that a breach of the peace may be occasioned" by the acts in question. There is not in this case the slightest hint of either. We need not be beguiled by the ritual of the request for a copy of "The Story of the Negro." We need not assume that petitioner Brown and his friends were in search of a book for night reading. We instead rest upon the

manifest fact that they intended to and did stage a peaceful and orderly protest demonstration, with no "intent to provoke a breach of the peace." See *Garner* v. *Louisiana, supra,* at 174.

Nor were the circumstances such that a breach of the peace might be "occasioned" by their actions, as the statute alternatively provides. The library room was empty, except for the librarians. There were no other patrons. There were no onlookers except for the vigilant and forewarned sheriff and his deputies. Petitioners did nothing and said nothing even remotely provocative. The danger, if any existed, was surely less than in the course of the sit-in at the "white" lunch counters in *Garner.* And surely there was less danger that a breach of the peace might occur from Mrs. Katie Reeves and Mrs. Perkins in the adult reading room of the Clinton Branch Library than that disorder might result from the "restless" white people in the bus depot waiting room in *Taylor,* or from the 100 to 300 "grumbling" white onlookers in *Cox.* But in each of these cases, this Court refused to countenance convictions under Louisiana's breach of the peace statute.

The argument of the State of Louisiana, however, is that the issue presented by this case is much simpler than our statement would indicate. The issue, asserts the State, is simply that petitioners were using the library room "as a place in which to loaf or make a nuisance of themselves." The State argues that the "test"—the permissible civil rights demonstration—was concluded when petitioners entered the library, asked for service and were served. Having satisfied themselves, the argument runs, that they could get service, they should have departed. Instead, they simply sat there, "staring vacantly," and this was "enough to unnerve a woman in the situation Mrs. Reeves was in."

This is a piquant version of the affair, but the matter is hardly to be decided on points. It was not a game. It could not be won so handily by the gesture of service to this particular request. There is no dispute that the library system was segregated, and no possible doubt that these petitioners were there to protest this fact. But even if we were to agree with the State's ingenuous characterization of the events, we would have to reverse. There was no violation of the statute which petitioners are accused of breaching; no disorder, no intent to provoke a breach of the peace and no circumstances indicating that a breach might be occasioned by petitioners' actions. The sole statutory provision invoked by the State contains not a word about occupying the reading room of a public library for more than 15 minutes, any more than it purports to punish the bare refusal to obey an unexplained command to withdraw from a public street, see *Garner, supra,* or public building. We can find nothing in the language of the statute, in fact, which would elevate the giving of cause for Mrs. Reeves' discomfort, however we may sympathize with her, to a crime against the State of Louisiana. Cf. *Shuttlesworth* v. *City of Birmingham,* 382 U. S. 87, 101 (concurring opinion).

But there is another and sharper answer which is called for. We are here dealing with an aspect of a basic constitutional right—the right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the Government for a redress of grievances. The Constitution of the State of Louisiana reiterates these guaranties. See Art. I, §§ 3, 5. As this Court has repeatedly stated,[6] these

[6] See, *e. g., N. A. A. C. P.* v. *Button,* 371 U. S. 415, 428–431; *Garner* v. *Louisiana, supra,* at 201 (separate opinion of MR. JUSTICE HARLAN); *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 460–463; *Stromberg* v. *California,* 283 U. S. 359, 369. See Kalven, *op. cit. supra,* n. 1, at 129–138.

rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities.[7] Accordingly, even if the accused action were within the scope of the statutory instrument, we would be required to assess the constitutional impact of its application, and we would have to hold that the statute cannot constitutionally be applied to punish petitioners' actions in the circumstances of this case. See *Edwards* v. *South Carolina, supra,* at 235. The statute was deliberately and purposefully applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest the unconstitutional segregation of a public facility. Interference with this right, so exercised, by state action is intolerable under our Constitution. *Wright* v. *Georgia, supra,* at 292.

It is an unhappy circumstance that the locus of these events was a public library—a place dedicated to quiet, to knowledge, and to beauty. It is a sad commentary that this hallowed place in the Parish of East Feliciana bore the ugly stamp of racism. It is sad, too, that it was a public library which, reasonably enough in the circumstances, was the stage for a confrontation between those discriminated against and the representatives of the offending parishes. Fortunately, the circumstances here were such that no claim can be made that use of the library by others was disturbed by the demonstration. Perhaps the time and method were carefully chosen with this in mind. Were it otherwise, a factor not present in this case would have to be considered. Here, there was no disturbance of others, no disruption of library activities, and no violation of any library regulations.

[7] Cf. *Wright* v. *Georgia, supra.*

A State or its instrumentality may, of course, regulate the use of its libraries or other public facilities. But it must do so in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all. It may not do so as to some and not as to all. It may not provide certain facilities for whites and others for Negroes. And it may not invoke regulations as to use—whether they are *ad hoc* or general—as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights. Cf. *Wright* v. *Georgia, supra,* at 293.

The decision below is

Reversed.

MR. JUSTICE BRENNAN, concurring in the judgment.

Petitioners were charged with and convicted of violating the Louisiana statute, § 14:103.1, 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).

In *Cox* v. *Louisiana,* 379 U. S. 536, 551–552, the Court declared this statute as construed unconstitutional for overbreadth: it "is unconstitutional in that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly." This holding was

concurred in by my Brothers BLACK, 379 U. S. 559, 576–580, HARLAN, and WHITE, *id.*, at 591. No limiting construction [1] or legislative revision [2] has intervened, and no circumstance of this case makes that declaration of invalidity less controlling here. The overbreadth of the statute recognized in *Cox* therefore requires the reversal of these convictions.

The appellants in *Cox* were convicted for their conduct on public streets and sidewalks, while petitioners here were convicted for their conduct in a public library. Because of this it is contended in dissent, *post*, p. 157, that *Cox* and this case involve different "phases" of § 14:103.1—a "public street and sidewalk phase" in contrast to a "public building phase." Insofar as this dissection of the statute is meaningful, it does not make the holding of *Cox* inapplicable; [3] both phases are overbroad and the overbreadth of each poses a serious threat to the exercise of constitutional rights.

First. The overbreadth of § 14:103.1 discerned in *Cox* did not inhere in the terms "public street" or "public sidewalk"; it inhered in the phrase "breach of the peace" as interpreted by the Supreme Court of Louisiana to mean "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet." 379 U. S., at 551. Nothing in the Louisiana courts' decisions in this case rejects this interpretation of the phrase "breach of the peace" for the public building phase of

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[1] See *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87, 99 (concurring opinion); *Dombrowski* v. *Pfister*, 380 U. S. 479, 491, n. 7.

[2] Compare *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, and *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587, with *Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U. S. 684.

[3] In declaring the statute unconstitutional for overbreadth the Court in *Cox* relied heavily on *Terminiello* v. *Chicago*, 337 U. S. 1, a case involving the application of a breach of the peace ordinance to an individual purporting to exercise First Amendment rights in an auditorium, not on the streets or sidewalks.

§ 14:103.1; nor is there anything about a public building that would make this definition of the proscribed conduct inapplicable.

The public building phase of § 14:103.1, especially when read in context of the other phases, is not, contrary to the dissent's suggestion, *post*, p. 162, restricted to, nor even aimed at, "trespassers on government property"; Louisiana has a separate criminal statute, not at all involved in this prosecution, which explicitly deals with trespassing in public buildings.[4] Moreover, I reject the suggestion that this breach of the peace statute, making refusal to obey an order "to disperse and move on" an element of the crime, is as narrow as a sufficiently specific trespass statute explicitly concerned with trespassing on government property that also makes refusal to obey an order to keep off or leave the property an element of the crime. Because this statute seeks to curb breaches of the peace and risks of such breaches occurring through crowding, it apparently permits a wide range of persons to issue the requisite order, no formal or customary procedures need be followed in issuing the order, and instantaneous and unquestioning compliance with the order is required. For example, the trial court below, in applying § 14:103.1, assumed that as a matter of state law any employee of the library would have the authority to issue the order "to disperse and move on"

[4] La. Acts 1963, No. 91, amending and re-enacting La. Rev. Stat. § 14:63.3 (Cum. Supp. 1962). The dissent refers to subdivision (4) of § 14:103.1 to support its view that subdivision (1), the basis for the charges and the convictions, "is to all intents and purposes aimed at trespassers on government property." *Post*, p. 162. However, subdivision (4) is also modified by the introductory clause "Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby"; and thus to establish a violation of that subdivision more than the refusal to leave the "premises of another" after an order to do so would have to be proved.

simply as the occasion arose and that petitioners were expected to immediately comply with the order even though they might have reasonably thought they were being ejected simply to preserve the segregated character of the library. Cf. *Wright* v. *Georgia,* 373 U. S. 284, 291–292.

Second. The danger posed by the Louisiana courts' definition of "breach of the peace"—that it might sweep within its broad scope activities that are constitutionally protected—is no less present when read in conjunction with "public building" than when read with "public street" and "public sidewalk." The constitutional protection for conduct in a public building undertaken to desegregate governmental services provided therein derives from both the First Amendment guarantees of freedom of speech, petition and assembly,[5] and

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[5] Cf. *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 428–431; *Garner* v. *Louisiana,* 368 U. S. 157, 201–202 (opinion of MR. JUSTICE HARLAN): "There was more to the conduct of those petitioners than a bare desire to remain at the 'white' lunch counter and their refusal of a police request to move from the counter. We would surely have to be blind not to recognize that petitioners were sitting at these counters, where they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country.

"Such a demonstration, in the circumstances of these two cases, is as much a part of the 'free trade in ideas,' *Abrams* v. *United States,* 250 U. S. 616, 630 (Holmes, J., dissenting), as is verbal expression, more commonly thought of as 'speech.' It, like speech, appeals to good sense and to 'the power of reason as applied through public discussion,' *Whitney* v. *California,* 274 U. S. 357, 375 (Brandeis, J., concurring), just as much as, if not more than, a public oration delivered from a soapbox at a street corner. This Court has never limited the right to speak, a protected 'liberty' under the Fourteenth Amendment, *Gitlow* v. *New York,* 268 U. S. 652, 666, to mere verbal expression. *Stromberg* v. *California,* 283 U. S. 359; *Thornhill* v. *Alabama,* 310 U. S. 88; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 633–634. See also *N. A. A. C. P.* v. *Ala-*

the Equal Protection Clause's prohibition against racial segregation of governmental services and facilities. Overbreadth in the public building phase might inhibit the exercise of these constitutional rights by threatening punishment of the initial efforts to secure such desegregation. For example, the public building phase of § 14:103.1 might be read as reaching the conduct of two Negroes who did nothing more than enter a library restricted to whites, request a book and refuse to leave when ordered to do so before service was rendered. The conduct of the two Negroes would be as constitutionally protected as the conduct of the Negro who refused to leave the white section of a segregated courtroom, *Johnson* v. *Virginia*, 373 U. S. 61, and yet their conduct would be punishable under § 14:103.1 because their purpose could be deemed "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet."

In light of these possible clearly unconstitutional applications of the statute, we need not decide whether petitioners' actual conduct is constitutionally protected; for "in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar." *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 432. It suffices that petitioners' conduct was arguably constitutionally protected and was "not the sort

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bama, 357 U. S. 449, 460. If the act of displaying a red flag as a symbol of opposition to organized government is a liberty encompassed within free speech as protected by the Fourteenth Amendment, *Stromberg* v. *California*, *supra*, the act of sitting at a privately owned lunch counter with the consent of the owner, as a demonstration of opposition to enforced segregation, is surely within the same range of protections."

Public buildings often provide a forum for more traditional forms of First Amendment activity, such as verbal expression. See, *e. g.*, *Thomas* v. *Collins*, 323 U. S. 516 (city hall); *Terminiello* v. *Chicago*, 337 U. S. 1 (auditorium open to public in privately owned building).

of 'hard-core' conduct that would obviously be prohibited under any construction" [6] of § 14:103.1. It was engaged in to achieve desegregation of the library through a request for service and a protest, expressed by petitioners' continued presence. Petitioners were orderly and quiet. Their continued presence, for a relatively short period of time, did not interfere with the functioning of the library. Their presence might have embarrassed and unnerved the librarians, who had in the past faithfully observed the policy of segregation; but such "vague disquietudes" [7] do not take petitioners' conduct outside the appropriate limits. The sheriff gave petitioners no reason for the order to leave,[8] and thus petitioners might

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[6] *Dombrowski* v. *Pfister,* 380 U. S., at 491–492.

[7] *Watson* v. *City of Memphis,* 373 U. S. 526, 535–536. See generally *Buchanan* v. *Warley,* 245 U. S. 60, 81; *Cooper* v. *Aaron,* 358 U. S. 1, 16; *Taylor* v. *Louisiana,* 370 U. S. 154, 156; *Wright* v. *Georgia,* 373 U. S., at 293; *Cox* v. *Louisiana,* 379 U. S., at 551.

[8] On cross-examination the sheriff testified as follows:

"Q. Sheriff, did you arrest these people, these defendants, because you considered their action going into the Library as a demonstration?

"A. I arrested them because the occupants of the building had asked them to leave, and so had I; it was a public building and they refused to leave.

. . . . .

"Q. What did you tell them when you went in, Sheriff, did you have any conversations with these people?

"A. Not with them, I talked to Mrs. Perkins, and she told me that she had taken their application and had asked them to leave, and they wouldn't, and I asked them to leave. Henry Brown told me it was a public library, the rest of them didn't say anything.

"Q. Did Brown mention anything to you about wanting a book on the Constitution of the United States?

"A. He did not.

"Q. After Brown told you that it was a public library, what did you say then?

"A. I don't know of anything that I said. I was assured that Mrs.

have reasonably believed that they were being ejected only because they were Negroes seeking to exercise their constitutional rights; [9] as my Brother BLACK observed in *Feiner* v. *New York*, 340 U. S. 315, 327, "at least where time allows, courtesy and explanation of commands are basic elements of good official conduct in a democratic society."

Since the overbreadth of § 14:103.1 as construed clearly requires the reversal of these convictions,[10] it is wholly unnecessary to reach, let alone rest reversal, as

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Perkins had asked them to leave since they didn't have the book they wanted.

"Q. Did you, at that point, ask them to leave?

"A. I did.

"Q. When you——

"A.—And I also told them that they had the choice of leaving, or be arrested for not leaving a public building when asked to do so by an officer.

"Q. When you got there, Sheriff, was anybody making any noise?

"A. No noise.

. . . . .

"Q. Prior to your asking these defendants to leave, did you ask each of them, all of them, whether or not they intended to use the reference-books at the Library?

"A. I didn't ask them what they intended to do, and they didn't state at that time what they were doing there."

[9] See *Wright* v. *Georgia*, 373 U. S., at 291–292: "Obviously . . . one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution."

[10] This ground of reversal makes it unnecessary to decide whether subdivision (1) of § 14:103.1 embodies an invidious discrimination because it contains the following exemption: "[N]othing 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 . . . ." My Brother BLACK in his opinion in *Cox* v. *Louisiana*, 379 U. S., at 581, found the obstructing public passages statute (La. Rev. Stat. § 14:100.1 (Cum. Supp. 1962)) to embody "an invidious discrimination forbidden by

the prevailing opinion seems to do, on the proposition that even a narrowly drawn "statute cannot constitutionally be applied to punish petitioners' actions in the circumstances of this case."

MR. JUSTICE WHITE, concurring in the result.

Were it clear from this record that lingering in a public library for 10 minutes after ordering a wanted book contravened some explicit statute, ordinance, or library regulation of general application, or even if it were reasonably clear that a 10-minute interlude between receiving service and departure exceeded what is generally contemplated as a normal use of a public library, I would have difficulty joining in a reversal of this case, for in either of these events, I would consider a refusal to leave the library and an insistence upon violating a generally applicable condition concerning the use of the library evidence of an intent to breach the peace constitutionally sufficient to sustain a conviction. Nor would I deem the First Amendment to forbid a municipal regulation limiting loafing in library reading rooms.

But nothing of the kind comes through to me in this record. There is no such ordinance or regulation and it can hardly be said that the brief sojourn in this parish library departed so far from the common practice of library users. The petitioners were there but a very brief period before being asked to leave, they were quiet and orderly, they interfered with no other library users and for all this record reveals they might have been considering among themselves what to do with the rest of their day. I think that the petitioners were entitled to be where they were for the time that they remained, and it is difficult to believe that if this group had been white its members would have been asked to leave on such

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the Equal Protection Clause of the Fourteenth Amendment" because it contained the same exemption from its coverage for labor union activities.

short notice, much less asked to leave by the sheriff and arrested, rather than merely escorted from the building, when reluctance to leave was demonstrated. That the library was a segregated institution and was not in the habit of allowing Negroes in the building only underlines this situation. In my view, the behavior of these petitioners and their use of the library building, even though it was for the purposes of a demonstration, did not depart significantly from what normal library use would contemplate.

The conclusion that petitioners were making only a normal and authorized use of this public library requires the reversal of their convictions. Petitioners' entering the library and refusing to forgo a use of the library normally permitted members of the public is no evidence, in the circumstances of this case, of any intent to breach the peace. Moreover, if the petitioners were making a use of the library normally permitted whites, why were they asked to leave the library? They were quiet, orderly, and exhibited no threatening or provocative behavior. The library had been a segregated institution, has been closed since the incident involved in this case, and the petitioners were advised they could pick up the desired book at the blue bookmobile. The State arrested petitioners because they refused to leave the library but offers no convincing explanation for why they were asked to leave. On this record, it is difficult to avoid the conclusion that petitioners were asked to leave the library because they were Negroes. If they were, their convictions deny them equal protection of the laws.

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

I do not believe that any provision of the United States Constitution forbids any one of the 50 States of the

Union, including Louisiana, to make it unlawful to stage "sit-ins" or "stand-ups" in their public libraries for the purpose of advertising objections to the State's public policies. That, however, is precisely what the Court or at least a majority of the Court majority [1] here holds that all the States are forbidden to do by our Constitution. I dissent. The three opinions written for the majority of five who reverse these convictions make it necessary for me to state the relevant facts, circumstances, and issues in this case as I view them.

Representatives of the Congress of Racial Equality (CORE) claimed that Negroes had been "locked out" of libraries operated jointly by three Louisiana parishes. A "demonstration was planned" by the organization "to integrate the Library," and accordingly these five petitioners, all Negroes, went to the Audubon Regional Library located at Clinton, Louisiana, on a Saturday morning about 11:30 "to sit-in at the Library." The county sheriff, whose office was in the courthouse within sight of the library building, had received information that "they [referring to CORE] were going to sit-in, or that something was going to take place at the Library that morning," and noticed the petitioners when they went by his office on their way to the library. Upon arrival at the library petitioners were met inside the building by Mrs. Reeves, who was the assistant librarian. She courteously asked them if she could help them in any way. One of the group, petitioner Brown, handed her a slip of paper on which was written the title of a book which he said he wanted. Mrs. Reeves went to her

[1] There are three separate opinions which support reversal of the decision below. The opinion of my Brother FORTAS, which for convenience I will call the majority's "prevailing" opinion, is joined by THE CHIEF JUSTICE and my Brother DOUGLAS. My Brothers BRENNAN and WHITE each concur in the result of the prevailing opinion, but reach that result on different grounds.

shelves and her catalogues, and after making a search, came back and told Mr. Brown that the library did not have the book, but that she could request it from the state library and probably get it for him. She told him she would do this. Mr. Brown then sat down in the only chair in the library room other than the chair at Mrs. Reeves' desk, and the other four petitioners stood around him. When petitioners did not leave, Mrs. Reeves told the group again that she would send for the book, and when Mr. Brown continued to sit and the others continued to stand, she asked them to leave. They did not leave, so Mrs. Reeves then called Mrs. Perkins, the regional librarian, and told Mrs. Perkins about the situation. Mrs. Perkins went to Mr. Brown and told him she did not know whether he understood that a request for the book he had asked for would be sent to the state library. Along about that time Mr. Brown said to Mrs. Perkins, "what about the Constitution?" but did not request that any copy of the Constitution be given to him. Mrs. Perkins then repeated the request of Mrs. Reeves that petitioners leave the library telling them "that the one who seemed to want something had been served." About 10 or 15 minutes after the petitioners came to the library, when according to Mrs. Perkins' testimony she was just about to call the sheriff over the phone, the sheriff came into the library. Mrs. Perkins explained to him that Mrs. Reeves had taken petitioners' application for the book they wanted, that the book was not available, that she and Mrs. Reeves had both requested the petitioners to leave, and that they would not do so. After learning these facts, the sheriff also asked petitioners to leave the library building and stated that he would have to arrest them if they did not. The petitioners refused to leave, and speaking for the group petitioner Brown told the sheriff

"that he was not going to leave the Library." Thereupon the sheriff immediately arrested all of them. Petitioners, while in the library, never talked in unusually loud voices and used no bad language. Beyond Mr. Brown's request for the book which the library did not have, none of the petitioners at any time prior to his arrest requested any further service of either of the librarians, nor did any petitioner in any other way seek to read in the library or otherwise use any of the library's facilities except for sitting and standing purposes.

The Clinton branch of the Audubon Regional Library is not a large one. It appears to be used almost entirely as a circulating and not a reading library. The duty of Mrs. Reeves, assistant librarian, according to her testimony which was not disputed, was "To assist people who come into the Library to select their books; check out the books to them; to keep the shelves in order, and to keep a record of the circulation of the day." In the library's "lobby," where the events of this case took place, there were book shelves and one table on each side; also in the room were a desk and chair for the librarian, and one other chair. The two tables were used mainly for book display and magazines. It was not against the policy of the library to allow citizens with library registration cards to read if they cared to. But according to Mrs. Reeves' testimony at trial, "very few people read; if a book is there and they want it, they take it and go." Mrs. Perkins testified that "We do not maintain a reading-room, as such, we do not have the space for it." Mrs. Perkins later referred to the "lobby" as the "adult reading-room, the adult service-room."

The particular part of the Louisiana statute,[2] under which petitioners were convicted, contrary to implica-

[2] La. Rev. Stat. § 14:103.1 (Cum. Supp. 1962).

tions in the other opinions, has never been before this Court previous to this time. It provides as follows:

> "Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby . . . congregates with others . . . in any . . . public . . . building . . . , and who fails or refuses to . . . move on, when ordered so to do by any law enforcement officer of any municipality . . . or any other authorized person . . . shall be guilty of disturbing the peace."

The information against these petitioners charged, substantially in the language of the statute, that petitioners failed and refused to leave the library when ordered to do so by Mrs. Perkins who was in lawful charge of the library and also failed to leave the premises when ordered to do so by the sheriff.

Because I think that the crucial issues to be decided here are much narrower and far less complicated than the prevailing opinion implies, I find it necessary first to point out that several matters discussed in that opinion are, in my judgment, either irrelevant, or do not justify the inferences drawn from them.

I.

In concluding to reverse these convictions the prevailing opinion relies almost entirely on three prior breach of the peace cases which have come to this Court from the State of Louisiana, and *Edwards* v. *South Carolina,* 372 U. S. 229. I think that none of these four cases has any appreciable bearing on what the Court should hold in this case.

(a) The first of these cases is *Garner* v. *Louisiana,* 368 U. S. 157, decided in December 1961. That case, in-

volving "sit-in" demonstrations at several lunch counters, was decided under an old Louisiana breach of the peace statute. The section involved here was added to the old law after the events described in that case took place, but before the Court's opinion. The old law considered in *Garner* did not contain any phrase similar to the one under consideration here which makes it an offense to disturb the peace by congregating in a public building over the protest of a person rightfully in charge of the building. Moreover, the majority of the Court in *Garner,* in construing the old law, noted the presence of the new section, and expressly contrasted its reach with that of the older statute. 368 U. S., at 168–169. There are other significant differences between *Garner* and this case, but the fact that *Garner* involved an almost entirely different statute, which was expressly distinguished from the present one by the Court's opinion, makes it hard for me to see how the Court's *Garner* holding can provide any meaningful support for the reversal of these convictions.

(b) The second Louisiana breach of the peace case upon which the prevailing opinion relies for reversal is *Taylor* v. *Louisiana,* 370 U. S. 154. That case as described today in the prevailing opinion "concerned a sit-in by Negroes in a waiting room at a bus depot, reserved 'for whites only.' " In *Taylor,* the Court in a short *per curiam* opinion held merely that the breach of the peace convictions could not be supported where "the only evidence to support the charge was that petitioners were violating a custom that segregated people in waiting rooms according to their race" contrary to federal law. 370 U. S., at 156. There was no indication in that case that persons, having no business whatever in a bus depot except to stage a public protest against some state policy, have a constitutional

right to occupy the depot's space after having been requested by competent authorities to leave.

(c) The case relied on most heavily by the prevailing opinion and my Brother BRENNAN is *Cox* v. *Louisiana,* 379 U. S. 536. That case, unlike this one, involved picketing and patrolling in the streets, and correspondingly that part of the Louisiana breach of the peace statute which prohibited certain kinds of street activity. The language of the phase of the statute under consideration here, relating to congregating in public buildings and refusing to move on when ordered to do so by an authorized person, was in no way involved or discussed in *Cox.* The problems of state regulation of the streets on the one hand, and public buildings on the other, are quite obviously separate and distinct. Public buildings such as libraries, schoolhouses, fire departments, courthouses, and executive mansions are maintained to perform certain specific and vital functions. Order and tranquillity of a sort entirely unknown to the public streets are essential to their normal operation. Contrary to the implications in the prevailing opinion it is incomprehensible to me that a State must measure disturbances in its libraries and on the streets with identical standards. Furthermore, the vice of discriminatory enforcement, which contaminates the "public street" phase of this statute,[3] does not beset the statute's application to activity in public buildings. In the public building, unlike the street, peace and quiet is a fast and necessary rule, and as a result there is much less room for peace officers to abuse their authority in enforcing the "public building" part of the statute.

In my Brother BRENNAN'S separate concurring opinion the contention seems to be made that in *Cox* this

[3] See my concurring opinion in *Cox* v. *Louisiana,* 379 U. S. 559, 578–580.

Court declared as unconstitutionally vague not only the part of the Louisiana statute under which Cox was convicted relating to picketing in the streets, but also the part creating the offense under which petitioners here were convicted. If this is true it means that in *Cox* the Court declared unconstitutional both the parts of the statute creating the offenses involved in the *Cox* case and this one, and also all of the some 30-odd separate and diverse offenses enumerated in the statute ranging from the making of obscene remarks and gestures, to causing a disturbance on a public bus, to refusing to leave the private premises of another when asked to do so by the owner. If the Court's holding was that broad it has placed in great jeopardy every breach of the peace statute in this country. I do not think the Court intended to do any such thing. I can see nothing in the Court's opinion in *Cox* or in any of the concurring opinions, one of which I wrote, which indicates an intention to make such a sweeping condemnation of breach of the peace statutes. In *Cox* this Court held unconstitutional the part of the statute under which Cox was convicted because as construed by the Louisiana Supreme Court it authorized "persons to be punished merely for peacefully expressing unpopular views." 379 U. S., at 551. The part of the statute involved here which makes it an offense to congregate in a public building and refuse to leave it when asked to do so by an authorized person, does not affect or threaten in any way an exercise of the rights of free speech, and the Louisiana courts did not so construe this phase of the statute as they had construed the part under which Cox was convicted. The phase of the statute under scrutiny in this case clearly and precisely regulates certain particular conduct in language which taken as a whole has no ambiguity whatever. Persons of ordinary intelligence would have no difficulty whatever in knowing that this part of the statute requires them to

move on from a public building when an authorized person asks them to do so. See *United States* v. *Petrillo,* 332 U. S. 1, 5–8. The only conduct reached by this part of the statute is a refusal to move on when requested to do so by an authorized person and this conduct is described in words declared in *Cox* to be "narrow and specific." [4] 379 U. S., at 551. Since petitioners here had no library business whatever the Constitution of the United States does not require that they be permitted to remain in the library despite state law to the contrary.

(d) The fourth case which the prevailing opinion cites as indicating that the "public building" phase of the Louisiana statute is unconstitutional is *Edwards* v. *South Carolina,* 372 U. S. 229. This Court's holding in the *Edwards* case, however, was based on the fact that the statute construed there was not narrowly drawn to assure its nondiscriminatory application. Here the part of the Louisiana statute relating to public buildings, as construed and applied by the Louisiana courts, does clearly describe the offense. Nothing in *Edwards* as I read it, states any principle of constitutional law under which a State must permit its public libraries, dedicated to reading and learning and studying, to be used for the purpose of conducting protests against public or private policies. And that is the constitutional issue in the present case.

I find nothing in these four cases, nor in any other case decided by this Court that I can recall, which re-

[4] A condition under which this conduct is punishable is that it be entered into "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby." In the context of the *Cox* case relating to activity on the public streets this Court held this language unconstitutionally vague. But as I have pointed out above, the Court could not have meant that every disturbing the peace statute which contains this language is unconstitutional.

stricts Louisiana's power to enforce that part of its statute on which these convictions rest in order to maintain peace and order in its public libraries so as to further the extremely necessary purposes underlying their existence.

II.

The prevailing opinion and to some extent the two separate concurring opinions treat this case as though Louisiana was here attempting to enforce a policy of denying Louisiana citizens the right to use the State's libraries on account of race. Whatever may have been the policy of the State of Louisiana in the past or may be the policy of that State at the present, at other places or in other circumstances, there simply was no racial discrimination practiced in this case. These petitioners were treated with every courtesy and granted every consideration to which they were entitled in the Audubon Regional Library. They asked for a book, perhaps as the prevailing opinion suggests more as a ritualistic ceremonial than anything else. The lady in charge nevertheless hunted for the book, found she did not have it, sent for it, and later obtained it from the state library for petitioners' use.[5] No petitioner asked for any other book, none indicated that he wanted to read any other book, and none attempted to read any other book or any other printed matter. As a matter of fact the record shows, and the prevailing opinion admits, that the five petitioners stayed in the library not to use it for learning but as "monuments of protest" to voice their disapproval of what they

[5] The note describing the book he wanted which petitioner Brown gave Mrs. Reeves read, "Wendall Arna, the Story of the Negro: Bontems." This information apparently described no printed book. The book which was obtained from the state library for petitioners' use was The Story of the Negro, by Arna Bontemps.

thought was a policy of the State. Although Mrs. Perkins, the branch's librarian, testified unambiguously that there was no racial discrimination practiced at her library, and although the record shows without the slightest dispute that there was no discrimination of any kind or character practiced against these petitioners, in at least the prevailing opinion and that of my Brother WHITE it is nevertheless implied at several places that the equal treatment given these petitioners was some kind of subterfuge or sham. These aspersions are I think wholly without justification. The prevailing opinion refers to the "tidy plan" of the State; with reference to the service given petitioners it says that "We may assume that the response constituted service, and we need not consider whether it was merely a gambit in the ritual"; it insinuates that Louisiana was playing a "game" with petitioners' rights, and the courteous treatment given petitioners by the librarian is degraded by calling it a "gesture of service"; it, moreover, refers to the State's argument in this case as giving a "piquant version of the affair." I see no basis or reason for these innuendos against the State's defense of its convictions in this case. The State's District Attorney, who argued the case before us, stated frankly and forthrightly that there would be no defense had Louisiana denied these petitioners equal service at its public libraries on account of their race. There was no such denial. We must now consider the Court's reversal on its merits.

III.

As best I can tell, one ground upon which both the prevailing opinion and that of my Brother WHITE rely to reverse these convictions is that the State failed to prove its case. This conclusion appears to be based on the assumption that under the Louisiana statute properly

construed, there can be no conviction unless persons who do not want library service stay there an unusually long time after being ordered to leave, make a big noise, use some bad language, engage in fighting, try to provoke a fight, or in some other way become boisterous. The argument seems to be that without a blatant, loud manifestation of aggressive hostility or an exceedingly long "sit-in" or "sojourn" in a public library, there are no circumstances which could foreseeably occasion a breach of the peace. Louisiana has not so construed its statute nor should we. Doing so goes against common sense and common understanding. While soft words can undoubtedly turn away wrath, they may also provoke it. Disturbers of the peace do not always rattle swords or shout invectives. It is high time to challenge the assumption in which too many people have too long acquiesced, that groups that think they have been mistreated or that have actually been mistreated have a constitutional right to use the public's streets, buildings, and property to protest whatever, wherever, whenever they want, without regard to whom such conduct may disturb.

The phase of the Louisiana statute that we are considering here is to all intents and purposes aimed at trespassers on government property. In addition, subdivision (4) of the same Louisiana law makes it an offense for one to refuse to leave the premises of another when requested to do so by the owner. Both of these provisions of the state statute, however, provide that before an offense is committed, the conduct must be engaged in "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby." There is a long history behind trespass laws in the United States. Invasion of another man's property over his protest is one of the surest ways any person can pick out to disturb the peace.

Louisiana, just like any other State in this Union, has a right to pass and use laws based on knowledge of this fact, a knowledge so widespread and prevalent that it would probably be difficult to find a hermit ignorant of its existence.

I think that the evidence in this case established every element in the offense charged against petitioners. No one disputes the fact that petitioners congregated in a public building and refused to move on when ordered to do so by authorized persons. The only factual question which can possibly arise regarding the application of the statute here is whether under Louisiana law petitioners either intended to breach the peace or created circumstances under which a breach might have been occasioned. The record shows that petitioners, as part of a plan, entered the library and once there stayed despite the librarians' protests until its normal activity was completely disrupted. To be sure, there were not "100 to 300 'grumbling' white onlookers" as there were in *Cox* v. *Louisiana, supra,* but surely, in the prevailing opinion's futile effort to rely on *Cox,* it is not meant that 300 or 100 grumbling onlookers must be crowded into a library before Louisiana can maintain an action under this statute. A tiny parish branch library, staffed by two women, is not a department store as in *Garner* v. *Louisiana, supra,* nor a bus terminal as in *Taylor* v. *Louisiana, supra,* nor a public thoroughfare as in *Edwards* v. *South Carolina, supra,* and *Cox.* Short of physical violence, petitioners could not have more completely upset the normal, quiet functioning of the Clinton branch of the Audubon Regional Library. The state courts below thought the disturbance created by petitioners constituted a violation of the statute. So far as the reversal here rests on a holding that the Louisiana statute was not violated, the Court simply substitutes its judgment

for that of the Louisiana courts as to what conduct satisfies the requirements of that state statute. We are a long way off from what happened there to substitute our judgment for theirs. To do so not only upsets settled doctrine concerning the interpretation of state statutes by federal courts, see, *e. g., Garner* v. *Louisiana, supra,* at 166; *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, 688, but also builds on shifting sands that ignore the realities of life in our country.

IV.

Having already attempted to hold, wrongfully I think, that these convictions should be set aside as unconstitutional because of a complete lack of evidence to prove the charge, the prevailing opinion ventures out in an attempt to decide other constitutional questions. It says:

> "Accordingly, even if the accused action were within the scope of the statutory instrument, we would be required to assess the constitutional impact of its application, and we would have to hold that the statute cannot constitutionally be applied to punish petitioners' actions in the circumstances of this case."

I have sometimes thought that this Court has gone entirely too far in refusing to decide constitutional questions on the ground that they should be avoided where possible. The journey here, however, goes entirely too far in the opposite direction. Apparently unsatisfied with or unsure of the "no evidence" ground for reversing the convictions, the prevailing opinion goes on to state that the statute was used unconstitutionally in the circumstances of this case because it was "deliberately and purposefully applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest the unconstitutional segregation of a public facility." First, I am

constrained to say that this statement is wholly unsupported by the record in this case. There is simply no evidence in the record at all that petitioners were arrested because they were exercising the "right to protest." It is nevertheless said that this was the *sole* reason for the arrests. Moreover, the conclusion that the statute was unconstitutionally applied because it interfered with the petitioners' so-called protest establishes a completely new constitutional doctrine. In this case this new constitutional principle means that even though these petitioners did not want to use the Louisiana public library for library purposes, they had a constitutional right nevertheless to stay there over the protest of the librarians who had lawful authority to keep the library orderly for the use of people who wanted to use its books, its magazines, and its papers. But the principle espoused also has a far broader meaning. It means that the Constitution (the First and the Fourteenth Amendments) requires the custodians and supervisors of the public libraries in this country to stand helplessly by while protesting groups advocating one cause or another, stage "sit-ins" or "stand-ups" to dramatize their particular views on particular issues. And it should be remembered that if one group can take over libraries for one cause, other groups will assert the right to do so for causes which, while wholly legal, may not be so appealing to this Court. The States are thus paralyzed with reference to control of their libraries for library purposes, and I suppose that inevitably the next step will be to paralyze the schools. Efforts to this effect have already been made all over the country. Furthermore, here it seems to have made no difference whatever that the Audubon Regional Library, at least in this instance, satisfied its constitutional duty by giving these petitioners its services in full measure without regard to their race.

The constitutional doctrine that actually prevails in this Court today for the first time in its history rests at least in great part on the Court's interpretation of the First Amendment as carried into the States by the Fourteenth. This is the First Amendment which, as I have said in the past, is to me the very heart of our free government without which liberty and equality cannot exist.[6] But I have never thought and do not now think that the First Amendment can sustain the startling doctrine the prevailing opinion here creates. The First Amendment, I think, protects speech, writings, and expression of views in any manner in which they can be legitimately and validly communicated. But I have never believed that it gives any person or group of persons the constitutional right to go wherever they want, whenever they please, without regard to the rights of private or public property or to state law. Indeed a majority of this Court said as much in *Cox* v. *Louisiana,* 379 U. S. 559, 574. Though the First Amendment guarantees the right of assembly and the right of petition along with the rights of speech, press, and religion, it does not guarantee to any person the right to use someone else's property, even that owned by government and dedicated to other purposes, as a stage to express dissident ideas. The novel constitutional doctrine of the prevailing opinion nevertheless exalts the power of private nongovernmental groups to determine what use shall be made of governmental property over the power of the elected governmental officials of the States and the Nation.

The prevailing opinion seems to find some comfort in its very questionable assumption that in this case "no claim can be made that use of the library by others was

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[6] See my dissenting opinion in *Drivers Union* v. *Meadowmoor Co.* 312 U. S. 287, 301–302.

disturbed by the demonstration. Perhaps the time and method were carefully chosen with this in mind." If this was the reason Saturday morning was selected, the only representative of CORE who testified was not aware of it.[7] No one of the petitioners has suggested such a thing. The lawyers for the petitioners have not. In fact at the trial responses of the sheriff to questions asked him by petitioners' lawyer indicate that there was another patron in the library at the time the petitioners "sat in" or "stood up" there. But even if there were no other patrons there in this instance, with this new constitutional doctrine rather shakily established, it is pretty clear that organized protesters will not overlook the chance to go into the libraries, and disturb those in there to learn, at a time when their "demonstration" activities will obtain the most publicity.

The prevailing opinion laments the fact that the place where these events took place was "a public library—a place dedicated to quiet, to knowledge, and to beauty." I too lament this fact, and for this reason I am deeply troubled with the fear that powerful private groups throughout the Nation will read the Court's action, as I do—that is, as granting them a license to invade the tranquillity and beauty of our libraries whenever they have quarrel with some state policy which may or may not exist. It is an unhappy circumstance in my judgment that the group, which more than any other has needed a government of equal laws and equal justice, is now encouraged to believe that the best way for it to

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[7] Miss Feingold, task force worker for CORE and the State's first witness, testified on direct examination as follows:

"Q. Was there any particular reason for these defendants going to the Library on a Saturday morning?

"A. You mean on a Saturday as opposed to any other day?

"Q. Yes?

"A. No, I don't."

advance its cause, which is a worthy one, is by taking the law into its own hands from place to place and from time to time. Governments like ours were formed to substitute the rule of law for the rule of force. Illustrations may be given where crowds have gathered together peaceably by reason of extraordinarily good discipline reinforced by vigilant officers. "Demonstrations" have taken place without any manifestations of force at the time. But I say once more that the crowd moved by noble ideals today can become the mob ruled by hate and passion and greed and violence tomorrow. If we ever doubted that, we know it now. The peaceful songs of love can become as stirring and provocative as the Marseillaise did in the days when a noble revolution gave way to rule by successive mobs until chaos set in. The holding in this case today makes it more necessary than ever that we stop and look more closely at where we are going.

I would affirm.

UNITED STATES *v.* JOHNSON.

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

No. 25. Argued November 10 and 15, 1965.—
Decided February 24, 1966.

Respondent, a former Congressman, was convicted on several counts of violating the conflict of interest statute (18 U. S. C. § 281) and on one count of conspiring to defraud the United States (18 U. S. C. § 371). The conspiracy charge involved an alleged agreement whereby respondent and another Congressman would attempt to influence the Justice Department to dismiss pending savings and loan company mail fraud indictments. As part of the conspiracy respondent allegedly delivered for pay a speech in Congress favorable to loan companies. The Government contended and adduced proof to show that the speech was delivered to serve private interests; that respondent was not acting in good faith; and that he did not prepare or deliver the speech as a Congressman would ordinarily do. The Court of Appeals set aside the conviction on the conspiracy count as being barred by Art. I, § 6, of the Constitution, providing that "for any Speech or Debate in either House" Senators and Representatives "shall not be questioned in any other Place," and ordered retrial on the substantive counts. *Held:*

1. The Speech or Debate Clause precludes judicial inquiry into the motivation for a Congressman's speech and prevents such a speech from being made the basis of a criminal charge against a Congressman for conspiracy to defraud the Government by impeding the due discharge of its functions. Pp. 173–185.

(a) The Speech or Debate Clause, which emerged from the long struggle for parliamentary supremacy, embodies a privilege designed to protect members of the legislature against prosecution by a possibly unfriendly executive and conviction by a possibly hostile judiciary. Pp. 177–180.

(b) The privilege, which will be broadly construed to effectuate its purposes, *Kilbourn* v. *Thompson*, 103 U. S. 168; *Tenney* v. *Brandhove*, 341 U. S. 367, was created not primarily to avoid private suits as in those cases, but to prevent legislative intimidation by and accountability to the other branches of government. Pp. 180–182.

(c) The Speech or Debate Clause forecloses inquiry not only into the "content" of a congressional speech but into circumstances involving the motives for making it. Pp. 182–183.

(d) Prosecution under a general criminal statute involving inquiry into the motives for and circumstances surrounding a congressional speech is barred even though the gravamen of the offense is the alleged conspiracy rather than the speech itself. Pp. 184–185.

2. The Government is not precluded from retrying the conspiracy count as purged of all the elements offensive to the Speech or Debate Clause. P. 185.

3. This Court does not review the Court of Appeals' determination that the substantive counts be retried because of the prejudicial effect thereon resulting from the unconstitutional aspects of the conspiracy count since the Government does not dispute that determination in this proceeding. Pp. 185–186.

337 F. 2d 180, affirmed and remanded.

Beatrice Rosenberg argued the cause for the United States. With her on the briefs were *Solicitor General Marshall, Assistant Attorney General Vinson, Ralph S. Spritzer* and *Jerome M. Feit.*

George Cochran Doub and *David W. Louisell* argued the cause and filed a brief for respondent.

Eugene Gressman and *Edward L. Genn* filed a brief for J. Kenneth Edlin, as *amicus curiae,* urging affirmance.

MR. JUSTICE HARLAN delivered the opinion of the Court.

Respondent Johnson, a former United States Congressman, was indicted and convicted on seven counts of violating the federal conflict of interest statute, 18 U. S. C. § 281 (1964 ed.),[1] and on one count of conspiring to

[1] "Whoever, being a Member of or Delegate to Congress, . . . directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, contro-

defraud the United States, 18 U. S. C. § 371 (1964 ed.).[2] The Court of Appeals for the Fourth Circuit set aside the conviction on the conspiracy count, 337 F. 2d 180, holding that the Government's allegation that Johnson had conspired to make a speech for compensation on the floor of the House of Representatives was barred by Art. I, § 6, of the Federal Constitution which provides that "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." The Court of Appeals ordered a new trial on the other counts, having found that the evidence adduced under the unconstitutional aspects of the conspiracy count had infected the entire prosecution.

The conspiracy of which Johnson and his three co-defendants were found guilty consisted, in broad outline, of an agreement among Johnson, Congressman Frank Boykin of Alabama, and J. Kenneth Edlin and William L. Robinson who were connected with a Maryland savings and loan institution, whereby the two Congressmen would exert influence on the Department of Justice to obtain the dismissal of pending indictments of the loan company and its officers on mail fraud charges. It was further claimed that as a part of this general scheme Johnson read a speech favorable to independent savings

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versy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States."

[2] "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

and loan associations in the House, and that the company distributed copies to allay apprehensions of potential depositors. The two Congressmen approached the Attorney General and the Assistant Attorney General in charge of the Criminal Division and urged them "to review" the indictment. For these services Johnson received substantial sums in the form of a "campaign contribution" and "legal fees." The Government contended, and presumably the jury found, that these payments were never disclosed to the Department of Justice, and that the payments were not bona fide campaign contributions or legal fees, but were made simply to "buy" the Congressman.

The bulk of the evidence submitted as to Johnson dealt with his financial transactions with the other conspirators, and with his activities in the Department of Justice. As to these aspects of the substantive counts and the conspiracy count, no substantial question is before us. 18 U. S. C. § 371 has long been held to encompass not only conspiracies that might involve loss of government funds, but also "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." *Haas* v. *Henkel,* 216 U. S. 462, 479. No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process. It is the application of this broad conspiracy statute to an improperly motivated speech that raises the constitutional problem with which we deal.[3]

[3] Only the question of the applicability of the Speech or Debate Clause to the prosecution of Johnson is before us. The Court of Appeals affirmed the convictions of co-defendants Edlin and Robinson whose appeals were consolidated with that of Johnson and,

I.

The language of the Speech or Debate Clause clearly proscribes at least some of the evidence taken during trial. Extensive questioning went on concerning how much of the speech was written by Johnson himself, how much by his administrative assistant, and how much by outsiders representing the loan company.[4] The government attorney asked Johnson specifically about certain

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except for a brief as *amicus curiae* submitted by Edlin, questions raised in those cases have not been presented to us. The defendant Boykin took no appeal from his conviction.

[4] See direct examination by the prosecution of Martin Heflin, App. 182–191, esp. 189–190:

"Q. What, if anything, did Congressman Johnson do with the material which Mr. Robinson brought in and gave to him? A. As I recall, Mr. Johnson said that his administrative assistant . . . would go over the material, too and if I am not mistaken, Mr. Johnson called him in and Buarque took the material and I left the office with Mr. Buarque to discuss it some more.

. . . . . .

"Q. After that meeting did you at any time thereafter have any contact either with Congressman Johnson or his office with regard to the speech? A. I telephoned a time or two there and I think I was called by Mr. Buarque and asked him about certain figures that the Institute—background material that might be supplied, and I did supply additional material and I believe Mr. Buarque sent me a draft, himself, with certain places, blank places for figures to be filled in. We had a discussion about some of the technical phases [*sic*] and information, statistical information and so forth.

"Q. You supplied some of the facts and figures for the draft that Mr. Buarque sent you? A. Yes.

"Q. What did you do with that draft once you had looked it over? A. Returned it."

See also cross-examination of Manual Buarque, App. 488–494; cross-examination of co-defendant Robinson, App. 772–775; cross-examination of defendant Johnson, Transcript 79–93.

sentences in the speech, the reasons for their inclusion and his personal knowledge of the factual material supporting those statements.[5] In closing argument the

[5] See cross-examination of Johnson, Transcript 84–86:

"Q. And did you not tell Mr. Heflin when he came to see you in your office after that luncheon that he should work with Mr. Buarque on the preparation of the speech which was ultimately given on June 30? A. My statement is the same as it has always been that Mr. Heflin came to my office, representing himself as a public relations man, for a certain institute of Independent Savings and Loan Associations. He had the article of one of the local newspapers. A very unfair attack which he claimed had been made on savings and loans. He talked with me a very short time. I told him that Mr. Buarque, my administrative assistant, did all of my writing, all of the conversations and if there were any answers to be made,—he went out with me to the next room, met Mr. Buarque and I left the two together.

. . . . . .

"Q. You told him, did you not, that he should work with Mr. Buarque on the matter since Mr. Buarque prepared your speeches? A. I told him at the time to discuss it with Mr. Buarque and any arrangements Mr. Buarque wanted to make, why, he, of course, would be cooperative with him.

. . . . . .

"Q. Now, you say that at that time—I assume you meant at the time of the speech—that one savings association meant nothing more to you than another. Is that what you referred to? A. Not only then but following the speech, too.

"Q. I believe you testified on direct examination that you did not know the name of First Continental Savings and Loan or First Colony Savings and Loan at the time this speech was delivered on June 30, is that your testimony? A. I think my testimony is that one name did not mean more than another.

. . . . . .

"Q. Now, your speech was finally delivered or submitted to the clerk and it was printed in the Congressional Record, and it stresses the value of commercial mortgage guaranty insurance, does it not? A. I think it has a reference to it, yes.

"Q. Isn't it a fact that at the time of the speech, First Continental and First Colony were the only independent savings and loan associations in the State of Maryland which carried commer-

theory of the prosecution was very clearly dependent upon the wording of the speech.[6] In addition to questioning the manner of preparation and the precise in-

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cial mortgage guaranty insurance? A. I have no knowledge of that and did not know at the time.

"Q. You have no knowledge of that? A. None, whatever.

"Q. As a matter of fact, that language in your speech, Congressman, was a part of the language which Mr. Edlin emphasized in his reprint, was it not? A. May I say that I did not see any of the so-called 'reprints.'"

And see Transcript 91:

"Q. Congressman, do you mean to tell the jury that Mr. Buarque put that language in the speech about three indicted institutions and none convicted, and you did not inquire as to which particular institutions they were? A. He did not tell me which they were, the names.

"Q. Well, let me ask you this: How could you, if you did not know which institutions were under indictment, how could you make this statement in your speech:

"'I personally do not know any of these institutions nor any of the circumstances leading to their respective indictments. I hold no brief for any of them, one way or another.'

"That is the language of your speech, is it not? A. Yes, I said that is the prepared speech which had been testified that Mr. Buarque with some help from Heflin, prepared."

[6] See Oral Argument on behalf of the Government, Transcript 232–248, esp. 244–245:

"I submit to you members of the jury, there is no other logical explanation you can make but that that speech was made solely for the purposes of Mr. Kenneth Edlin. It was a day's work for a day's pay for the man to whom he was selling his Congressional Office and his Congressional influence.

"Congressman Johnson has claimed on the stand in this case that he did not then know that the First Colony Savings and Loan Association was then under indictment.

"Now, you will recall the language in the speech, itself, that out of 400 independent savings and loan associations in Maryland, exactly three of them have been indicted and none convicted.

"[']Personally, I do not know any of these indicted institutions

gredients of the speech, the Government inquired into the motives for giving it.[7]

The constitutional infirmity infecting this prosecution is not merely a matter of the introduction of inadmissible evidence. The attention given to the speech's substance and motivation was not an incidental part of the Government's case, which might have been avoided by

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nor any of the circumstances leading to their respective indictments. I hold no brief for any of them one way or the other.[']

"Congressman Johnson claimed under oath, Members of the Jury, that he did not even bother to check the facts to ascertain whether he could truthfully make such a statement in his speech.

"If so, I submit to you, it was utterly and completely irresponsible and reprehensible, but the Government submits that that is not so and that that was not a fact. The Government submits that Congressman Johnson did know at that time that both First Colony and Mr. Edlin were then under indictment in this very Court and that he, nevertheless made those statements in the speech which he delivered on June 30, 1960.

"Those statements, Members of the Jury, the Government submits were completely untrue and deceitful."

[7] See, *e. g.*, cross-examination of Johnson, Transcript 79–81:

"Q. Now, Congressman, you told Mr. Estabrook on December 20, 1961, in London, did you not, that this speech had been made at the urging of several of your own people or of your own constituents? Is that not a fact? A. Which conference are you speaking of with Mr. Estabrook?

. . . . . .

"Q. As a matter of fact, then, except for Mr. Buarque, whom you term a constituent, no constituent of yours ever spoke to you about making that speech on the floor of the House of Congress, is that not correct? A. It could be. I do not recall.

"Q. You would be—you would not deny it? A. No.

"Q. Is it not a fact that prior to that speech Congressman, you had never discussed savings and loan programs or problems with any of your constituents on the Eastern Shore of Maryland? A. Oh, I think possibly I had. I do not know to what degree but I want to say too, that the speech you refer to there was a motivation that Mr. Buarque testified that I was interested in a statewide election for the Senate in 1964."

omitting certain lines of questioning or excluding certain evidence. The conspiracy theory depended upon a showing that the speech was made solely or primarily to serve private interests, and that Johnson in making it was not acting in good faith, that is, that he did not prepare or deliver the speech in the way an ordinary Congressman prepares or delivers an ordinary speech. Johnson's defense quite naturally was that his remarks were no different from the usual congressional speech, and to rebut the prosecution's case he introduced speeches of several other Congressmen speaking to the same general subject, argued that his talk was occasioned by an unfair attack upon savings and loan associations in a Washington, D. C., newspaper, and asserted that the subject matter of the speech dealt with a topic of concern to his State and to his constituents. We see no escape from the conclusion that such an intensive judicial inquiry, made in the course of a prosecution by the Executive Branch under a general conspiracy statute, violates the express language of the Constitution and the policies which underlie it.

II.

The Speech or Debate Clause of the Constitution was approved at the Constitutional Convention without discussion and without opposition. See V Elliot's Debates 406 (1836 ed.); II Records of the Federal Convention 246 (Farrand ed. 1911). The present version of the clause was formulated by the Convention's Committee on Style, but the original vote of approval was of a slightly different formulation which repeated almost verbatim the language of Article V of the Articles of Confederation: "Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress . . . ." The language of that Article, of which the present clause is only a slight modification, is in turn almost identical to the English Bill of Rights of 1689:

"That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M., Sess. 2, c. 2.

This formulation of 1689 was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators.[8] Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature. See, *e. g.*, Story, Commentaries on the Constitution § 866; II The Works of James Wilson 37–38 (Andrews ed. 1896). In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders. As Madison noted in Federalist No. 48:

> "It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and compleatly administered by either of the other departments. It is equally evident, that neither of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating therefore in theory, the several classes of power, as they may in their nature be legislative,

[8] See generally C. Wittke, The History of English Parliamentary Privilege (Ohio State Univ. 1921); Neale, The Commons' Privilege of Free Speech in Parliament, in Tudor Studies (Seton-Watson ed. 1924).

> executive, or judiciary; the next and most difficult task, is to provide some practical security for each against the invasion of the others. What this security ought to be, is the great problem to be solved." (Cooke ed.)

The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the "practical security" for ensuring the independence of the legislature.

In part because the tradition of legislative privilege is so well established in our polity, there is very little judicial illumination of this clause. Clearly no precedent controls the decision in the case before us. This Court first dealt with the clause in *Kilbourn* v. *Thompson,* 103 U. S. 168, a suit for false imprisonment alleging that the Speaker and several members of the House of Representatives ordered the petitioner to be arrested for contempt of Congress. The Court held first that Congress did not have power to order the arrest, and second that were it not for the privilege, the defendants would be liable. The difficult question was whether the participation of the defendants in passing the resolution ordering the arrest was "speech or debate." The Court held that the privilege should be read broadly, to include not only "words spoken in debate," but anything "generally done in a session of the House by one of its members in relation to the business before it." 103 U. S., at 204.

In *Tenney* v. *Brandhove,* 341 U. S. 367, at issue was whether legislative privilege protected a member of the California Legislature against a suit brought under the Civil Rights statute, 8 U. S. C. §§ 43, 47 (3) (1946 ed.), alleging that the legislator had used his official forum "to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional

rights of free speech and to petition the Legislature for redress of grievances . . . ." 341 U. S., at 371. The Court held a dismissal of the suit proper; it viewed the state legislative privilege as being on a parity with the similar federal privilege, and concluded that

> "The claim of an unworthy purpose does not destroy the privilege. . . . The holding of this Court in *Fletcher* v. *Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." 341 U. S., at 377.

III.

Kilbourn and *Tenney* indicate that the legislative privilege will be read broadly to effectuate its purposes; neither case deals, however, with a criminal prosecution based upon an allegation that a member of Congress abused his position by conspiring to give a particular speech in return for remuneration from private interests. However reprehensible such conduct may be, we believe the Speech or Debate Clause extends at least so far as to prevent it from being made the basis of a criminal charge against a member of Congress of conspiracy to defraud the United States by impeding the due discharge of government functions. The essence of such a charge in this context is that the Congressman's conduct was improperly motivated, and as will appear that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry.

Even though no English or American case casts bright light on the one before us [9] it is apparent from the history

[9] Compare *The King* v. *Boston*, 33 Commw. L. R. 386 (Austl. 1923); *The Queen* v. *White*, 13 Sup. Ct. R. 322 (N. S. W. 1875); *Regina* v. *Bunting*, 7 Ont. 524 (1885), for commonwealth cases dealing with the general question of liability of legislators for bribery in distinguishable contexts. See 78 Harv. L. Rev. 1473, 1474.

of the clause that the privilege was not born primarily of a desire to avoid private suits such as those in *Kilbourn* and *Tenney,* but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary. In the notorious proceedings of King Charles I against Eliot, Hollis, and Valentine, 3 How. St. Tr. 294 (1629), the Crown was able to imprison members of Commons on charges of seditious libel and conspiracy to detain the Speaker in the chair to prevent adjournment.[10] Even after the Restoration, as Holdsworth noted, "[t]he law of seditious libel was interpreted with the utmost harshness against those whose political or religious tenets were distasteful to the government." VI Holdsworth, A History of English Law 214 (1927). It was not only fear of the executive that caused concern in Parliament but of the judiciary as well, for the judges were often lackeys of the Stuart monarchs,[11] levying punishment more "to the wishes of the crown than to the

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[10] The court in that case attempted to distinguish between the true privilege and unlawful conspiracies:

"And we hereby will not draw the true Liberties of Parliament-men into question; to wit, for such matters which they do or speak in a parliamentary manner. But in this case there was a conspiracy between the Defendants to slander the state, and to raise sedition and discord between the king, his peers, and people; and this was not a parliamentary course.

. . . . . .

"That every of the Defendants shall be imprisoned during the king's pleasure: Sir John Elliot to be imprisoned in the Tower of London, and the other Defendants in other prisons." 3 How. St. Tr., at 310.

See the account in Taswell-Langmead's English Constitutional History (Plucknett ed. 1960), at 376–378. After the Restoration, some 38 years after the trial, Parliament resolved that the judgment "was an illegal judgment, and against the freedom and privilege of Parliament." The House of Lords reversed the convictions in 1668. See Taswell-Langmead, *supra,* at 378, note 55.

[11] See Holdsworth, *supra,* at 503–511.

gravity of the offence." *Id.*, at 214–215. There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause. In scrutinizing this criminal prosecution, then, we look particularly to the prophylactic purposes of the clause.[12]

The Government argues that the clause was meant to prevent only prosecutions based upon the "content" of speech, such as libel actions, but not those founded on "the antecedent unlawful conduct of accepting or agreeing to accept a bribe." Brief of the United States, at 11. Although historically seditious libel was the most frequent instrument for intimidating legislators, this has never been the sole form of legal proceedings so employed,[13] and the language of the Constitution is framed

[12] Compare *Thornhill* v. *Alabama*, 310 U. S. 88, and *New York Times Co.* v. *Sullivan*, 376 U. S. 254, for expressions of the central importance to our political system of uninhibited political expression as guaranteed to the general populace by the First and Fourteenth Amendments.

[13] See, *e. g.*, *Strode's Case*, one of the earliest and most important English cases dealing with the privilege. In 1512, Richard Strode, a member of Commons from Devonshire, introduced a bill regulating tin miners which appears to have been motivated by a personal interest. He was prosecuted in a local Stannary Court, a court of special jurisdiction to deal with tin miners, for violating a local law making it an offense to obstruct tin mining. He was sentenced and imprisoned. Parliament released him in a special bill, declaring "That suits, accusements, condemnations, executions, fines, amerciaments, punishments, corrections, grievances, charges, and impositions, put or had, or hereafter to be put or had, unto or upon the said Richard, and to every other of the person or persons afore specified that now be of this present Parliament, or that of any Parliament hereafter shall be, for any bill, speaking, reasoning, or declaring of

in the broadest terms. The broader thrust of the privilege is indicated by a nineteenth century British case, *Ex parte Wason,* L. R. 4 Q. B. 573 (1869), which dealt specifically with an alleged criminal conspiracy. There a private citizen moved that a magistrate be required to prosecute several members of the House of Lords for conspiring wrongfully to prevent his petition from being heard on the floor. The court denied the motion, stating that statements made in the House "could not be made the foundation of civil or criminal proceedings . . . . And a conspiracy to make such statements would not make the person guilty of it amenable to the criminal law." *Id.,* at 576. (Cockburn, C. J.) Mr. Justice Lush added, "I am clearly of opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House." *Id.,* at 577.

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any matter or matters concerning the Parliament to be communed and treated of, be utterly void and of none effect." 4 Hen. 8, c. 8, as reproduced in Tanner, Tudor Constitutional Documents 558, 559 (2d ed. 1930); see Taswell-Langmead, *supra,* at 248–249. During the prosecution of Sir John Eliot in 1629 it was argued that Strode's Act applied to all legislators, but the court held that it was a private act. 3 How. St. Tr. 294, 309. In 1667 both Houses of Parliament declared by formal resolutions that Strode's Act was a general law, "And that it extends to indemnify all and every the Members of both Houses of Parliament, in all Parliaments, for and touching all Bills, speaking, reasoning, or declaring of any Matter or Matters in and concerning the Parliament, to be communed and treated of, and is only a declaratory law of the antient and necessary Rights and Privileges of Parliament." I Hatsell, Precedents of Proceedings in the House of Commons 86–87 (1786); see Taswell-Langmead, *supra,* at 378, note 55. The central importance of Strode's case in English constitutional history is persuasive evidence that the parliamentary privilege meant more than merely preventing libel and treason prosecutions.

In the same vein the Government contends that the Speech or Debate Clause was not violated because the gravamen of the count was the alleged conspiracy, not the speech, and because the defendant, not the prosecution, introduced the speech itself.[14] Whatever room the Constitution may allow for such factors in the context of a different kind of prosecution, we conclude that they cannot serve to save the Government's case under this conspiracy count. It was undisputed that Johnson delivered the speech; it was likewise undisputed that Johnson received the funds; controversy centered upon questions of who first decided that a speech was desirable, who prepared it, and what Johnson's motives were for making it. The indictment itself focused with particularity upon motives underlying the making of the speech and upon its contents:

> "(15) It was a part of said conspiracy that the said THOMAS F. JOHNSON should . . . render services, for compensation, . . . to wit, the making of a speech, defending the operations of Maryland's 'independent' savings and loan associations, the financial stability and solvency thereof, and the reliability and integrity of the 'commercial insurance' on investments made by said 'independent' savings and loan associations, on the floor of the House of Representatives." App. 5–6.

We hold that a prosecution under a general criminal statute dependent on such inquiries necessarily contra-

[14] The Government, however, did introduce a reprint of the speech in its case-in-chief, in order to show how the co-conspirators made use of it. Certain portions were shown to be outlined in red because, as the prosecution's witness testified, "these were the points most pertinent to what we were trying to put across and for ease in the person's reading it." App. 259. The use of a copy of the speech in this context necessarily required the jury to read those portions and to reflect upon its substance.

venes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us. Our decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them. And, without intimating any view thereon, we expressly leave open for consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.[15]

The Court of Appeals' opinion can be read as dismissing the conspiracy count in its entirety. The making of the speech, however, was only a part of the conspiracy charge. With all references to this aspect of the conspiracy eliminated, we think the Government should not be precluded from a new trial on this count, thus wholly purged of elements offensive to the Speech or Debate Clause.

IV.

The Court of Appeals held that Johnson was entitled to a new trial on the conflict of interest counts because the admission of evidence concerning the speech aspect of the conspiracy count was prejudicial on these other counts as well. The Government reserved the right to contest the order of a new trial, but, except for a footnote in its reply brief, it did not so argue in this Court; on the contrary it stated in oral argument that it stood solely on its position with reference to the conspiracy

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[15] Cf. Note, The Bribed Congressman's Immunity from Prosecution, 75 Yale L. J. 335, 347–348 (1965).

count.[16] In these circumstances we find no occasion to review the Court of Appeals' assessment of the record in this respect.

For the foregoing reasons we affirm the judgment of the Court of Appeals and remand the case to the District Court for further proceedings consistent with this opinion. *It is so ordered.*

MR. JUSTICE BLACK took no part in the decision of this case.

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

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, concurring in part and dissenting in part.

I concur in the limited holding of the Court that the use of the Congressman's speech during this particular trial—with an examination into its authorship, motiva-

[16] In oral argument, government counsel stated as follows:

"And so the question that we brought to the Court, and the only question that we think is properly involved in this case now, revolves around the taking of money to give a speech on the floor of Congress."

Question from the Bench: "Well, was there [to be] a new trial on the other phase of it?"

Government Counsel: "It [the Court of Appeals] ordered a new trial on the other phase. And we have not brought that issue here. We reserved it in our petition but we did not argue it, I might say largely because it cannot be determined without reading the whole record. The question in this case which we did bring here, and which we think is the question involved, is this: Article 1, Section 6, of the Constitution provides that for any speech or debate in either House, no member of Congress shall be questioned in any other place. And as we view it, the question is, does that Speech or Debate Clause mean that Congress is without power under the Constitution to make it a crime triable in court for a Congressman to take money to make a speech?"

tion and content—was violative of the Speech or Debate Clause. I also join the Court in its remand of the conspiracy count for a new trial, this time purged of offensive matter. The Court's refusal to decide the validity of the conviction under the seven substantive counts, however, prompts me to dissent. In my view, the conflict of interest counts are properly before us, raise important questions and should be resolved now since the respondent will probably raise these issues on his forthcoming reprosecution.

I.

The Court explains its refusal to reach the substantive counts by referring to a single statement made by the Government's counsel at the outset of oral argument, p. 186, n. 16, *ante*. In the same colloquy, the Government remarked that it did not consider the issues raised by the substantive counts to be of general importance, and felt that the question of the effect of the tainted evidence on these counts would unavoidably require an examination of the entire 1,300-page record. Prior to oral argument, the Government had argued these issues exhaustively in the Court of Appeals, and had mentioned them in its petition for certiorari in compliance with Supreme Court Rule 40 (1)(d)(1) and (2), and in its reply brief on the merits. Both in its reply brief and later in oral argument, in answer to inquiries from the Bench, it contended that the evidence, arguments and instructions on the conspiracy count were distinct from the substantive counts. At best, then, the Government's position is ambiguous, if not puzzling.[1] Beyond that,

[1] I confess to some surprise that the Government almost abandoned these issues when in this Court, even though the major question in the case is the application of the Speech or Debate Clause. In the first place, this Court has not had occasion to deal with the conflict of interest statutes as applied to a Member of Congress

the respondent himself specifically urged this Court to consider the issues in his brief on the merits, pp. 100–101 and n. 86, devoted 33 pages of argument to this phase of the case and addressed himself to the questions on oral argument. Under these unique circumstances, I think it is our duty carefully to scrutinize all the facts and issues involved in the prosecution.

II.

After reading the record, it is my conclusion that the Court of Appeals erred in determining that the evidence concerning the speech infected the jury's judgment on the substantive counts. The evidence amply supports the prosecution's theory and the jury's verdict on these counts—that the respondent received over $20,000 for attempting to have the Justice Department dismiss an indictment against his co-conspirators, without disclosing his role in the enterprise. This is the classic example of a violation of § 281 by a Member of the Congress.[2] See *May* v. *United States,* 175 F. 2d 994, 1006 (C. A. D. C. Cir.); *United States* v. *Booth,* 148 F. 112, 117 (Cir. Ct. D.

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since 1906, *Burton* v. *United States,* 202 U. S. 344, and they remain viable although lately revised, see Manning, Federal Conflict of Interest Law 14–73 (1964). Moreover, the Government itself has argued strenuously and successfully in many cases that an erroneous conviction on one count does not vitiate a conviction on other counts, especially where concurrent sentences are involved, see, *e. g.*, *United States* v. *Romano,* 382 U. S. 136; *United States* v. *Gainey,* 380 U. S. 63, 65; *Sinclair* v. *United States,* 279 U. S. 263, 299; *Barnard* v. *United States,* 342 F. 2d 309 (C. A. 9th Cir.), certiorari denied, 382 U. S. 948. There are, in addition, numerous cases in which the issue was raised in this Court and the petitioner-defendant was denied certiorari.

[2] The sentence given was lenient—six months on each count, but all to run concurrently. The conspiracy statute, 18 U. S. C. § 371, authorizes a five-year prison term and a $10,000 fine, and the conflict of interest statute in effect at the trial permitted a two-year sentence and a $10,000 fine for each violation, 18 U. S. C. § 281.

Ore.). The arguments of government counsel and the court's instructions separating the conspiracy from the substantive counts seem unimpeachable. The speech was a minor part of the prosecution. There was nothing in it to inflame the jury and the respondent pointed with pride to it as evidence of his vigilance in protecting the financial institutions of his State. The record further reveals that the trial participants were well aware that a finding of criminality on one count did not authorize similar conclusions as to other counts, and I believe that this salutary principle was conscientiously followed. Therefore, I would affirm the convictions on the substantive counts.

IDAHO SHEET METAL WORKS, INC. *v.* WIRTZ, SECRETARY OF LABOR.

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

No. 30. Argued December 8, 1965.—Decided February 24, 1966.*

In No. 30 the employer, petitioner, has 12 workers who fabricate, install and repair sheet metal products. While about 60% of sales in number are to the general public, about 83% of gross income comes from work done, generally on individual specifications for sizable pieces of equipment, for five potato processing companies which dehydrate and freeze potatoes for interstate shipment. In reply to respondent's claim that it was violating the overtime provisions of the Fair Labor Standards Act of 1938, petitioner denied that its workers engaged in or produced goods for interstate commerce and asserted that it was a "retail or service establishment" under § 13 (a)(2) of the Act, which exempts certain establishments 75% of whose dollar volume of sales is not for resale and is recognized as retail sales or services in the industry. Petitioner showed that 75% of its dollar volume was not for resale and that its officials and salesmen who sell to it regarded the business as retail. The District Court agreed with petitioner, but the Court of Appeals reversed. Respondent employer in No. 31 is a franchised tire dealer with 47 employees engaged in selling, recapping and repairing tires. More than half its gross income comes from sales and repairs of tires furnished to businesses using heavy industrial or construction vehicles or fleets of trucks, operating to a sizable but unspecified extent in interstate commerce. Respondent alleged that it came within the § 13 (a) (2) exemption and showed that 75% of its sales were not for resale and that the industry's use of the word retail applied to all sales not for resale, despite the commercial character of the tires and an established pattern of quantity discounts. Petitioner showed that the word retail was used by the industry in other senses which excluded commercial sales and that respondent's commercial customers did not regard

*Together with No. 31, *Wirtz, Secretary of Labor* v. *Steepleton General Tire Co., Inc., et al.*, on certiorari to the United States Court of Appeals for the Sixth Circuit.

their purchases as at retail. Petitioner also introduced his official guidelines, which class as nonretail all sales to fleets of five or more vehicles at "wholesale prices," defined as those charged on sales for resale or on sales to 10-vehicle fleets. The District Court held respondent to be within the interstate commerce coverage of the Act but to be entitled to the exemption, and the Court of Appeals affirmed. *Held:*

1. The industry-usage test is not in itself controlling in determining when business transactions are retail sales under the Act. Pp. 199–202.

2. While the typical retail sale is one involving goods or services that are frequently acquired for family or personal use, Congress also intended that the retail exemption extend somewhat beyond consumer goods and services, to include certain nondomestic or nonconsumer products—for example, farm implements and certain types of trucks. Pp. 203–204.

3. Within the category of goods and services that can be sold at retail, not every sale can be so classified. Sales for resale are excluded by the language of the exemption, and the legislative history and common usage indicate that the term retail becomes less appropriate as the quantity and price discount increase in a transaction. Pp. 204–205.

4. The sheet metal company is disqualified as a retail establishment since 83% of its gross income is derived from the fabrication and maintenance of potato processing equipment, which appears to have no private or noncommercial utility and bears little resemblance to those strictly commercial articles which may be sold at retail. Pp. 205–207.

5. The tire company, which as the employer has the burden of proof in establishing its exemption under § 13 (a)(2), has not met that burden, as it has failed to show that the transactions qualified as retail under the Secretary's guidelines for retail sales, which in pertinent part are sustained in view of the common conception of the term retail as excluding sales made in quantity and at significant discounts, and in view of the legislative history in respect thereto. Pp. 207–209.

335 F. 2d 952, affirmed; 330 F. 2d 804, reversed.

Eli A. Weston argued the cause for petitioner in No. 30. On the brief was *T. H. Eberle.*

Bessie Margolin argued the cause for petitioner in No. 31. With her on the briefs were *Solicitor General Marshall, Ralph S. Spritzer, Philip B. Heymann, Charles Donahue* and *Caruthers G. Berger.*

Charles Donahue argued the cause for respondent in No. 30. With him on the brief were *Solicitor General Marshall, Philip B. Heymann, Bessie Margolin, Robert E. Nagle* and *Caruthers G. Berger.*

Lucius E. Burch, Jr., argued the cause for respondents in No. 31. With him on the brief was *Tom Mitchell, Jr.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

The common question presented by these two cases is the meaning of the phrase "retail or service establishment" as that language is used in the exemptive provisions of the federal wage and hour statute. We first set forth the statute and describe the two cases before us, then examine the history and content of the exempting clause, and finally apply the resulting analysis to the facts of each case.

I.

The Fair Labor Standards Act of 1938 enacted a comprehensive scheme providing for minimum wages and overtime pay for workers "engaged in" or "in the production of goods for" interstate and foreign commerce.[1] Among other exemptions, Congress by § 13 (a)(2) of the Act has excluded from the statute's wage and hour protections those employees working for certain "retail

[1] 52 Stat. 1060, as amended, 29 U. S. C. §§ 201–219 (1964 ed.). Sections 6–7, codified as §§ 206–207, respectively cover minimum wages and overtime pay. The commerce coverage of the Act, through a special definition of "production," is drawn in generous terms. See § 3 (j), codified as § 203 (j).

or service" establishments.[2] To qualify for this exemption in its present form, an establishment must meet three tests: *first,* it must make more than 50% of its annual dollar volume of sales of goods or services within the State; [3] *second,* it must meet one of four tests designated "(i)–(iv)," chiefly designed to prevent most very large employers from enjoying the exemption; [4] *third,* it must be a "retail or service establishment." Regarding this third requirement—which is the focus of this decision—§ 13 (a)(2) states that "[a] 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services

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[2] 52 Stat. 1067, as amended, 29 U. S. C. § 213 (a)(2) (1964 ed.). The section provides that the minimum wage and overtime pay provisions of the Act shall not apply to:

"(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, if such establishment—

". . . [meets one of four tests, designated '(i)–(iv)' and framed with reference to another section of the Act].

"A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry."

[3] This requirement has been met by the companies in this case. Section 13 (a)(4) of the Act, added in 1949 by 63 Stat. 917, 29 U. S. C. § 213 (a)(4) (1964 ed.), provides that an establishment that makes or processes the goods it sells may qualify as exempt if it meets the tests of § 13 (a)(2) and "is recognized as a retail establishment in the particular industry" and makes more than 85% of its annual dollar volume of sales of such goods within the State. So far as the companies in this case may be deemed to make or process the goods they sell, the Government is apparently satisfied that the added requirements of § 13 (a)(4) have been met or at least is unwilling to rely upon them.

[4] These four tests were added to § 13 (a)(2) in 1961 by 75 Stat. 71. The Government has not suggested that this amendment would disqualify either of the companies in the present case.

(or of both) is not for resale and is recognized as retail sales or services in the particular industry."

Of the cases before us, the first one, No. 30, stems from two consolidated actions brought by the Secretary of Labor against Idaho Sheet Metal Works, Inc. (Idaho Sheet). By one action the Secretary sought to enjoin future disregard of the Act's overtime provisions, and by the other he sought to collect on behalf of one employee unpaid overtime compensation for a period during the year 1960. See §§ 15–17, 52 Stat. 1068–1069, as amended, 29 U. S. C. §§ 215–217 (1964 ed.). The ensuing litigation established that Idaho Sheet operates a plant in Burley, Idaho, where it employs about 12 workers to fabricate, install, and maintain sheet metal products. Many articles are sold to individuals, farmers, and local merchants, the plant has display racks to show its wares, and about 60% of sales in number are said to be to "the general public" as opposed to industrial customers. About 83% of the gross income, however, is derived from metal work done on equipment used by five potato processing companies which dehydrate and freeze the potatoes for interstate shipment.

For its defense, Idaho Sheet denied its workers were engaged in or producing goods for interstate commerce. It also claimed to be an exempt retail or service establishment, adducing proof that over 75% of its dollar volume of sales was not for resale and that its officials and salesmen who sell to it regarded the business as retail. The District Court held that Idaho Sheet was outside the interstate commerce coverage of the Act and was in any case exempt. The Court of Appeals for the Ninth Circuit reversed on both points and held in favor of the Secretary. 335 F. 2d 952. We granted certiorari limited to the question whether Idaho Sheet was a retail or service establishment within the meaning of the Act. 380 U. S. 905.

In the other case before us, No. 31, the Secretary of Labor sued the Steepleton General Tire Company (Steepleton) and its president to require compliance with the minimum wage, overtime pay, and record-keeping provisions of the Act. Steepleton, which is located in Memphis, Tennessee, and employs about 47 workers, is a franchised tire dealer engaged in the sale, recapping, and repair of tires. Some of Steepleton's income derives from dealings with private customers but more than half the gross income comes from sales and repairs of tires furnished to businesses operating heavy industrial or construction vehicles or operating fleets of trucks; apparently a sizable though unspecified portion of these commercial customers operated their equipment in interstate commerce.

The District Court determined that Steepleton came within the interstate commerce coverage of the Act, and that issue is no longer in the case. Alleging itself to be exempt under § 13 (a)(2), Steepleton showed that 75% or more of its sales were not for resale and that the industry's predominant and long-standing use of the word retail applied that term to all tire sales not for resale, despite the commercial character of the tires and the established pattern of quantity discounts. The only explanation offered for this use was that it conformed to many state sales tax statutes. The Secretary showed that the industry sometimes used the word retail in other senses that excluded commercial sales and that commercial customers of Steepleton did not regard their purchases as retail transactions. The District Court held Steepleton to be entitled to the exemption. The Court of Appeals for the Sixth Circuit affirmed the District Court in all respects, 330 F. 2d 804, and we granted certiorari at the behest of the Secretary to consider whether Steepleton qualified as a retail or service establishment. 380 U. S. 904.

The approach of the Sixth Circuit, which took industry usage as controlling, and that of the Ninth Circuit, which rejected it as the sole test, represent irreconcilable interpretations of the critical statutory language. While support can be mustered for both views, we believe the Ninth Circuit is correct and on this point follow our earlier decision in *Mitchell* v. *Kentucky Finance Co.*, 359 U. S. 290. After rejecting the industry's usage as controlling, we face the further difficult question of what criteria do determine when business transactions are retail under the Act; to this question it is still less easy to return a clear-cut answer, but our analysis of the matter leads us to conclude that neither Idaho Sheet nor Steepleton qualifies as a retail or service establishment.

II.

To construe the present language of the exemption demands a knowledge of its origins. Section 13 (a)(2), as it appeared in the 1938 enactment, used the present phrase "retail or service establishment" to delimit the exemption but did not further define the concept.[5] The Department of Labor's Wage and Hour Administrator initially made his interpretation of the retail exemption known through an Interpretative Bulletin and through various official statements.[6] To summarize very generally, the Administrator viewed a retail establishment as one selling goods or services to private individuals for personal or family consumption; sales of these same

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[5] The 1938 version read: "(a) The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." 52 Stat. 1067.

[6] This Bulletin, designated No. 6, appears along with other official statements in various editions of the BNA Wage and Hour Manual (hereafter cited as WH Manual), *e. g.*, 1942 edition. The Secretary's present views are stated in 29 CFR §§ 779–779.515 (1965).

goods or services to businesses or state agencies remained retail if sold at the normal price charged private consumers or in quantities a private consumer would buy. See Interp. Bull. No. 6, ¶ 14, in 1942 WH Manual, p. 330. However, there were deviations from this consumer-goods standard in favor of employers, notable instances being the exemption of farm implement dealers and linen supply firms supplying commercial customers. See Statements of the Administrator, in 1944–1945 WH Manual, pp. 469–470.

In 1946 this Court decided *Roland Co.* v. *Walling,* 326 U. S. 657, holding *inter alia* that a business engaged in commercial wiring, electrical contracting for industry, and repair and replacement of electric motors and generators did not constitute a retail or service establishment. The opinion used considerable language suggesting that no sale of any article for business or profit-making use as opposed to personal consumption could qualify as a retail sale, a position which supported the result but went far beyond a necessary holding. See 326 U. S., at 673–677. This case, and several others in this vein,[7] prompted the Administrator to report to Congress that certain hitherto exempt classes of business were endangered—notably farm equipment dealers—and to recommend amending legislation. See 1948 Wage and Hour Division, Annual Report, pp. 120–121.

The Administrator proposed, so far as immediately relevant, to define a retail establishment as one deriving 75% of its income from retail sales and then to define as retail sales those made to private individuals for personal or family consumption, sales of the same items to any other customer if not for resale and if similar in type

[7] See *Martino* v. *Michigan Window Cleaning Co.,* 327 U. S. 173; *Boutell* v. *Walling,* 327 U. S. 463. See also *McComb* v. *Factory Stores Co.,* 81 F. Supp. 403; *McComb* v. *Diebert,* 16 CCH Labor Cas. ¶ 64,982.

and quantity, and sales to farmers of goods of the type and quantity used on the ordinary farm. When Congress convened in 1949, a number of bills were introduced to amend the Act in various respects. The bill reported out by the House committee and the substitute measure first debated by the House adopted the Administrator's basic proposal, but a further substitute backed by an opposing coalition and introduced as an amendment during the debates finally prevailed and was sent to the Senate.[8] This bill as passed contained the definition of exempt retail and service establishments that became law in 1949 and which remains the law today.[9] The Senate during the debate of its own committee-reported bill, which did not amend the retail exemption, amended the Senate bill to conform to the House's revision of § 13 (a)(2).[10] Thus, when the House-Senate conference committee met to iron out other differences in the respective versions of the legislation, uniformity in the amendment to § 13 (a)(2) already existed. The debates on the retail exemption in each House were substantial and several legislative documents construe the amended section.[11]

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[8] The bill reported out of committee was H. R. 3190, 81st Cong., 1st Sess., accompanied by H. R. Rep. No. 267. The first substitute was H. R. 5856, brought to debate by H. Res. 183. The final, successful version retained the number H. R. 5856 but was drawn from H. R. 5894. See generally 6 Lab. Rel. Rep., p. 90:459 (1961).

[9] The only difference between the 1949 version of § 13 (a)(2) and current law derives from the 1961 amendment to the section, which is not relevant in this case. See n. 4, *supra*, and accompanying text.

[10] The bill reported out of committee was S. 653, 81st Cong., 1st Sess., accompanied by S. Rep. No. 640. The amendment was offered at 95 Cong. Rec. 12491 and passed at 95 Cong. Rec. 12520.

[11] The principal debates appear at various points in 95 Cong. Rec. 11002–11203 (House), 12490-12520 (Senate). No initial committee reports discuss the ultimately successful version of § 13 (a)(2) but a pertinent statement of the House members of the conference

In light of the legislative history, the first question to be faced is whether the 1949 amendment requires the Secretary to treat as retail any sale of goods or services not for resale that is most customarily described or labeled as a retail transaction by those in the industry, acting of course in good faith. If the answer were yes, then both Idaho Sheet and Steepleton would deserve exemptions without more ado, since admittedly the predominant or sole usage of those in the industry applied the term retail to the questioned sales. It should not be said that this reading is without support. Most importantly, it would appear to follow from the most literal reading of the statute; the phrase "recognized as retail . . . in the particular industry" well lends itself to an inquiry into how the businessmen concerned term their dealings. Some statements in the debates explicitly foster this reading, for example, the comment by Senator Holland who sponsored the amendment in the Senate that under his approach, "for different commodities . . . we have to find the definition which is understood by the people dealing in that industry." 95 Cong. Rec. 12519.[12] We do not agree with the Government that this reading is necessarily infirm because the Secretary and courts may have to seek a standard or predominant use of the word retail among several uses extant in the industry. Certainly we do not agree with the further suggestion that this literal reading must give the industry self-determination as to whether the exemp-

committee appears in H. R. Conf. Rep. No. 1453, 81st Cong., 1st Sess., pp. 24–26 (hereafter cited as House Conf. Rep.). There is also a relevant but less authoritative statement of the majority of Senate conferees (hereafter cited as Senate Conf. Majority Statement) appearing at 95 Cong. Rec. 14877.

[12] Other comments in some measure favoring the most literal construction are those assuming that each industry has an established understanding of what is a retail sale, *e. g.*, 95 Cong. Rec. 12502 (remarks of Senator Holland), 12516 (remarks of Senator

tion applies; courts are not incompetent to distinguish between a legitimized usage fixed by established practice and one recently instituted with the aim of avoiding the law.

On balance, however, the arguments against this literal reading are more persuasive. At the start, such a reading would attribute to Congress a purpose going well beyond its reiterated explanation that the amendment was designed to overturn the sweeping principle of the *Roland* case. The legislative history is replete with evidence that the target of the amendment was *Roland*'s proposition that no sale to a business purchaser could be a retail sale, which Senator Holland condemned by comparing the different status it gave to the sale of a batch of towels to a housewife and the same sale to a hotelkeeper. 95 Cong. Rec. 12494.[13] Further, for every suggestion in the debates that Congress intended also wholly to revamp the exemption by substituting an overriding industry-usage test, there are statements that point in the other direction. Thus, Senator Holland observed that his amendment would not undo the commonly held view that quantity sales at discount prices are generally nonretail.[14] It was said that the "recog-

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Taft); those few which seem to equate "recognized as retail" with "regarded as retail," 95 Cong. Rec. 11003 (remarks of Mr. Lucas, sponsor of the prevailing version in the House), 12502 (remarks of Senator Holland); and one or two suggesting that a discount sale may qualify as retail, 95 Cong. Rec. 11003 (remarks of Mr. Lucas), 11199 (remarks of Mr. McConnell).

[13] See House Conf. Rep., p. 24 ("This clarification [the amended § 13 (a)(2)] is needed in order to obviate the sweeping ruling of the Administrator and the courts that no sale of goods or services for business use is retail. See *Roland Electrical Co.* v. *Walling* . . . ."); 95 Cong. Rec. 11003 (remarks of Mr. Lucas); 95 Cong. Rec. 11203 (remarks of Mr. Celler).

[14] "Of course if . . . [a sale is 'made in such quantity that discounts are allowed'] it comes in the category of wholesale sales."

nizing" is done by the Administrator and the courts as well as the merchant, 95 Cong. Rec. 12510 (remarks of Senator Holland), and that due weight must be given to the "actual practice" in the industry, Senate Conf. Majority Statement, 95 Cong. Rec. 14877, and the "well-settled habits of business," 95 Cong. Rec. 12510 (remarks of Senator Holland). The lists set forth of potentially retail businesses include almost only those selling consumer goods and services. See House Conf. Rep., p. 25 (quoted p. 203, *infra*); 95 Cong. Rec. 11003–11004 (remarks of Mr. Lucas); 95 Cong. Rec. 12502 (remarks of Senator Holland). There are denials that the industries' own interpretations of a retail sale will be decisive.[15]

The conclusive consideration for us in rejecting the industry-usage test is that it would compel results flatly inconsistent with those Congress explicitly contemplated and might indeed work a major revolution in the Act's coverage not acknowledged in any legislative statement or report before us. The prime example of this threatened inconsistency is the problem presented to this Court in 1959 by *Mitchell* v. *Kentucky Finance Co.*, 359 U. S.

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95 Cong. Rec. 12501. Perhaps more ambiguously, Senator Holland also stated: "If sales were made in sufficient quantity so there would be a discount and they would be regarded not as retail sales, but as wholesale sales, they would lose their exemption." 95 Cong. Rec. 12497. See also 95 Cong. Rec. 12505. But cf. 95 Cong. Rec. 11003 (remarks of Mr. Lucas).

[15] "Mr. DOUGLAS. I understand that the interpretation which would be made would be that given to 'retail sale' by a trade association.

"Mr. HOLLAND. That is one criterion, of course; but I do not believe the Senator from Illinois, and certainly not the Senator from Florida, would wish to delegate full authority in the matter to a trade association or any other interested group." 95 Cong. Rec. 12501.

See also 95 Cong. Rec. 12510 (remarks of Senator Holland).

290, where a business making small personal loans and purchasing conditional sale contracts from retailers claimed to be an exempt retail or service establishment. Although the company introduced persuasive evidence that the industry regarded its transactions as retail, the Court denied the exemption in the face of the legislative history indicating a limited purpose for the 1949 amendment and containing an express statement that "[t]he amendment does not exempt banks, insurance companies, building and loan associations, credit companies, newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc., because there is no concept of retail selling or servicing in these industries." House Conf. Rep., pp. 25–26. See Senate Conf. Majority Statement, 95 Cong. Rec. 14877. If weight is to be given to statements about the nonretail status of quantity sales at discounts, see n. 14, *supra,* congressional intent would be similarly frustrated by the truck tire industry's retail designation of all sales not for resale no matter how great the quantity and discount. In view of the use of the word retail in the truck tire and credit industries, it would hardly be surprising to find that newspaper, telephone, or gas and electric companies label their sales to consumers as retail. Yet the legislative history is so explicitly opposed to the extension of the retail exemption to such businesses as to provide the final argument against adopting an industry-usage test that could dictate that result.

Since we reject the industry's usage as the single touchstone, the question arises what meaning is to be given to the term retail. In approaching this question we agree with the Secretary that it is generally helpful to ask first whether the sale of a particular type of goods or services can ever qualify as retail whatever the terms of sale; if and only if the answer is affirmative is it then

necessary to determine the terms or circumstances that make a sale of those goods or services a retail sale.

Plainly the typical retail transaction is one involving goods or services that are frequently acquired for family or personal use. As examples of sales that could qualify as retail, the House Conference Report lists those made "by the grocery store, the hardware store, the coal dealer, the automobile dealer selling passenger cars or trucks, the clothing store, the dry goods store, the department store, the paint store, the furniture store, the drug store, the shoe store, the stationer, the lumber dealer, etc. . . ." House Conf. Rep., p. 25 (sale of farm machinery is another example given). See also 95 Cong. Rec. 11003–11004 (remarks of Mr. Lucas); 95 Cong. Rec. 12502 (remarks of Senator Holland). Of course Congress' conceded intent to overrule the *Roland* principle means sales of such goods or services can be retail "whether made to private householders or to business users," House Conf. Rep., p. 25, but the goods and services listed nearly all share the common characteristic that they are often purchased by householders. The legislative recital of telephone, gas and electric, and credit companies along with a number of others as businesses outside the exemption, see p. 202, *supra,* demonstrates that not everything the consumer purchases can be a retail sale of goods or services, but the breadth of this qualification need not here be explored.

What is important for this decision is that Congress also intended that the retail exemption extend in some measure beyond consumer goods and services to embrace certain products almost never purchased for family or noncommercial use. An indisputable example is the sale of farm implements. See House Conf. Rep., p. 25. Another instance is trucks, at least of some varieties, whose "retailability" is assumed in the legislative history,

e. g., 95 Cong. Rec. 12497 (remarks of Senator Holland), and confirmed by the presence of another exemption in the Act that would otherwise be difficult to understand.[16] See also 95 Cong. Rec. 12495 (remarks of Senator Holland) (retailability of modest office desk). We cannot draw a precise line between such articles and those like industrial machinery which can never be sold at retail, see House Conf. Rep., p. 26, but a few characteristics of items like small trucks and farm implements may offer some guidance: their employment is very widespread as is that of consumer goods; they are often distributed in stores or showrooms and by means not dissimilar to those used for consumer goods; and perhaps it can be said that they are very frequently used in commercial activities of limited scope. While the list of strictly commercial items whose sale can be deemed retail is presumably very small, their existence precludes use of the uncomplicated "consumer goods" test proposed by the Administrator in 1949. See pp. 197–198, *supra.*

Within the category of goods and services that can be sold at retail, naturally not every sale can be so classified. The exemption itself excludes any sale for resale and beyond that, references in the legislative history, n. 14, *supra,* and common parlance certainly suggest that the term retail becomes less apt as the quantity and the price discount increase in a particular transaction. Again, we do not believe the word usage of the industry must

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[16] Section 13 (a)(19), added in 1961 by 75 Stat. 73, 29 U. S. C. § 213 (a)(19) (1964 ed.), exempts from the minimum wage and overtime pay requirements "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements" regardless of whether the establishment meets the further tests of § 13 (a)(2), notably those added in 1961, see n. 4, *supra,* and accompanying text. Quite evidently this section contemplates that a business primarily selling trucks may be a retail establishment.

be given conclusive force. The legislative comments on discounting just cited are to the contrary; and the statute cannot easily be read to make usage control whether a particular sale is retail after we have rejected that test in deciding whether sale of a given item can ever be retail. The Secretary has in fact quite properly looked carefully at usage and practice in each industry before taking a position, 29 CFR § 779.323 (1965), but he cannot be hamstrung by the terminology of a particular trade. In view of the diversity of structure and marketing practices in different industries, flexibility is certainly appropriate, and we do not here further attempt to adduce general rules. We do note that the considerable discretion possessed by the Secretary as the one responsible for the actual administration of the Act should not be understressed. *Boutell* v. *Walling*, 327 U. S. 463, 471; see *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549.

III.

In light of the premises now established, resolution of the two cases before us can be accomplished readily. Turning first to Idaho Sheet Metal Works, we believe it is disqualified as a retail establishment by the 83% of its gross income derived from metal work relating to the potato processing equipment. The company has stressed the wide public it serves, the display racks and other retail facilities in its building, the irregular intervals at which work on the potato equipment is performed, and the company's lineage tracing back to the "tin shops" of yesterday. All these factors may bear upon the classification of its other sales, and if those were its sole business or three-quarters of it the company might well deserve the exemption. But § 13 (a)(2) is explicit in its treatment of establishments whose sales are variegated: a business is characterized by its sales and no more than

25% of the dollar volume may derive from sales designated nonretail without loss of the exemption. See n. 2, *supra*. In this instance 83% of the gross income is made by sale or servicing of the potato processing equipment and we do not believe those transactions before us can be labeled retail whatever the particular terms.

This last conclusion follows naturally from the admitted facts. The pretrial order described the potato equipment fabricated and maintained by Idaho Sheet as vats, storage tanks, hoods, elevator buckets, and chutes. Hoods were described at trial by one purchaser as being "five feet square on the bottom and about four feet high where they go to the vent stacks." He also testified that the tanks held as much as "5,000 pounds of peeled potatoes," and that chutes were about 12 feet long. If this testimony is not fairly representative of the nature of the equipment under scrutiny, there is no indication of that from Idaho Sheet, upon which lies the burden of establishing the facts requisite to an exemption. *Arnold* v. *Ben Kanowsky, Inc.*, 361 U. S. 388. The type of equipment described plainly appears to have no private or noncommercial utility. Nor does it bear much resemblance to those strictly commercial articles earlier named that may be sold at retail. Unlike small trucks and farm equipment, the market for these goods is highly limited, and far from being stock items purchased off the shelf, these articles were generally fabricated to meet individual specifications.[17] In the 83% of its business relating to the potato equipment, Idaho Sheet seems hardly distinguishable from "an establishment engaged

[17] The company relies upon *Wirtz* v. *Modern Trashmoval, Inc.*, 323 F. 2d 451, in which the Fourth Circuit as an alternative ground of decision held a trash collection business to be a retail or service establishment under the Act. We need go no further than to say the case is quite distinguishable; trash removal is not only a widespread need in the commercial world but is required by private families.

in the sale and servicing of manufacturing machinery and manufacturing equipment used in the production of goods," which the House Conference Report flatly stated could not be exempt. House Conf. Rep., p. 26. Since in our view this potato equipment cannot be the subject of a retail sale, we have no occasion to consider the company's claim that the pricing and quantity of its particular sales of the equipment conform to retail standards.

The second case, involving the Steepleton tire business, is in some respects more intricate. The Government has alleged, and Steepleton does not deny, that better than half the company's dollar volume derives from sales to companies operating fleets of commercial vehicles and other heavy industrial machinery such as earth-moving equipment. The Government's first ground for withholding the exemption is that tire transactions relating to large trucks and industrial vehicles are intrinsically nonretail whatever the terms. It analogizes these vehicles to industrial machinery and then would treat the tires just as the trucks. And it stresses the ties between these vehicles and interstate commerce.

Admitting that the argument has force, we do not accept it. Among the few strictly commercial articles that Congress pretty plainly viewed as retailable were trucks in at least some varieties, as we have already shown. No reason appears why the sale of tires for those trucks should be distinguished and not allowed to qualify as retailable items. The strength of the Government's position lies in its readiness to separate big trucks and tires from little trucks and tires. The Secretary, however, seemingly has chosen not to classify truck tires on this basis but instead treats all truck tires as capable of being sold at retail.[18] A decision of this

[18] 29 CFR § 779.373 (1965) relevantly provides that for purposes of § 13 (a)(2) "all sales of tires, tubes, accessories and tire repair

kind, no doubt turning in part on problems of administration and facets of industry practice, clearly implicates the Secretary's discretion, and we see no cause to disturb its exercise in this case.

Steepleton is, nevertheless, deprived of the retail establishment exemption because—as the Government alternatively contended—it has failed to show that the tire dealings in question were made on terms and in circumstances that qualify them as retail within the Secretary's guidelines. The guidelines class as nonretail all sales to fleets of five or more vehicles at "wholesale prices," a wholesale price being defined as that charged on sales for resale or on sales to 10-vehicle fleets. See n. 18, *supra.* These guidelines, reportedly designed after inquiry into industry practices, are quite evidently aimed at excluding from the retail category sales generally made at significant discounts and in quantity. Given the common conception of the term retail and references in the legislative history to discount sales, see n. 14, *supra,* we see no reason not to sustain these guidelines; indeed, the company does not even appear to discuss them, save as is implicit in its claims that the Secretary's position here does not correspond to word usage in the industry.

In concluding that Steepleton has not proved itself exempt, a certain indefiniteness in the record should be noted. The Government showed at trial that many of

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services, including retreading and recapping" are classified as retail, with a series of exceptions including:

"(d) Sales to fleet accounts at wholesale prices: . . . a 'fleet account' is a customer operating five or more automobiles or trucks for business purposes. Wholesale prices . . . are prices equivalent to, or less than, those typically charged on sales for resale. . . . If the establishment makes no sales of truck tires for resale, the wholesale price . . . [is] the price charged . . . on sales of truck tires to fleet accounts operating 10 or more commercial vehicles, or if the establishment makes no such sales . . . [it is] the price typically charged in the area on [such] sales . . . ."

the sales were to large fleets, that a number of purchasers said they received discounts, that the practice in the industry was to grant significant discounts for fleet sales, that some sales were for resale or pursuant to bids to public agencies, and pointed out other facts directed at showing nonexemption under the guidelines. Despite this evidence, there is unclarity as to the precise percentages of dollar volume attributable to the various sales that the guidelines label nonretail. However, the burden of proof respecting exemptions is upon the company, as earlier indicated, and since we uphold the Secretary's test, that burden has not been met. If Steepleton had alleged on appeal that it could meet the Secretary's standards if they prevailed, even then we would hesitate to order a remand since the Secretary's position has been known from the outset. In all events, Steepleton has not even claimed in this Court that the Secretary's standards could be met.

The judgment of the Court of Appeals in No. 30 is affirmed; the judgment of the Court of Appeals in No. 31 is reversed.

It is so ordered.

SWANN ET AL. *v.* ADAMS, SECRETARY OF STATE OF FLORIDA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 973. Decided February 25, 1966.

This reapportionment case, instituted in 1962, was remanded to the District Court for further proceedings in light of *Reynolds* v. *Sims*, 377 U. S. 533, and companion cases. The Florida Legislature on June 29, 1965, enacted a reapportionment plan, which the District Court on appellants' challenge, filed July 6, held unconstitutional on December 23. That court, however, gave the plan interim approval. The period for which such approval was given would delay valid apportionment in Florida until at least 1969. *Held:* There is no warrant for perpetuating the unconstitutional apportionment for three more years. The case is reversed and remanded to the District Court so that a valid reapportionment plan will be made effective for the 1966 elections.

Reversed and remanded.

D. P. S. Paul, P. D. Thomson, Neal Rutledge, Richard F. Wolfson, Thomas C. Britton and *Stuart Simon* for appellants.

Earl Faircloth, Attorney General of Florida, and *Edward D. Cowart* and *Sam Spector,* Assistant Attorneys General, for appellees.

PER CURIAM.

We previously remanded this case to the District Court for further proceedings in light of *Reynolds* v. *Sims,* 377 U. S. 533, and the other cases relating to legislative reapportionment decided with *Reynolds.* 378 U. S. 553. The District Court deferred action until the conclusion of the legislative session which convened on April 6,

1965, stating that it would reconsider its decision should the Florida Legislature fail to effect a valid reapportionment by July 1, 1965.

A reapportionment law was passed by the legislature on June 29, 1965. On July 6 the appellants filed a joint petition asking the District Court to declare the newly enacted plan unconstitutional and proposing an alternative plan. The District Court did not take action until October 5 when it ordered oral argument for November 2, 1965. On December 23 the District Court concluded that the newly passed reapportionment plan failed to "meet the requirements of the Equal Protection Clause of the Federal Constitution as construed and applied in Reynolds v. Sims . . . ."

Although the District Court concluded that the plan did not comport with constitutional requirements, it approved the plan (making only minor changes) on an interim basis. Its approval was limited to the period ending 60 days after the adjournment of the 1967 session of the Florida Legislature.

We have no occasion to review the District Court's determination that the legislative reapportionment plan fails to meet constitutional standards. Indeed, Florida does not contend that the District Court erred in this regard, having conceded below that the plan was constitutionally deficient. We hold, however, that in approving the plan on an interim basis, the District Court erred. This litigation was commenced in 1962. The effect of the District Court's decision is to delay effectuation of a valid apportionment in Florida until at least 1969. While recognizing the desirability of permitting the Florida Legislature itself to determine the course of reapportionment, we find no warrant for perpetuating what all con-

cede to be an unconstitutional apportionment for another three years.

We reverse and remand to the District Court so that a valid reapportionment plan will be made effective for the 1966 elections.

Reversed and remanded.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART would affirm the judgment.

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

CARNATION CO. *v.* PACIFIC WESTBOUND CONFERENCE ET AL.

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

No. 20. Argued November 8, 1965.—Decided February 28, 1966.

Petitioner ships evaporated milk from west coast ports to the Philippines. Respondent conferences are associations of shipping companies that establish rates for their members pursuant to agreements approved by the Federal Maritime Commission (FMC). Pacific Westbound Conference is composed of companies operating between the West Coast and the Far East, and the Far East Conference of companies operating between the Atlantic and Gulf Coasts and the Far East. In 1957 Pacific Westbound announced a rate increase for evaporated milk going to the Philippines. Petitioner tried to get the original rate restored, but the increase remained until 1962. Thereafter petitioner filed an antitrust treble-damage action against the conferences and their members, alleging that the increase was initiated and maintained to implement rate-making agreements between the two conferences which had not been approved by the FMC and that Pacific Westbound refused to restore the original rate only because the Far East Conference would not agree. Petitioner claimed treble damages because the implementation of such unapproved agreements is unlawful *per se* under the antitrust laws. Respondents moved to dismiss on the ground that the Shipping Act, 1916 repealed all antitrust regulation of the rate-making activities of the shipping industry. The District Court granted the motion. The Court of Appeals affirmed on the ground that such action cannot be maintained until the FMC has passed on the agreements. After certiorari was granted the FMC completed an investigation of respondents' activities and concluded that its approval of a 1952 agreement between the two conferences did not cover the implementation of subsequent unapproved agreements which are the basis of petitioner's treble-damage complaint. *Held:* The implementation of rate-making agreements which have not been approved by the FMC is subject to the antitrust laws. Pp. 216–224.

(a) Creation of an antitrust exemption under § 15 of the Shipping Act for rate-making activities lawful under the Act implies

that unlawful rate-making activities are not exempt. *United States* v. *Borden Co.*, 308 U. S. 188, 201. Pp. 216–217.

(b) The Shipping Act was not intended to remove all antitrust regulation of the shipping industry's rate-making activities. Pp. 217–220.

(c) The decisions in *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474, and *Far East Conference* v. *United States*, 342 U. S. 570, holding that courts must refrain from imposing antitrust sanctions for activities of debatable legality under the Act to avoid the possibility of conflict between the courts and the FMC, while precluding the courts from awarding treble damages for conduct arguably lawful under the Act, do not require that the shipping industry be totally immunized from antitrust regulation. Pp. 220–222.

(d) Although the Court of Appeals thought respondents' activities were arguably lawful under the Act, it should have stayed the action instead of dismissing it since the statute of limitations might bar petitioner's claims before the FMC ruled. Pp. 222–223.

(e) Petitioner's failure to seek reparations under the Act in the FMC proceeding does not affect its rights under the antitrust laws, which are collateral to those which it might have sought under the Shipping Act. P. 224.

(f) The case is remanded with instructions to proceed only after the final outcome of the Shipping Act proceedings. P. 224.

336 F. 2d 650, reversed and remanded.

Arthur B. Dunne argued the cause for petitioner. With him on the briefs was *James R. Baird, Jr.*

Edward D. Ransom argued the cause for respondent Pacific Westbound Conference. With him on the brief was *R. Frederic Fisher*. *Elkan Turk, Jr.*, argued the cause and filed a brief for respondents Far East Conference et al. *Daniel M. Friedman* argued the cause for the United States and the Federal Maritime Commission. On the brief were *Solicitor General Marshall, Assistant Attorney General Turner, Philip B. Heymann, Irwin A. Seibel* and *Milan C. Miskovsky.*

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

We granted certiorari in this case in order to determine whether the Shipping Act, 1916, 39 Stat. 728, as amended, 75 Stat. 762, 46 U. S. C. §§ 801–842 (1964 ed.), precludes the application of the antitrust laws to the shipping industry.

The petitioner in this case is a shipper in foreign commerce that ships substantial quantities of evaporated milk from the West Coast of the United States to the Philippine Islands. The respondent conferences are associations of shipping companies that establish rates for their respective members pursuant to agreements approved by the Federal Maritime Commission. Pacific Westbound Conference is composed of companies operating between the West Coast and the Far East; Far East Conference, of companies operating between the Atlantic and Gulf Coasts and the Far East.

In 1957, Pacific Westbound announced a rate increase of $2.50 per ton for the shipment of evaporated milk to the Philippine Islands. Petitioner attempted to persuade Pacific Westbound to restore the original rate, but Pacific Westbound declined to do so until 1962.

Petitioner filed an antitrust treble-damage action against the respondent conferences and their respective members shortly after the original rate was restored. Petitioner alleged that Pacific Westbound initiated and maintained the rate increase in order to implement certain rate-making agreements between the conferences which have never been approved by the Maritime Commission. Petitioner also alleges that it asked Pacific Westbound to restore the original rate and that Pacific Westbound refused to do so only because Far East would not agree to it. Petitioner claimed that it is entitled to recover treble damages because the implementation of

such unapproved agreements is unlawful *per se* under the antitrust laws.

Respondents moved to dismiss, claiming that the Shipping Act, 1916 repealed all antitrust regulation of the rate-making activities of the shipping industry. The District Court granted the motion. The Court of Appeals for the Ninth Circuit affirmed the dismissal of the action on the ground that such an action cannot be maintained until the Commission has passed upon the agreements, 336 F. 2d 650. We granted certiorari, 380 U. S. 905, and hold that the implementation of rate-making agreements which have not been approved by the Federal Maritime Commission is subject to the antitrust laws.

The Shipping Act contains an explicit provision exempting activities which are lawful under § 15 of the Act from the Sherman and Clayton Acts. This express provision covers approved agreements, which are lawful under § 15, but does not apply to the implementation of unapproved agreements, which is specifically prohibited by § 15.[1] The creation of an antitrust exemption for

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[1] Section 15, as set forth in 46 U. S. C. § 814, provides in part:

"Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to non-contract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section

rate-making activities which are lawful under the Shipping Act implies that unlawful rate-making activities are not exempt. This Court so interpreted an analogous provision of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. § 601 *et seq.* (1964 ed.), exempting marketing agreements approved by the Secretary of Agriculture from the antitrust laws. The Court there declared that the "explicit provisions requiring official participation and authorizations show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable. If Congress had desired to grant any further immunity, Congress doubtless would have said so." *United States* v. *Borden Co.*, 308 U. S. 188, 201.

Respondents contend, nevertheless, that the § 15 exemption does not reflect the true intent of the Congress which enacted it. They insist that the structure of the Act and its legislative history demonstrate an unstated legislative purpose to free the shipping industry from the antitrust laws.

We do not believe that the remaining provisions of the Shipping Act can reasonably be construed as an implied repeal of all antitrust regulation of the shipping industry's rate-making activities. We recently said: "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust

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817 (b) of this title and with the provisions of any regulations the Commission may adopt.

"Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1–11 and 15 of Title 15, and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action. . . ."

and regulatory provisions." *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 350–351. We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry. We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision such as the exemption provisions of the Shipping and Agricultural Acts. See, *e. g., United States* v. *Philadelphia National Bank, supra.*

The historical background of the Shipping Act does not indicate that a different rule of construction should be applied in interpreting that Act. The Congress which enacted the Shipping Act was not hostile to antitrust regulation. On the contrary, the Shipping Act was the end product of an extensive investigation of the shipping industry that was conducted by the Congress which enacted the Clayton Act.[2]

Respondents claim, nonetheless, that the Committee which conducted the investigation must have been hostile to antitrust regulation of the shipping industry because it concluded that the abolition of the conference system, which the Sherman Act probably required, would not be in the public interest. But the Committee also concluded that the conference system had produced sub-

[2] The Shipping Act, 1916 was passed following an exhaustive investigation into shipping combinations undertaken by the House Committee on Merchant Marine and Fisheries under the chairmanship of Congressman Alexander. That Committee issued its Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade, H. R. Doc. No. 805, 63d Cong., 2d Sess. ("Alexander Report") in 1914.

stantial evils and that it should not be permitted to continue without governmental supervision.

The Committee said: "While admitting their many advantages, the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision. To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action. Abuses exist, and the numerous complaints received by the Committee show that they must be recognized." H. R. Doc. No. 805, 63d Cong., 2d Sess., pp. 417–418.

Therefore, it seems likely that the Committee really only wanted to give the shipping industry a limited antitrust exemption. We do not believe that its purpose would be frustrated by the application of the antitrust laws to the implementation of conference agreements which have not been subjected to public scrutiny and examination by a governmental agency.[3]

But even if the Committee considered the possibility of a complete antitrust exemption at the time of the 1914 Report, the § 15 exemption clearly demonstrates

[3] Respondents contend that treble-damage actions will frustrate one of the Committee's purposes. The Committee found, however, that the conferences had discriminated among shippers and concluded that such discrimination should be eliminated. Respondents assert that treble-damage awards for shippers are equivalent to rebates and that shippers will receive unequal "rebates" because different courts and juries will inevitably apply different measures of damages. Therefore, they conclude that treble-damage actions will frustrate the Shipping Act policy of equality of treatment for shippers.

We believe that Congress was concerned with assuring equality of treatment by the conferences, not with equality of treatment by juries in collateral proceedings. There is no reason to believe that Congress would want to deprive all shippers of their right to treble damages merely to assure that some shippers do not obtain more generous awards than others.

that those who drafted the Shipping Act during the next Congress decided not to give the industry complete antitrust immunity. Since the problem of the application of the antitrust laws to the shipping industry was one of the focal points of the entire inquiry, the exemption provision could not have been a casual afterthought. The language of that provision must have been selected as a matter of deliberate choice in order to indicate the extent to which the industry's rate-making activities remain subject to the antitrust laws as well as the extent to which those activities are exempted from antitrust regulation.

This Court's decisions in *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474, and *Far East Conference* v. *United States*, 342 U. S. 570, do not conflict with our interpretation of the Shipping Act. Those cases merely hold that courts must refrain from imposing antitrust sanctions for activities of debatable legality under the Shipping Act in order to avoid the possibility of conflict between the courts and the Commission.

The plaintiffs in the *Cunard* and *Far East* cases were seeking to enjoin activities which allegedly implemented unapproved agreements even though the Commission had never determined whether those alleged activities constituted the implementation of unapproved agreements. There was a real risk that the District Court might find that the defendants had implemented unapproved agreements while the Commission might find in some later proceeding that the same activities constituted the implementation of approved agreements. This Court decided that the danger of such a conflict could best be avoided by holding that one tribunal or the other has the exclusive right to make the initial factual determination. Since the Commission has specialized knowledge of the industry, the Court concluded that such primary jurisdiction should be vested in the Commission

and accordingly instructed the District Court to refrain from acting until the Commission had ascertained and interpreted the circumstances underlying the legal issues.

The relief requested in the *Cunard* and *Far East* cases also created another source of possible conflict. Even if the Commission found that the defendants in those cases had implemented unapproved agreements, the Commission might decide to approve the prospective implementation of those agreements. The Commission would obviously be hampered in the exercise of that power if a court had previously issued an unconditional injunction prohibiting the implementation of the agreements in question. Therefore, the Court concluded that the District Court should not be permitted to issue an unconditional injunction in the absence of a Commission determination disapproving future operations under those agreements.

The considerations which led to our decisions in the *Far East* and *Cunard* cases do not require that the shipping industry be totally immunized from antitrust regulation. The *Far East* and *Cunard* principles permit courts to subject activities which are clearly unlawful under the Shipping Act to antitrust sanctions so long as the courts refrain from taking action which might interfere with the Commission's exercise of its lawful powers. The *Far East* opinion explicitly recognized that this is the case. The Court observed that the Government could reinstate its injunction suit if and when the Commission found that the defendants' activities were not lawful under the Shipping Act and would not be approved prospectively.[4]

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[4] The Court said:

"Having concluded that initial submission to the Federal Maritime Board is required, we may either order the case retained on the District Court docket pending the Board's action . . . or order dismissal of the proceeding brought in the District Court. . . . We

The award of treble damages for past and completed conduct which clearly violated the Shipping Act would certainly not interfere with any future action of the Commission. Although the Commission can approve prospective operations under agreements which have been implemented without approval, respondents concede that the Commission has no power to validate pre-approval implementation of such agreements. Therefore, the *Far East* and *Cunard* principles only preclude courts from awarding treble damages when the defendants' conduct is arguably lawful under the Shipping Act.

The Court of Appeals thought that respondents' activities were arguably lawful under the Shipping Act. It concluded that respondents' activities conceivably constituted the implementation of a 1952 agreement between the respondents which had been approved by the Commission. Therefore, the Court of Appeals affirmed the District Court's order dismissing the action.

We believe that the Court of Appeals erred in dismissing the action. The Court of Appeals apparently thought that this was the proper course because this Court dismissed the action in *Far East*. However, the *Far East* opinion indicates that the Court only chose to dismiss that action rather than to stay the proceedings pending Commission action because it found that dismissal would not prejudice the plaintiff's right to obtain

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believe that no purpose will here be served to hold the present action in abeyance in the District Court while the proceeding before the Board and subsequent judicial review or enforcement of its order are being pursued. A similar suit is easily initiated later, if appropriate." 342 U. S. 570, 576–577.

If the *Far East* decision had held that the activities in question could never be subjected to the antitrust laws under any circumstances, there would obviously have been no reason to consider whether the proceedings should be stayed or dismissed. Thus, the *Far East* opinion effectively determined that the implementation of unapproved rate-making agreements is subject to antitrust regulation.

antitrust relief at the appropriate time.[5] That plaintiff was seeking injunctive relief from continuing conduct. Such a suit could easily be reinstituted if and when the Commission determined that the activities in question violated the Shipping Act. But a treble-damage action for past conduct cannot be easily reinstituted at a later time. Such claims are subject to the Statute of Limitations and are likely to be barred by the time the Commission acts. Therefore, we believe that the Court of Appeals should have stayed the action instead of dismissing it.

The Commission completed its own investigation of respondents' activities after certiorari was granted and concluded that its approval of respondents' 1952 agreement did not cover the implementation of the subsequent agreements which are the basis of petitioner's treble-damage complaint.[6] An appeal from the Commission's decision is now pending.

Petitioner's treble-damage action is based upon the theory that those same subsequent rate-making agreements are unlawful *per se* under the antitrust laws.

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[5] See note 4, *supra*.

[6] The Federal Maritime Commission commenced an investigation in 1959 to determine whether the 1952 agreement between respondents constituted the full agreement between the parties. This investigation culminated in the issuance of the Commission's Report on *Joint Agreement Between Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference*, Federal Maritime Commission Docket No. 872, July 28, 1965, rehearing denied, November 1, 1965.

The Commission found that the respondents had entered into and implemented a number of joint rate-making agreements after the Commission approved the 1952 agreement for consultation and that none of the subsequent agreements had been filed for approval. The Commission concluded that its approval of the 1952 agreement did not cover any of the subsequent agreements and, therefore, that respondents had violated the Shipping Act by implementing those subsequent agreements.

Petitioner participated in the proceedings before the Commission, but petitioner did not ask for reparations under the Shipping Act and, therefore, could not be accorded any. Petitioner's failure to seek Shipping Act reparations does not affect its rights under the antitrust laws. The rights which petitioner claims under the antitrust laws are entirely collateral to those which petitioner might have sought under the Shipping Act. This does not suggest that petitioner might have sought recovery under both, but petitioner did have its choice.

Therefore, we reverse the order dismissing this action and remand the case to the United States District Court for the Northern District of California with instructions to stay the action pending the final outcome of the Shipping Act proceedings and then to proceed in a manner consistent with this opinion.

It is so ordered.

Syllabus.

ACCARDI ET AL. *v.* PENNSYLVANIA RAILROAD CO.

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

No. 280. Argued January 20, 1966.—Decided February 28, 1966.

Petitioners, after military service in World War II, returned to their employment as tugboat firemen with respondent, Pennsylvania Railroad, which they had commenced in 1941 and 1942. Each was given the same amount of seniority he had before leaving, plus credit for the time spent in the service as required by the Selective Training and Service Act of 1940. A strike developed in 1959 over the need for firemen on the new diesel tugs, which was settled the next year by petitioners' union and the railroads. The settlement agreement called for retention of firemen with 20 years or more seniority who wanted to remain. Other employees, including petitioners, were to be paid a severance or separation allowance determined by the length of "compensated service" with the railroad, a month of such service being defined as any month in which the employee worked one or more days, and a year of such service being 12 such months or a major portion thereof. Petitioners claimed that their years in the armed forces were to be included in calculating their separation allowances. When the railroad declined to adjust their allowances accordingly, petitioners brought this action in District Court, claiming that respondent's refusal contravened § 8 (b)(B) of the Act, requiring reinstatement "to [the former] position or to a position of like seniority, status and pay," as re-emphasized by § 8 (c) providing that a person reinstated "shall be so restored without loss of seniority." Respondent claimed that those provisions were wholly inapplicable and also contended, in view of the § 8 (c) provision that a reinstated veteran "shall not be discharged . . . without cause within one year after such restoration," that the Act had no application to any rights created by the settlement agreement. The District Court rendered judgment for petitioners and the Court of Appeals reversed. *Held:*

1. Failure to credit petitioners' "compensated service" time with the period spent in the armed services does not accord petitioners the right to be reinstated "without loss of seniority" guaranteed by §§ 8 (b)(B) and (c). Pp. 228–232.

2. Respondent's contention that the Act does not apply to rights resulting from the contract, which was entered into over a year after petitioners resumed employment, is wholly without merit, since seniority status continues beyond the first year of a veteran's re-employment. *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278. Pp. 232–233.

3. The case is remanded to the Court of Appeals for consideration of the issue of the District Court's computation of interest on the judgment awarded petitioners. P. 233.

341 F. 2d 72, reversed and remanded.

Richard A. Posner argued the cause for petitioners, *pro hac vice,* by special leave of Court. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Richard S. Salzman.*

Edward F. Butler argued the cause for respondent. With him on the brief was *R. L. Duff.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioners, who are World War II veterans and former employees of the Pennsylvania Railroad, brought this action claiming that their former employer denied them certain seniority rights guaranteed by § 8 of the Selective Training and Service Act of 1940.[1] Section 8 (b)(B) of that Act provides that upon application by any former employee who has satisfactorily completed his military service, a private employer "shall restore" such honorably discharged serviceman to his former "position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." Section 8 (c)

[1] 54 Stat. 890, as amended, 50 U. S. C. App. § 308 (1946 ed.). Section 8 of the 1940 Act is now § 9 of the Universal Military Training and Service Act, 62 Stat. 614, as amended, 50 U. S. C. App. § 459 (1964 ed.).

re-emphasizes § 8 (b)(B) by providing that any person so restored "shall be so restored without loss of seniority."

The facts in this case are undisputed. In 1941 and 1942 the six petitioners began working as firemen on tugboats owned by the Pennsylvania Railroad and operated in the Port of New York. Petitioners left their jobs in 1942 and 1943 to enter the armed services and after serving three years or more each received an honorable discharge. Shortly after discharge each was restored by the railroad to his former position as fireman with the same amount of seniority he had before leaving plus credit for the time spent in the armed forces, as required by the 1940 Act. All six continued to work for the railroad until 1960. In 1959 a labor dispute broke out when the Pennsylvania and nine other railroad carriers operating tugboats claimed that firemen were not necessary on the new diesel tugs, and the owners of the tugs sought to abolish the craft and class of fireman. The unions affected called a strike. This strike was settled in 1960 when petitioners' union and the railroads entered an agreement which abolished the position of fireman on all diesel tugs. As their part of the bargain the railroads agreed to retain in their employ firemen with 20 years or more seniority who desired to remain, but all firemen with less than 20 years seniority were discharged. To make this settlement more acceptable to the employees, those who were discharged or who did not desire to stay with the railroads were paid a severance or separation allowance based on a formula set out in the agreement. Each of the petitioners involved in this case left his job with the Pennsylvania Railroad and received a separation allowance, but each received less than he thought was due. This lawsuit was begun as an attempt to recover what each believed was owed him by the railroad.

The amount of the separation allowances was determined, according to the language of the agreement, by

the length of "compensated service" with the railroad. A month of "compensated service" was defined as any month in which the employee worked one or more days and "a year of compensated service is 12 such months or major portion thereof." In computing petitioners' separation allowances the railroad did not include the years spent in the armed forces as years of "compensated service." Petitioners claim this was error and contrary to § 8 of the Selective Training and Service Act of 1940. Each petitioner received $1,242.60 less than he would have if given credit for the three or more years he spent in military service and the parties have stipulated that if petitioners are entitled to have the time in the service included in determining severance pay, judgment for this amount should be rendered for each of them. The District Court rendered judgment for petitioners. The Court of Appeals reversed, holding, contrary to the District Court, that the petitioners were not entitled to credit for their time in the service in computing the allowances because the allowances did not come within the concepts of "seniority, status, and pay." 341 F. 2d 72.

The language of the 1940 Act clearly manifests a purpose and desire on the part of Congress to provide as nearly as possible that persons called to serve their country in the armed forces should, upon returning to work in civilian life, resume their old employment without any loss because of their service to their country. Section 8 (b)(B) of the statute requires that private employers reinstate their former employees who are honorably discharged veterans "to [their former] position or to a position of like seniority, status, and pay," and § 8 (c) provides that such a person "shall be so restored without loss of seniority." This means that for the purpose of determining seniority the returning veteran is to be treated as though he has been continuously employed during the period spent in the armed forces. *Fishgold* v.

Sullivan Corp., 328 U. S. 275, 284–285. The continuing purpose of Congress in this matter was again shown in the Universal Military Training and Service Act, 62 Stat. 604, as amended, 50 U. S. C. App. § 451 *et seq.* (1964 ed.). Section 9 (c)(2) of that Act provides:

> "It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

Respondent railroad does not quarrel with this interpretation of the statute but insists that the severance pay involved here was not based on seniority and that §§ 8 (b)(B) and (c) are wholly inapplicable to this case.

The term "seniority" is nowhere defined in the Act, but it derives its content from private employment practices and agreements. This does not mean, however, that employers and unions are empowered by the use of transparent labels and definitions to deprive a veteran of substantial rights guaranteed by the Act. As we said in *Fishgold* v. *Sullivan Corp., supra,* "[N]o practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." At 285. The term "seniority" is not to be limited by a narrow, technical definition but must be given a meaning that is consonant with the intention of Congress as expressed in the 1940 Act. That intention was to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to

the call of their country. In this case there can be no doubt that the amounts of the severance payments were based primarily on the employees' length of service with the railroad. The railroad contends, however, that the allowances were not based on seniority, but on the actual total service rendered by the employee. This is hardly consistent with the bizarre results possible under the definition of "compensated service." As the Government [2] points out, it is possible under the agreement for an employee to receive credit for a whole year of "compensated service" by working a mere seven days. There would be no distinction whatever between the man who worked one day a month for seven months and the man who worked 365 days in a year. The use of the label "compensated service" cannot obscure the fact that the real nature of these payments was compensation for loss of jobs. And the cost to an employee of losing his job is not measured by how much work he did in the past—no matter how calculated—but by the rights and benefits he forfeits by giving up his job. Among employees who worked at the same jobs in the same craft and class the number and value of the rights and benefits increase in proportion to the amount of seniority, and it is only natural that those with the most seniority should receive the highest allowances since they were giving up more rights and benefits than those with less seniority. The requirements of the 1940 Act are not satisfied by giving returning veterans seniority in some general abstract sense and then denying them the perquisites and benefits that flow from it. We think it clear that the amount of these allowances is just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall. We hold that the failure to credit petitioners' "compensated service" time with the

[2] The Department of Justice is representing petitioners in this case pursuant to § 8 (e) of the 1940 Act.

period spent in the armed services does not accord petitioners the right to be reinstated "without loss of seniority" guaranteed by §§ 8 (b)(B) and (c).

What we have said makes it unnecessary to discuss in detail the Court of Appeals' holding that these allowances did not come within the concepts of "seniority, status, and pay" and thus were governed not by § 8 (b)(B) and the part of § 8 (c) relating to seniority but rather by the clause in § 8 (c) stating that returning veterans "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces . . . ." The Government contends that the "other benefits" clause of § 8 (c) was added to the bill "for the express purpose of entitling employees to receive, while in service, such benefits as their employers accorded employees on leave of absence." The legislative history referred to in the Government's brief persuasively supports such a purpose.[3]

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[3] Senator Sheppard in explaining an amendment which included the "other benefits" provision said:

"That amendment would make certain that all trainees would receive the same insurance and other benefits as those who are on furlough or leave of absence in private life. It seems to me to be a good suggestion." 86 Cong. Rec. 10914.

And Congressman May, the Chairman of the House Committee on Military Affairs, had this colloquy with another Congressman on the same question:

"Mr. MILLER. In reference to insurance, will that apply to group insurance? Many industrial plants, of course, carry group insurance. Under those contracts they continue their participation while a man is on vacation or on furlough. Would they continue those policies in force?

"Mr. MAY. This would continue them in force and that is the very purpose of the legislation." 86 Cong. Rec. 11702.

This argument of the Government—that the "insurance or other benefits" clause was put in to provide these company benefits for the serviceman at the time he was in the armed forces—also finds some support in the fact that § 8 (c) provides that the serviceman would be entitled to these benefits only if they were "in effect with the employer at the time such person was inducted into such forces . . . ." Without attempting in this case to determine the exact scope of this provision of § 8 (c) it is enough to say that we consider that it was intended to add certain protections to the veteran and not to take away those which are granted him by § 8 (b)(B) and the other clauses of § 8 (c).

Since the Court of Appeals held that the provisions of § 8 (b)(B) did not apply to separation allowances it found it unnecessary to decide an alternative ground which the railroad contended should cause reversal. That contention was that since the agreement between the railroad and the union was entered into more than one year after petitioners were restored to their employment, the Act has no application to any rights created by the agreement. This argument rested on that part of § 8 (c) which provides that a veteran who is restored to employment "shall not be discharged from such position without cause within one year after such restoration." The District Court rejected the contention as having no merit. We agree with the District Court and believe this contention to be so wholly without merit that the case need not be remanded to the Court of Appeals for its decision on the point. In *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, 284, we said:

> "[T]he expiration of the year did not terminate the veteran's right to the seniority to which he was entitled by virtue of the Act's treatment of him as though he had remained continuously in his civilian employment; nor did it open the door to discrimina-

> tion against him, as a veteran. . . . His seniority status . . . continues beyond the first year of his reemployment . . . ."

What we said there governs this case. The District Court was correct in rejecting this contention of the railroad.

In the Court of Appeals the railroad also contended that the District Court had improperly computed the interest owing on the judgment awarded the plaintiffs. Because of its holding that petitioners were entitled to no recovery at all the Court of Appeals declined to decide the question of interest. The record before us does not present that question with sufficient clarity for us to pass upon it.

We affirm the judgment of the District Court holding that petitioners are entitled to recover from the railroad the stipulated damages due them because they are entitled to credit for the full amount of time served in the armed forces in calculating their severance pay. But the cause is remanded to the Court of Appeals for further consideration of the interest contention.

Reversed and remanded.

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

STEVENS *v.* MARKS, NEW YORK SUPREME COURT JUSTICE.

CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 210. Argued January 24, 1966.—Decided February 28, 1966.*

Petitioner, a New York City police officer, was subpoenaed before one of the grand juries investigating alleged bribery of public officials. He appeared without counsel and signed a waiver of immunity upon the prosecutor's advice that failure to do so would subject him to removal from public office. The New York Constitution and the New York City Charter provide for forfeiture of employment by a public employee who invokes the privilege against self-incrimination or who refuses to waive immunity from prosecution. The waiver covered both the privilege against self-incrimination and immunity from prosecution. Petitioner was asked a few questions and given a questionnaire to fill out. He appeared later before another grand jury and, having consulted counsel, refused to sign a waiver of immunity. He was thereafter discharged as a police officer. He was summoned again before the first grand jury, refused on the basis of his federal and state constitutional rights to answer questions and again refused for those reasons when thereafter directed by a judge to answer. Following a hearing at which petitioner contended that the waiver was invalid or, alternatively, had been effectively withdrawn, he was found guilty of contempt and sentenced. He appealed to a state appellate court which dismissed the appeal in reliance on *Regan* v. *New York*, 349 U. S. 58, reasoning that if the immunity waiver was invalid petitioner would have received immunity from prosecution under New York statutes, and that if the waiver was valid he no longer had a privilege not to testify. Leave to appeal that dismissal was denied. While review of the foregoing contempt conviction (before this Court now in No. 210) was still pending, petitioner was again summoned before the first grand jury, claimed his privilege, refused to answer, was brought before another judge, refused again to answer, was adjudged guilty of contempt and served the sentence

*Together with No. 290, *Stevens* v. *McCloskey, Sheriff*, on certiorari to the United States Court of Appeals for the Second Circuit.

imposed. Petitioner was summoned before the grand jury for a third time; on refusing to answer, he was again adjudged guilty of contempt. While serving the sentence imposed for this third contempt petitioner sought habeas corpus in the Federal District Court, which on the basis of *Regan* denied relief. The Court of Appeals affirmed, and this Court granted the petition for certiorari (No. 290). *Held:*

1. Petitioner's withdrawal of the waiver was, as a matter of federal law, effective. Pp. 238–244.

2. Since the waiver had been effectively withdrawn, petitioner's privilege against self-incrimination was available. *Malloy* v. *Hogan,* 378 U. S. 1. Pp. 238–239.

3. Under the applicable New York statutes, immunity is conferred only by taking affirmative steps in strict compliance with the current immunity statutes and no such steps were taken in this case. Pp. 241–243.

4. Having suggested to petitioner that he had no immunity from prosecution, New York cannot thereafter claim that in fact petitioner did have immunity within the "fair warning" requirement of *Raley* v. *Ohio,* 360 U. S. 423. Pp. 240–241; 244–246.

22 App. Div. 2d 683, 253 N. Y. S. 2d 401; 345 F. 2d 305, reversed.

John P. Schofield and *Eugene Gressman* argued the cause and filed briefs for petitioner in both cases.

H. Richard Uviller argued the cause for respondents in both cases. With him on the brief were *Frank S. Hogan* and *Michael R. Stack.*

Briefs of *amici curiae,* urging reversal, were filed by *Robert J. Eliasberg* and *Kenneth C. Eliasberg* for the Patrolmen's Benevolent Association of the City of New York, and by *Abraham Glasser* for the Superior Officers Council of the City of New York Police Department.

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner, a member of the New York City Police Department, was summarily discharged on July 15, 1964. On June 26 he had been subpoenaed before a New

York County grand jury, known as the First June 1964 Grand Jury. Before appearing in the grand jury room, an Assistant District Attorney advised him to sign a waiver of immunity, saying that otherwise he would be subject to removal from public office.[1] He signed the waiver.[2] Thereupon he was an unsworn witness before the grand jury:

"Q. Lieutenant . . . Stevens, as was pointed out to you earlier, this grand jury is inquiring into the

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[1] Article I, § 6, of the New York Constitution provides in part: "No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general."

[2] The waiver read in part:

". . . all benefits, privileges, rights and immunity which I would otherwise obtain from indictment, prosecution and punishment for or on account of, regarding or relating to any matter, transaction or thing, concerning the conduct of my office or the performance of my official duties, or the property, government or affairs of the State of New York or of any county included within its territorial limits, or the . . . official conduct of any officer of the city or of any such county, concerning any of which matters, transactions or things I may testify or produce evidence, documentary or otherwise, before the 1st, 1964 Grand Jury in the County of New York, in the investigation being conducted by said Grand Jury."

crimes of conspiracy to commit the crime of bribery of a public officer and the crime of bribery of a public officer; do you understand that?

"A. I do.

"Q. Do you understand further that you have been called here as a potential defendant, not as a witness; do you understand that?

"A. I do.

"Q. Do you understand that under the Constitution of the United States you have the right to refuse to answer any questions that might tend to incriminate you; do you understand that?

"A. I do.

"Q. Do you understand further that under the New York State Constitution, and New York City Charter, a public officer is required, if he desires to continue to hold his public position, to sign a limited waiver of immunity; do you understand that?

"A. I do.

"Q. Do you understand that that means that if you sign a limited waiver of immunity which requires you to answer questions concerning the conduct of your public office, that what you say will be taken down and recorded, and that should this grand jury vote a true bill against you, that is an indictment—to indict you for a crime, the testimony you give can and will be used against you. Do you understand that?

"A. I do.

"Q. Are you prepared to sign a waiver of immunity?

"A. I am."

That petitioner's waiver of "all benefits, privileges, rights and immunity which I would otherwise obtain

from indictment, prosecution and punishment" covered both the *privilege* against self-incrimination and *immunity* from prosecution [3] is evidenced by the foregoing colloquy.

Then petitioner was sworn, asked a few questions, given a questionnaire to fill out, and asked to return with it completed.

At these stages petitioner had no counsel. On July 15, he returned to a different grand jury—the Third July 1964 Grand Jury. Now he had counsel and refused to sign a waiver of immunity. He was examined, as before, concerning his knowledge that to save his job he had to waive his immunity. He acknowledged that he knew the consequences of his refusal to waive his immunity and was excused.

That same day, as a consequence of his refusal to waive immunity before the Third July 1964 Grand Jury, petitioner was discharged as a police officer.

On July 22 he was again summoned before the First June 1964 Grand Jury and put a certain question which he refused to answer on the basis of his state and federal [4] constitutional rights. He was brought before a judge who directed him to answer the questions. He refused to answer "on the grounds stated in the State and Federal Constitution" and the judge found him in contempt. On July 28, a hearing was held, at which petitioner, through his counsel, contended that the waiver was invalid or, alternatively, had been effectively withdrawn. In either

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[3] This was the view of the Appellate Division which, when affirming petitioner's first contempt conviction, said: "[I]f the waiver of immunity is still valid, petitioner no longer has any privilege to refuse to testify." 22 App. Div. 2d 683, 684, 253 N. Y. S. 2d 401, 402.

[4] *Malloy* v. *Hogan*, 378 U. S. 1, holding that the Fourteenth Amendment guaranteed a witness the protection of the Fifth Amendment's privilege against self-incrimination, was decided June 15, 1964.

event his Fifth Amendment claim was valid under *Malloy* v. *Hogan,* 378 U. S. 1. For it was agreed that "there is no claim that this witness has been given immunity." [5] At the conclusion of the hearing, petitioner was fined $250 and given 30 days in the civil jail in New York City for that contempt. Petitioner promptly appealed to the Appellate Division of the New York Supreme Court. While this appeal was pending, he sought and was denied federal habeas corpus. *Application of Stevens,* 234 F. Supp. 25. The Appellate Division dismissed the appeal, stating its belief that *Regan* v. *New York,* 349 U. S. 58, was controlling.[6] 22 App. Div. 2d 683, 253 N. Y. S. 2d 401. The New York Court of Appeals denied leave to appeal. 15 N. Y. 2d 483, 205 N. E. 2d 315. This is the conviction which is the basis of the petition in No. 210.

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[5] Petitioner's counsel made the following statement: "May we also have the record clarified, Your Honor. It is my understanding, based on what was said here the last time in court before Your Honor, that there is no claim that this witness has been given immunity. The claim is that he has signed a valid waiver and that he refused to testify under it, and that is why Your Honor has found him guilty of criminal contempt, is that right?" The court replied, "That covers the situation."

[6] *Regan* v. *New York* arose under an earlier version of the New York immunity law, which conferred *automatic* immunity from prosecution on anyone who testified before the grand jury. Regan had, like petitioner, executed a waiver of immunity and later sought to repudiate it. Unclear of his rights, Regan refused to testify though ordered to do so. This Court affirmed his contempt conviction, refusing to consider questions raised as to the validity of his waiver and the efficacy of his efforts to withdraw it. The Court's theory was that regardless of the validity of the waiver, Regan was bound to answer the questions put to him: If the waiver was valid and binding, then of course he must answer since he had waived the right to refuse to do so. If the waiver was invalid, then petitioner would have immunity from prosecution, and thus could not rely on the privilege against self-incrimination.

Thereafter, on September 28, petitioner was summoned again before the First June 1964 Grand Jury. Once again a question was put him and once more he refused to answer, claiming his privilege which, as we have said, was available to him under *Malloy* v. *Hogan, supra,* if the waiver was invalid or had been effectively withdrawn. He was brought before another judge who directed him to answer the question. On refusal, petitioner was held in contempt and fined $250 and sentenced to 30 days in jail.[7] On January 11, 1965, petitioner was once more summoned before the First June 1964 Grand Jury and refused again to answer a question on the ground that it was incriminating. He was taken before a judge and directed to answer. On his refusal he was fined $250 and sentenced to 30 days. While serving that jail term, petitioner once again sought a writ of habeas corpus in the United States District Court. The court denied relief, indicating that it regarded *Regan* v. *New York, supra,* binding authority. *United States ex rel. Stevens* v. *McCloskey,* 239 F. Supp. 419. The Court of Appeals for the Second Circuit affirmed. 345 F. 2d 305. It is this last conviction that is the basis of petitioner's application for a writ of habeas corpus in No. 290.

Both cases are here on writs of certiorari. 382 U. S. 809.

Not once in any of the hearings was petitioner told that if he responded with incriminating answers, the state immunity statute might preclude a prosecution based on such answers. On the contrary, the Assistant District Attorney made it clear that the view of the prosecution was that petitioner had waived any rights he might have had under the immunity statute:

"Q. And was it further told to you that it meant that if you signed a limited waiver of immunity,

[7] This sentence was served.

which required you to answer questions concerning your conduct in public office, that what you said would be taken down and recorded and that should this grand jury vote a true bill against you, that is an indictment, the testimony you gave could be and will be used against you? Was that explained to you?

"A. I believe it was, yes, sir.

"Q. And did you tell this grand jury you understood that?

"A. That's right."

The Assistant District Attorney went on to say:

"Q. And do you understand further that regardless of what your lawyer may say or what anyone else may say, that it is the contention of the People that this is a valid waiver of immunity and that you do not have immunity? Do you understand that?

"A. Yes, sir."

As we read this record, petitioner was led to believe that he could invoke his federal privilege against self-incrimination only on pain of losing his public employment; that to retain his job he was obliged to sign a waiver; and that should he sign a waiver he would have no immunity in answering incriminating questions. Throughout the various appearances petitioner made before the grand juries and in the New York courts which held him in contempt, the prosecution consistently maintained that petitioner's waiver was valid. And there was never any suggestion that if, as petitioner contended, the waiver *were* invalid or effectively withdrawn, he might obtain a valid immunity from subsequent prosecution.

Here lies the difference between this case and *Regan* v. *New York*. For after that case arose, New York amended its immunity statute. Instead of conferring automatic immunity on all witnesses who testify before

the grand jury, immunity is now conferred "only by strict compliance with the procedural requirements of our immunity statutes properly enacted . . . ." *People* v. *Laino*, 10 N. Y. 2d 161, 173, 176 N. E. 2d 571, 579. Section 381 of the Penal Law, as amended in 1953,[8] provides that in any bribery investigation "the court, magistrate or grand jury, or the committee may confer immunity in accordance with the provisions" of § 2447. The latter section provides that an investigating grand jury is among those "authorized to confer immunity" in a proceeding relating to bribery, provided that certain procedural steps are taken: (a) the witness must refuse to answer on the ground of self-incrimination; (b) the grand jury must then be "expressly requested by the prosecuting attorney to order such person to . . . answer"; (c) the grand jury must then order the person to answer; (d) the witness must then comply with the order to answer; and (e) thereupon "immunity shall be conferred." Under these laws, immunity is not automatically conferred "merely by testifying." *People* v. *Laino*, *supra*, at 172, 176 N. E. 2d, at 578. "Complete immunity from prosecution may be obtained by a prospective defendant, or any witness, only by strict compliance with the procedural requirements of our immunity statutes properly enacted . . . or by virtue of immunity provisions in our State Constitution . . . ." *Id.*, at 173, 176 N. E. 2d, at 579.

In the present case neither the prosecutor nor the grand jury had any thought of conferring immunity on petitioner. They tried to hold petitioner to his waiver. Yet if he had gone ahead and testified and it were established in a later prosecution that his waiver was invalid, it seems that he would have been bereft of

[8] See *Regan* v. *New York*, 349 U. S. 58, 59, note 2 and accompanying text, for a discussion of the earlier version of that section.

any immunity under the New York law, since the requirements of "strict compliance" had not been met.[9] Accordingly, only if the petitioner's waiver was valid and binding was he bound to testify—at least until the affirmative steps necessary to confer immunity were taken. Whether or not petitioner could validly assert the privilege against self-incrimination depends on whether the waiver was, as he contends, invalid or effectively withdrawn. Although the trial judge which first found him in contempt ruled that the waiver was valid, the Appellate Division considered that question irrelevant in light of *Regan* v. *New York*.

Since, as we have seen, *Regan* is inapposite, we conclude that at the time petitioner was held to be in contempt, he had—as a matter of federal constitutional law—effectively withdrawn the waiver. When petitioner was asked to waive his federally secured right to refuse to answer the questions, he was informed that failure to execute the waiver would result in the loss of his public employment. Although it put petitioner to "a choice between the rock and the whirlpool" (*Frost Trucking Co.* v. *Railroad Comm'n*, 271 U. S. 583, 593), New York says that, having "voluntarily" waived his constitutional rights, petitioner may not thereafter claim his privilege. At petitioner's first appearance before a grand jury after having consulted with counsel, petitioner attempted to do just that: he announced his intention to withdraw his waiver.

Even were we to assume, without deciding, that a State may constitutionally exact, on pain of loss of employment and in the absence of counsel, the waiver of a constitutional right, we would be unable to find any justifi-

[9] That immunity was never properly conferred on petitioner was, as we read this record, recognized by petitioner's counsel and by the judge which first found him in contempt of court. See note 5, *supra*, and accompanying text.

cation for denying the right to withdraw it.[10] We hold that petitioner's effort to withdraw the waiver was effective, and that in the absence of an immunity provision clearly made applicable to him, petitioner could properly stand on his privilege and refuse to answer potentially incriminating questions.

One final point remains. Although the courts below did not consider the possibility, the briefs suggest that petitioner might, quite apart from the statutory immunity conferred by § 2447, have been given immunity by operation of law. It is said that, as the New York courts have interpreted the state constitution, a potential defendant may not be compelled to appear before a grand jury; any testimony given by him during such an appearance may not thereafter be used against him. *People* v. *Steuding,* 6 N. Y. 2d 214, 160 N. E. 2d 468; *People* v. *Laino,* 10 N. Y. 2d 161, 176 N. E. 2d 571. Thus it might be thought that this "automatic" immunity resulting from petitioner's appearance before the grand jury makes this case precisely identical with *Regan.* We cannot agree. We need not stop to determine whether the immunity said to be conferred here—which merely prevents the use of the defendant's testimony or its fruits in any subsequent prosecution but, apparently, does not preclude prosecution based on "independent" evidence (*People* v. *Laino, supra; People* v. *Ryan,* 11 App. Div. 2d 155, 204 N. Y. S. 2d 1)—constitutes that "absolute immunity against further prosecution" about which the Court spoke in *Counselman* v. *Hitchcock,* 142 U. S. 547, 586, and which the Court said was necessary if the

[10] As for the suggestion that withdrawal of the waiver in mid-hearing poses an administrative inconvenience, we only note that there was no such inconvenience here. Petitioner had answered only a few perfunctory questions at his first appearance before the grand jury. He asserted his desire to withdraw the waiver immediately upon returning before the grand jury.

privilege were to be constitutionally supplanted. And see *Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70, 79–81. For even if the *Steuding-Laino* immunity were available to petitioner, he was led to believe—as we have already seen—that *no* immunity provisions were applicable to his case.

In this sense the case is very close to *Raley* v. *Ohio,* 360 U. S. 423, where the existence of immunity was never suggested to the witnesses, later held in contempt. In that case the State Supreme Court held that the immunity under the statute was automatically available to the witnesses and advice of the investigating agency was not necessary. But we reversed those judgments of conviction since what the State was doing was "convicting a citizen for exercising a privilege which the State clearly had told him was available to him" (*id.,* at 438), and we went on to say:

> "A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them. *Lanzetta* v. *New Jersey,* 306 U. S. 451. Inexplicably contradictory commands in statutes ordaining criminal penalties have, in the same fashion, judicially been denied the force of criminal sanctions. *United States* v. *Cardiff,* 344 U. S. 174. Here there were more than commands simply vague or even contradictory. There was active misleading. Cf. *Johnson* v. *United States,* 318 U. S. 189, 197. The State Supreme Court dismissed the statements of the Commission as legally erroneous, but the fact remains that at the inquiry they were the voice of the State most presently speaking to the appellants. We cannot hold that the Due Process Clause permits convictions to be obtained under such circumstances." *Id.,* at 438–439.

Raley demonstrates that the State may not substitute for the privilege against self-incrimination an intricate scheme for conferring immunity and thereafter hold in contempt those who fail fully to perceive its subtleties. A witness has, we think, a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him.[11] This, it seems to us, is the teaching of *Raley,* and accordingly the *Steuding-Laino* immunity—if otherwise applicable—cannot now be invoked to validate these contempt convictions.

Reversed.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

Proper disposition of these cases is rendered more difficult because of seeming confusion that has attended them all along the line. In the courts below the significance of an important New York statutory amendment was apparently overlooked. This Court granted certiorari limited to a question which, in my view, the record does not present and which the Court does not answer.[1] The judgments below are now reversed on different

[11] The suggestion that we should remand the case to the New York courts for a finding of whether or not petitioner was misled is, we think, wide of the mark. A State must affirmatively demonstrate to the witness that a valid immunity from prosecution is his before it may hold him in contempt for refusing to answer questions that would otherwise be incriminating. Whether the State has met its burden must be measured at the time of the alleged contempt. A declaration that there was a valid immunity uttered for the first time on appeal would come too late.

[1] Certiorari was limited to the question whether a law is unconstitutional which requires the discharge and bars the rehiring of any public officer who refuses to sign a waiver of immunity and claims his privilege against self-incrimination. 382 U. S. 809.

grounds never properly set forth by petitioner. With this background, a good case could be made for dismissing the writs as improvidently granted. However, I believe briefing and argument have brought to the fore errors sufficiently plain to warrant setting aside these judgments, although my analysis differs from the Court's and I consider that a remand, and not an outright reversal, is called for.

It is common ground that petitioner cannot be jailed for refusing to incriminate himself unless either he waived his federal privilege against self-incrimination, or immunity adequate to offset that privilege was conferred upon him. Taking up the first possibility—waiver of the privilege against self-incrimination—it seems to me evident that petitioner was never asked to sign, nor did he sign, a waiver of that privilege. What the New York Constitution and the New York City Charter explicitly require be signed, and what petitioner did in terms sign, is a waiver of immunity from criminal prosecution, that is, a waiver not of the federal privilege but of the state immunity that may be granted to circumvent the privilege.[2] That a waiver of the privilege and a waiver of immunity may both often lead a witness to incriminate himself is no reason to blur these two different legal concepts. A State in exacting a waiver of the privilege should turn square corners; New York did not ask for nor did it obtain a waiver of the privilege in

[2] N. Y. Const., Art. I, § 6, requires "a waiver of immunity against subsequent criminal prosecution" and the New York City Charter, § 1123, requires that one "waive immunity from prosecution." The document signed by petitioner stated that he waived "all benefits, privileges, rights and immunity which I would otherwise obtain from indictment, prosecution and punishment . . . ." N. Y. Penal Law § 2446 states that where any law provides that a person shall not be prosecuted because of his testimony or that testimony he gives shall not be used against him, that person may file a statement "expressly waiving such immunity or privilege."

this instance, so that basis for justifying the contempt convictions is out of the case. The only other basis is a claim that New York has conferred immunity upon petitioner adequate to replace the privilege.

Before turning to that issue, it should be noted that there can be no reason to consider now whether petitioner's purported waiver of immunity was ineffective or withdrawn. If the Court is right in saying that no statutory immunity was ever conferred and that immunity under the state constitution cannot now be relied on by New York because of *Raley* v. *Ohio,* 360 U. S. 423, then it is hardly necessary to decide if this never-conferred immunity was adequately waived or the waiver effectively withdrawn. If New York did properly confer adequate immunity and so offset the privilege, then under *Regan* v. *New York,* 349 U. S. 58, it is irrelevant at this stage whether petitioner has or has not lost the benefits of that immunity through waiver since he is obliged to testify in either event. Adequacy or withdrawal of a waiver of the privilege against self-incrimination might sometimes be relevant at this stage, but no waiver of the privilege was even attempted in this instance as I have noted above. On this phase of the case, it only remains for me to demur to the Court's statement that "we would be unable to find any justification for denying the right to withdraw" the waiver (pp. 243–244, *ante*). New York has the very deepest interest in uprooting and punishing misconduct by its officials; it also has a narrower interest in having an investigation, commenced on the premise of a waiver, not suddenly balked by the witness' change of heart. It seems to me there is no federal constitutional reason why a witness who has properly given a voluntary waiver either of his privilege or his immunity should not be held to it.

Turning now to the conferral of immunity as a means of offsetting the privilege and justifying these convic-

tions, I agree with the Court that the pertinent New York statute quite plainly is no longer an automatic immunity statute and that it was not brought into play in this instance. While further consideration on this score should not be foreclosed on the remand which for reasons later indicated I believe should take place here, *People* v. *Laino,* 10 N. Y. 2d 161, 176 N. E. 2d 571, seems fairly persuasive that this literal construction of the statute is accurate.[3] Disregarding the statute then, the convictions can stand only if immunity adequate to offset the privilege flowed from the state constitution and if petitioner was not misled in his reliance on the privilege. For reasons now set forth, I believe these questions should be decided only after a remand to the state courts.

As construed in *Laino,* the New York Constitution gives automatic immunity only against use of compelled testimony and its fruits, 10 N. Y. 2d, at 173, 176 N. E. 2d, at 579, and the Court today leaves undecided the question whether this immunity is sufficient to supplant the privilege. While the reference to "absolute immunity against further prosecution" in *Counselman* v. *Hitchcock,* 142 U. S. 547, 586, may point toward a negative answer, I agree that the question ought not be decided until it is necessarily presented after a full briefing and argument by the parties. It is perhaps reason

[3] In *Laino* the New York Court of Appeals stated that immunity under the state statutes could be acquired only "by strict compliance with the procedural requirements . . . ." 10 N. Y. 2d, at 173, 176 N. E. 2d, at 579. N. Y. Penal Law § 2447, governing the procedure for conferring statutory immunity, provides that in the case of a grand jury, the grand jury must be "expressly requested" by the prosecutor to order the witness to answer and the grand jury must give that order; there appears to have been neither request nor order in this case. That courts might "estop" the prosecutor from later prosecuting in these circumstances should not be taken as the deliberate, assured grant of immunity the Constitution requires.

enough for postponement that the negative answer would perforce invalidate one or more federal statutes which protect only against later use of compelled testimony.[4] In addition, this Court has recently extended the Fifth Amendment to the States, *Malloy* v. *Hogan,* 378 U. S. 1, and abolished the "two sovereignties" rule, *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, so that an expansive reading of the privilege could have a far more serious impact than was true in the days of *Counselman.*[5] In any event, the question need not be reached if *Raley* v. *Ohio,* 360 U. S. 423, governs the instant case.

As I read *Raley,* it holds that the State may not lead witnesses into believing that no immunity provisions are applicable and then, when the witnesses stand on their privilege, hold them in contempt on the ground that immunity provisions supplanted the privilege. In this case the Court apparently believes that statements of the prosecutor and trial court led petitioner to think that no immunity provisions applied to him even contingently; if this is so, then I would agree the State cannot now rely on the state constitution, or the state statute for that matter, to negative petitioner's privilege. However, there are no findings on how petitioner understood the statements made to him and they are certainly susceptible of quite a different interpretation. It may well be that the State meant, and was understood by the petitioner, to convey only that it believed petitioner's waiver of immunity to be valid and irrevocable so that it would attempt to prosecute him on the basis of any testimony he gave. On this reading, it is quite possible

[4] See, *e. g.,* 49 U. S. C. § 9 (1964 ed.) See generally *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 104, n. 6 (concurring opinion of MR. JUSTICE WHITE).

[5] A number of States appear to provide immunity no greater than that implied by the New York Constitution. See, *e. g.,* Ariz. Rev. Stat. Ann. § 13–384; Conn. Gen. Stat. § 12–2.

that both the State and petitioner believed that adequate immunity provisions were generally applicable to the extent of supplanting the privilege and that petitioner would be shielded at a later trial if the State there proved to be wrong in its views on waiver.[6] If so, and assuming the state constitution does in law provide adequate immunity, then petitioner was obliged to testify under *Regan* and was not relevantly misled.[7] The present record was not formulated with regard to the *Raley* problem, that issue was not briefed in its present form, and it seems to me wrong to decide the point without a remand.

I would vacate both judgments and remand the case to the state courts[8] so the State may there try to establish that apart from a possible waiver adequate immunity was conferred, and so that petitioner may try to show that he was misled on this score.

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[6] It should be noted that nothing in the record indicates that petitioner raised the *Raley* argument in the lower courts, and that case was not even cited in his petitions for certiorari.

[7] In a footnote, the Court appears to announce as a new and distinct principle that "[a] State must affirmatively demonstrate to the witness that a valid immunity from prosecution is his" before overriding the privilege (p. 246, n. 11, *ante*). Reading the words "valid immunity" literally, the statement is simply inconsistent with *Regan*. If instead the Court means that immunity—albeit contingent on the invalidity of a waiver—must be "affirmatively demonstrated," regardless of whether the State misled the witness and regardless of whether the witness well knew he had contingent immunity, then I disagree with that proposition which is not supported by *Raley*.

[8] The case to be so remanded is No. 210; No. 290, which originated in the Federal District Court as a habeas corpus suit should be returned there to await the outcome of any further state proceedings.

HICKS *v.* DISTRICT OF COLUMBIA.

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

No. 51. Argued October 21, 1965.—Decided February 28, 1966.

Certiorari dismissed.

Reported below: See 197 A. 2d 154.

Charles W. Wolfram argued the cause for petitioner, *pro hac vice,* by special leave of Court. With him on the briefs were *Lawrence Speiser, Melvin L. Wulf* and *Monroe Freedman.*

Hubert B. Pair argued the cause for respondent. With him on the brief were *Chester H. Gray, Milton D. Korman* and *Ted D. Kuemmerling.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE HARLAN, concurring.

Among the several reasons which support the action of the Court in dismissing the writ in this case as improvidently granted, I rest my decision to join in this disposition on the lack of a record, without which I do not believe the constitutional issues tendered can properly be decided.

MR. JUSTICE DOUGLAS, dissenting.

I.

We granted certiorari in this case to consider what I think is an important question: the constitutionality of petitioner's conviction of "vagrancy." Relying on our determination that this case presented substantial ques-

tions of constitutional law, the parties comprehensively briefed those questions and we heard argument. But now the Court decides that the writ of certiorari must be dismissed as improvidently granted.

With all respect, I must dissent from this disposition of the case.

In the first place, the alleged "untimeliness" of the petition was called to the attention of the Court by respondent in its brief opposing the grant of certiorari. We were thus fully aware of this point when we granted the writ. Moreover, Rule 22 (2) is not jurisdictional or mandatory and may be waived by this Court under proper circumstances, at least where no jurisdictional statute is involved. *Heflin* v. *United States,* 358 U. S. 415, 418, n. 7. Having brought the case here, required the parties to brief the issues, and heard argument, it is most inappropriate to decline to exercise our discretion and waive the time bar of Rule 22 (2).[1]

Nor, in my opinion, is the objection to the adequacy of the record well founded. Petitioner argued in this Court that the statute defining "vagrant" is unconstitutionally vague. The challenged statute is § 22–3302 (3) of the District of Columbia Code, and it provides that a "vagrant" is:

> "Any person leading an immoral or profligate life who has no lawful employment and who has no

[1] The above assumes that Rule 22 (2) applies to this case. Our jurisdiction to review this decision is not based on 28 U. S. C. § 1254 (1) (1964 ed.) which we previously held did not permit review by writ of certiorari of cases where the Court of Appeals for the District of Columbia Circuit refused to allow an appeal. *Ferguson* v. *District of Columbia,* 270 U. S. 633. Our jurisdiction is founded on the power to issue a common-law writ of certiorari. *House* v. *Mayo,* 324 U. S. 42; 28 U. S. C. § 1651 (a) (1964 ed.). Arguably, Rule 22 (2) has no application in cases involving extraordinary writs. Rule 31 which governs the procedure on applications for extraordinary writs imposes no time limit.

lawful means of support realized from a lawful occupation or source."

We do not need a detailed account of the particular facts of this case in order to pass on the claim that this statute lacks the specificity that due process of law requires. In *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453, we said:

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. . . . It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. . . . No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."

The Court held the challenged statute bad in that case without considering the defendant's conduct which formed the basis of the prosecution. If a penal statute is so imprecise as to deny fair warning to those who might transgress it, any conduct of the defendant prosecuted under it which might have been proscribed by a more precisely worded statute is irrelevant.

The *Lanzetta* case is close kin to the present one because the crime there charged was one of being a "gangster" which was defined as any person "not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State." 306 U. S., at 452. The Court, without considering the facts of record, looked only at the statute and the charge of the indictment and ruled that the Act was unconstitutional for vagueness.

If one takes my view and approaches this case as an attempt by the Government to regulate the *status* of

being a vagrant, the absence of a detailed record is—as with the vagueness point—no impediment to proper analysis.

II.

Our vagrancy laws stem from the series of the Statutes of Labourers (23 Edw. 3; 25 Edw. 3, Stat. I) first passed in 1349 and amended and modified from time to time over the next 200 years.[2] They reflected "the criminal aspect of the poor laws." [3] They "confined the labouring population to stated places of abode, and required them to work at specified rates of wages. Wandering or vagrancy thus became a crime." [4] History tells the story from the point of view of the Establishment: that wandering bands of people, who had left their masters, committed all sorts of crimes and hence must be punished for wandering. That philosophy obtains in this country, because

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[2] III Stephen, History of the Criminal Law of England 203 *et seq.* (1883).

[3] *Id.*, at 266; see II Holdsworth, History of English Law 459–462 (1927). The purpose of these statutes was to offset the loss of workers and to check the rise in wages which resulted from the Black Death. Those able to work, and lacking other means of support were compelled to work, and at regulated wages. Workers were confined to their existing place of residence. Stephen suggests that the "object of this legislation was to provide a kind of substitute for the system of villainage and serfdom, which was then breaking down . . . ." Stephen, *op. cit. supra,* at 204. See also Kenny's Outlines of Criminal Law 411 (Turner ed. 1958). Early laws forbidding begging distinguished between beggars "able to serve or labor" and "beggars impotent to serve." See, *e. g.*, 12 Rich. 2, c. 7. Economic conditions changed; when work became scarce, laborers were forced to look elsewhere. The focus of the laws dealing with laborers shifted; the ban on migration became a preventive to keep a parish from being saddled with the needs of foreign paupers and idlers. "The vagrant came to be regarded rather as a probable criminal than as a runaway slave. He must be made to work or else be treated as a criminal." Stephen, *op. cit. supra,* at 274.

[4] Stephen, *op. cit. supra,* at 267.

the English statutes provided the seed of our vagrancy laws. Article IV, ¶ 1, of the Articles of Confederation assured the free inhabitants of each State, save "paupers, vagabonds, and fugitives from Justice," the privileges and immunities of citizenship of the several States, and the right of free ingress and egress to and from each State.

But there was incongruity in superimposing the English anti-migratory policy upon the law of America:

> "Vast movements of people motivated by urgent economic need settled this country from Europe, pushed settlement westward and fed growing cities from rural population reservoirs. England's Enclosure Acts, by withdrawing land from agricultural use, swelled the army of English vagrants; America invited migration with the lure of free land. The same elements of the population who on one side of the Atlantic were rogues and vagabonds, on the other were frontiersmen." [5]

America's vagrancy laws were expanded to cover a host of acts other than wandering—begging, drunkenness, disorderly conduct, loitering, prostitution, lewdness, narcotics peddling, and so on. They were justified here, as in early England, as devices of control. This Court, writing in 1837, said:

> "We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of

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[5] Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603, 617 (1956). And see Scott, Criminal Law in Colonial Virginia 272–275 (1930).

which may be labouring under an infectious disease." *City of New York* v. *Miln,* 11 Pet. 102, 142–143.

The wanderer, the pauper, the unemployed—all were deemed to be potential criminals. As stated by the Court of Appeals for the District of Columbia Circuit in *District of Columbia* v. *Hunt,* 82 U. S. App. D. C. 159, 161, 163 F. 2d 833, 835, "A vagrant is a probable criminal; and the purpose of the statute is to prevent crimes which may likely flow from his mode of life." The vagrant, therefore, is not necessarily one who has committed any crime but one who reflects "a present condition or status." *Handler* v. *Denver,* 102 Colo. 53, 58, 77 P. 2d 132, 135. Cf. *Ex parte Branch,* 234 Mo. 466, 470–471, 137 S. W. 886, 887. That condition is not a failure to make a productive contribution to society, for the idle rich are not reached. The idle pauper is the target. Insofar as that status reflects pauperism it suggests the need for welfare; and insofar as it reflects idleness it suggests the need for the intervention of employment agencies. I do not see how under our constitutional system either of those elements can be made a crime. To do so serves the cause either of arrests and convictions on suspicion or of arrests and convictions of unpopular minorities (*Edelman* v. *California,* 344 U. S. 357, 366, dissenting opinion)—procedures very convenient to the police [6] but foreign to our system.

I do not see how economic or social status can be made a crime any more than being a drug addict can be. *Robinson* v. *California,* 370 U. S. 660, 668 (concurring opinion).[7] No overt act of criminal dimensions is charged

[6] Foote, *op. cit. supra,* n. 5, at 625 *et seq.*

[7] The volume of vagrancy cases in the courts each year is large. The most recent FBI Crime Reports show that in 1964, in 3,012 cities with populations exceeding 2,500, 125,763 vagrancy arrests were made (out of a total of 4,155,924 arrests for that same period). Uniform Crime Reports—1964, p. 120.

here. Petitioner was either arrested on suspicion [8] or for innocent acts [9] which were used as a cloak for an arrest on grounds the police could not establish. In either event the arrest and conviction were, in my view, unconstitutional.

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS, DISSENTING.

GUITARIST CONVICTION STIRS PROTEST

By STERLING SEAGRAVE

The Washington Post

June 14, 1963

Eddie Hicks, the 25-year-old Dupont Circle troubadour convicted of vagrancy because he spent his afternoons playing a guitar in Dupont Circle, was given a suspended sentence yesterday.

The American Civil Liberties Union announced it would appeal the Hicks case and attack the constitutionality of his conviction under the vagrancy statute. The

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[8] For the prevalency of arrests "on suspicion" or "for investigation" in the District of Columbia, see Report and Recommendations of the Commissioners' Committee On Police Arrests for Investigation (the Horsky Report), July 1962.

[9] He was either arrested for playing a guitar in a park (see Appendix) or for sleeping in a men's room (cf. Jean Valjean in Victor Hugo's Les Miserables), for the information reads as follows:

"Eddie J. Hicks late of the District of Columbia aforesaid, on or about the 19th day of May in the year A. D. nineteen hundred and sixty three, in the District of Columbia aforesaid, and on Dupont Circle north, west, was then and there, and has been since that day and still is a vagrant, to wit; a person leading an immoral and profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation and source and who wanders abroad and lodges in a public park and public comfort stations, living upon the charity of others, and who lives idly and without any settled home, and otherwise leading a profligate life."

ACLU said the statute was unclear and was being used by police to persecute Hicks and others who were only enjoying themselves innocently in a public park.

The young troubadour was arrested by a Park Policeman Wednesday after being warned not to play his guitar in Dupont Circle. As a result, residents of the area and "regulars" in the park are protesting what they consider an invasion of their right to assemble in peaceful recreation.

Top officials of the Interior Department spoke out in favor of guitar playing and folk singing as a "wholesome activity that should not be disturbed but encouraged" in the Nation's public parks.

At the trial Wednesday, Park Policeman James E. Thomas told Judge Thomas C. Scalley that Hicks was unemployed. Hicks testified that he was only visiting Washington for a few weeks and that he had shown Thomas a $20 bill when the policeman had threatened to arrest him for vagrancy if he ever came back to Dupont Circle.

When he was arrested Wednesday, Hicks was sitting on a bench with a friend, his guitar in a case and money in his pocket, testimony showed.

At the sentencing yesterday, Judge Scalley told the minstrel that he was suspending sentence and that Hicks was free on "personal bond." The conviction went down on his record, however.

Reaction came swiftly. At Dupont Circle, angry sympathizers plotted a demonstration.

"If they are going to stick that boy with a vagrancy conviction just for playing a guitar, they're going to have to arrest several hundred of us. We've been playing guitars there for years," said one.

The regular habitues of Dupont Circle on any given day are neighborhood residents, retired folk, families who pause on a stroll in the summer sun, children who play

porpoise in the fountain, couples who doze on the grass, and students.

The students were priced out of Georgetown, moved to Foggy Bottom, then relocated to the Dupont Circle area when urban renewal closed Foggy Bottom to them.

They live for blocks around the Circle in low-rent rooming houses, studios and shared apartments. Most are poor, some are out of school temporarily to work evenings and part-time wherever they can find jobs.

Generally, they are clean-cut, neatly dressed in sports clothes, articulate, quiet and yet quick to take offense when they think civil authorities are breathing too closely on their necks.

When they can, they play chess in the Circle, around the fountain, argue age-old questions, or gather around the talented and untalented guitarists among them for spontaneous folk music sessions that quickly draw the interest and amusement of passers-by.

On recent Sundays, spontaneous "hootenannys" have started out of nothing, drawing small crowds which sat listening on the grass.

On May 19, Park Policemen routed the last hootenanny, sending everyone scurrying for cover. Attorney Arthur Neuman was passing by and snapped pictures.

"It was a peaceful, lawful assembly," Neuman said yesterday. "There was no disturbance and it was commendable and refreshing to see young people engaged in good social behavior rather than roaming the streets committing crimes."

Capt. Raymond S. Pyles, chief of the Third Precinct which includes the Circle, reported, "I cannot recall a single complaint about them."

Walter Pozen, assistant to Secretary of the Interior Stewart Udall, said, "Not only do I think they shouldn't be singled out—they should be encouraged. The parks are there for recreation and general use."

"There's no rule I know against playing in a park," said Conrad Wirth, director of the National Park Service. "I like music myself."

Charles Wolfram, the ACLU attorney who will champion Hicks when the case is appealed, said yesterday that his attack would be against three sections of the vagrancy statute.

The statute describes a vagrant as "immoral, profligate and dissolute (with) no lawful means of employment or support, without any settled home."

"First," Wolfram said, "the word 'dissolute' is so vague you can't tell what it forbids. Second, the statute discriminates against the poor and the unemployed. Third, it is used by police as carte blanche to harass anyone they personally dislike."

Looking back at the whole episode, attorney Neuman said, "If a man chooses to spend his life playing a guitar, who has the right to insist that he engage in some sort of servitude?"

HOPSON ET AL. *v.* TEXACO, INC.

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

No. 818. Decided February 28, 1966.

Petitioners sued under the Jones Act for damages for injuries to one seaman and for death of another resulting from an automobile accident in Trinidad. The seamen, who were crew members of respondent's tanker docked at respondent's refinery, fell ill and were unable to continue the voyage. To comply with the statutory requirement that incapacitated seamen be brought before a U. S. Consul before discharge in a foreign port, the ship's Master procured a cab from one of the two local taxi companies usually used for trips outside the refinery area. The jury found the taxi driver negligent and judgment on the jury's verdict was entered for petitioners in the District Court. The Court of Appeals reversed the determination that respondent is liable for the taxi driver's negligence. *Held:* Under the standards of the Federal Employers' Liability Act, incorporated into the Jones Act, which render an employer liable for injuries to his employees inflicted through the negligence of his "officers, agents, or employees," respondent, who had a duty of getting the seamen to the Consulate and who selected, as it had done before, the taxi service, bears the responsibility for the negligence of the driver it chose. *Sinkler* v. *Missouri Pac. R. Co.*, 356 U. S. 326.

Certiorari granted; 351 F. 2d 415, reversed.

Abraham E. Freedman for petitioners.

Harry E. McCoy for respondent.

PER CURIAM.

These actions were brought under the Jones Act, as amended (41 Stat. 1007, 46 U. S. C. § 688 (1964 ed.)), to recover damages for injuries sustained by one seaman, and for the death of another, as a result of an automobile accident on the island of Trinidad. Judgment on the jury's verdict was entered in United States District Court in favor of the plaintiffs, but the Court of Appeals

reversed. 351 F. 2d 415. We grant the petition for a writ of certiorari and reverse.

The facts are not in dispute. The two seamen were members of the crew of respondent's tanker which was docked at respondent's refinery at Pointe-à-Pierre on the island of Trinidad. Both fell ill and it was determined that they would be unable to continue the voyage. In order to discharge an incapacitated seaman in a foreign port, federal law [1] requires that he be taken to a United States Consul where arrangements for his return to the United States can be made. The United States Consul's Office was located in Port of Spain, some 38 miles distant. Although respondent had a fleet of motor vehicles used for transportation in the immediate vicinity of the refinery and docking area, its practice was to utilize either of two local taxi companies for journeys to more distant points. The ship's Master procured one of these cabs which set out for Port of Spain with the two ill seamen. En route, the taxi collided with a truck, killing the Master and one of the seamen; the other seaman was seriously injured. The jury found that the taxi driver had been negligent—a finding challenged neither in the Court of Appeals nor here. The Court of Appeals reversed the District Court's determination that respondent is liable to petitioners for this negligence of the taxi operator.

The Jones Act [2] incorporates the standards of the Federal Employers' Liability Act, as amended,[3] which renders an employer liable for the injuries negligently inflicted on its employees by its "officers, agents, or employees." [4] We noted in *Sinkler* v. *Missouri Pac. R. Co.*, 356 U. S. 326, that the latter Act was "an avowed

[1] Rev. Stat. §§ 4578, 4580, 4581, as amended, 46 U. S. C. §§ 679, 682, 683 (1964 ed.).

[2] 46 U. S. C. § 688 (1964 ed.).

[3] 53 Stat. 1404, 45 U. S. C. § 51 *et seq.* (1964 ed.).

[4] 45 U. S. C. § 51 (1964 ed.).

departure from the rules of the common law" (*id.*, at 329), which, recognizing "[t]he cost of human injury, an inescapable expense of railroading," undertook to "adjust that expense equitably between the worker and the carrier." *Ibid.* In order to give "an accommodating scope . . . to the word 'agents'" (*id.*, at 330–331), we concluded that "when [an] . . . employee's injury is caused in whole or in part by the fault of others performing, under contract, operational activities of his employer, such others are 'agents' of the employer within the meaning of § 1 of FELA." (*Id.*, at 331–332).

We think those principles apply with equal force here. These seamen were in the service of the ship and the ill-fated journey to Port of Spain was a vital part of the ship's total operations. The ship could not sail with these two men, nor could it lawfully discharge them without taking them to the United States Consul. Indeed, to have abandoned them would have breached the statutory duty to arrange for their return to the United States. Getting these two ill seamen to the United States Consul's office was, therefore, the duty of respondent. And it was respondent—not the seamen—which selected, as it had done many times before, the taxi service. Respondent—the law says—should bear the responsibility for the negligence of the driver which it chose. This is so because, as we said in *Sinkler,* "justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered." 356 U. S., at 330.

Reversed.

Mr. Justice Harlan, believing that *Sinkler* v. *Missouri Pac. R. Co.,* 356 U. S. 326, should not be extended, dissents.

LEVINE *v.* UNITED STATES.

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

No. 112. Decided February 28, 1966.*

Petitioners were found guilty by a jury on each count of a ten-count indictment, of which the first count was a conspiracy charge and the remaining counts were charges of substantive offenses. The Court of Appeals affirmed the conspiracy convictions, and with some exceptions, the convictions for the substantive offenses. *Held:* In view of the Solicitor General's concessions that an individual cannot be held criminally liable for substantive offenses committed before he joined or after he had withdrawn from the conspiracy, and that some of the convictions for substantive offenses here must accordingly be reversed, and upon consideration of the entire record, the judgment of the Court of Appeals is vacated insofar as it affirms petitioners' convictions for substantive offenses and remanded to reverse the convictions the Solicitor General concedes must be reversed and to determine whether petitioners are entitled to any further relief regarding the convictions for substantive offenses.

Certiorari granted; 342 F. 2d 147, vacated and remanded.

Nicholas J. Capuano for petitioner in No. 112.

Thomas F. Call for petitioner in No. 125.

Joseph W. Wyatt for petitioner in No. 230.

Sidney M. Dubbin and *E. David Rosen* for petitioners in No. 234.

Solicitor General Marshall, former *Solicitor General Cox, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Daniel H. Benson* for the United States.

PER CURIAM.

Ten persons were found guilty by a jury on each count of a 10-count indictment. The count predicated on 18

*Together with No. 125, *Roberts* v. *United States,* No. 230, *Grene* v. *United States,* and No. 234, *Gradsky et al.* v. *United States,* also on petitions for writs of certiorari to the same court.

U. S. C. § 371 (1964 ed.) charged all defendants with conspiring to violate § 17 of the Securities Act of 1933, 15 U. S. C. § 77q (a) (1964 ed.), and the Mail Fraud Act, 18 U. S. C. § 1341 (1964 ed.); each of the remaining nine counts charged all defendants with substantive offenses of violating these latter statutes. The Court of Appeals affirmed all the conspiracy convictions; and, with some exception for petitioner Roberts and two other defendants, that court also affirmed the convictions for the substantive offenses. 342 F. 2d 147. Four defendants petitioned for writs of certiorari, and a fifth defendant subsequently moved to be added as a co-petitioner in one of the petitions already filed (No. 234). We grant that motion; and we grant the petitions for writs of certiorari limited to the issue whether petitioners were improperly convicted of substantive offenses committed by members of the conspiracy before petitioners had joined the conspiracy or after they had withdrawn from it. In all other respects the petitions are denied.

In response to specific questions addressed by this Court, the Solicitor General has made a two-pronged concession: First, he concedes that an individual cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy; and second, he concedes that in this case some of the convictions for the substantive offenses must be reversed because they are inconsistent with this principle.[1] On the basis of this concession, and upon consideration of the entire record, we vacate the judgment of the Court of Appeals insofar as it affirms petitioners' convictions for the substantive offenses. We remand the

[1] Specifically, the Solicitor General concedes that petitioner Levine's convictions on Counts 1, 3, 4, 5, 6, 7, and 8, and petitioner Grene's convictions on Counts 1 and 7 must be reversed.

case to that court with instructions to reverse the convictions the Solicitor General concedes must be reversed, and to determine, in light of the concession, the evidence, the instructions to the jury, and the applicable principles of law, whether in addition to the relief conceded by the Solicitor General petitioners are entitled to further relief regarding the convictions for the substantive offenses.

Vacated and remanded.

ARIZONA *v.* CALIFORNIA ET AL.

No. 8, Original. Decided June 3, 1963.—Decree entered March 9, 1964.—Amended Decree entered February 28, 1966.

Opinion reported: 373 U. S. 546; Decree reported: 376 U. S. 340.

Mark Wilmer for plaintiff.

Thomas C. Lynch, Attorney General of California, *Northcutt Ely,* Special Assistant Attorney General, *Burton J. Gindler* and *David B. Stanton,* Deputy Attorneys General, *C. Emerson Duncan II, Jerome C. Muys, Roy H. Mann, Earl Redwine, Harry W. Horton, R. L. Knox, James H. Carter, Charles C. Cooper, Jr., John H. Lauten, H. Kenneth Hutchinson, Roger Arnebergh, Gilmore Tillman, Edward T. Butler, Harvey Dickerson,* Attorney General of Nevada, and *Robert E. Jones,* Deputy Attorney General, for defendants.

Solicitor General Marshall for the United States, intervenor.

ORDERED.

The joint motion to amend Article VI of the Decree in this case entered on March 9, 1964, is hereby granted and Article VI of said decree is hereby amended to read as follows:

VI. Within three years from the date of this decree [March 9, 1964], the States of Arizona, California, and Nevada shall furnish to this Court and to the Secretary of the Interior a list of the present perfected rights, with their claimed priority dates, in waters of the mainstream within each State, respectively, in terms of consumptive use, except those relating to federal establishments. Any named party to this proceeding may present its claim of present perfected rights or its opposition to the claims of others. The Secretary of the Interior shall supply simi-

lar information, within a similar period of time, with respect to the claims of the United States to present perfected rights within each State. If the parties and the Secretary of the Interior are unable at that time to agree on the present perfected rights to the use of mainstream water in each State, and their priority dates, any party may apply to the Court for the determination of such rights by the Court.

THE CHIEF JUSTICE and MR. JUSTICE FORTAS took no part in the consideration or decision of this motion.

HARRISON ET AL. *v.* SCHAEFER ET AL.

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

No. 854. Decided February 28, 1966.

251 F. Supp. 450, affirmed.

Thomas O. Miller for appellants.

A. G. McClintock for appellees.

PER CURIAM.

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

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

CALLENDER ET AL. *v.* FLORIDA.

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

No. 58, October Term, 1964. Order and judgment of April 26, 1965, vacated. Decided February 28, 1966.

Certiorari granted to District Court of Appeal of Florida, First District, and judgments reversed.

PER CURIAM.

The mandate of this Court in this case issued on the 21st day of May, 1965, is hereby recalled and the judgment heretofore entered on the 26th day of April, 1965, is hereby vacated. The order of the Court dated the 26th day of April, 1965, granting the writ of certiorari to the Supreme Court of Florida is vacated.

Treating the papers submitted as a petition for a writ of certiorari to the District Court of Appeal of Florida, First District, the petition for a writ of certiorari is granted and the judgments are reversed. *Boynton* v. *Virginia,* 364 U. S. 454; *Abernathy* v. *Alabama,* 380 U. S. 447.

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

CRAWFORD COUNTY BAR ASSOCIATION *v.* FAUBUS, GOVERNOR OF ARKANSAS, ET AL.

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

No. 941. Decided February 28, 1966.*

251 F. Supp. 998, affirmed.

Fines F. Batchelor, Jr., for appellant in No. 941. *W. B. Brady* for appellant in No. 942.

Bruce Bennett, Attorney General of Arkansas, *Farrell E. Faubus,* Assistant Attorney General, and *Jack L. Lessenberry* for appellees in both cases.

PER CURIAM.

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

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

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*Together with No. 942, *Alexander* v. *Faubus, Governor of Arkansas, et al.,* also on appeal from the same court.

FRIBOURG NAVIGATION CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 23. Argued November 10, 1965.—Decided March 7, 1966.

Prior to acquiring a used Liberty ship for $469,000 in December 1955, petitioner obtained a letter ruling from the Internal Revenue Service that it would accept straight-line depreciation of the ship over a useful economic life of three years, with a salvage value of $54,000. Petitioner claimed ratable depreciation deductions from date of purchase to the end of 1955 and for the year 1956 in its income tax returns, which were not challenged by respondent. After Egypt seized the Suez Canal in 1956, ship prices rose and petitioner sold the ship, which it delivered to the purchaser on December 23, 1957, for $695,500. Prior to the sale petitioner adopted a plan of complete liquidation pursuant to § 337 of the Internal Revenue Code of 1954, which it carried out within 12 months and thus incurred no tax liability on the gain from the ship's sale. By December 1957 the shipping shortage had abated and Liberty ships were being scrapped for the predicted salvage value. Petitioner's 1957 income tax return showed a deduction from gross income of depreciation for 357½ days of 1957, and computation of capital gain by subtraction of the adjusted basis, including 1957 depreciation, from the sales price of the ship. Respondent did not question the original ruling as to useful life and salvage value of the vessel, but disallowed depreciation for 1957. Respondent argued that depreciation deductions are meant to give deductions equal to the taxpayer's "actual net cost" of the asset, and since the sales price exceeded the adjusted basis at the start of the year the ship's use during 1957 "cost" the petitioner "nothing." Respondent's position was sustained by the Tax Court and the Court of Appeals. *Held:* The sale of a depreciable asset for an amount in excess of its adjusted basis at the beginning of the year of sale does not bar deduction of depreciation for that year. Pp. 275–288.

(a) Respondent has commingled two distinct and established concepts of tax accounting: depreciation of an asset through wear and tear or gradual expiration of useful life, provided for in § 167 of the Internal Revenue Code of 1954, and fluctuations in valuation through market appreciation. Pp. 275–277.

(b) The Commissioner's regulatory scheme provides no basis for disallowance of depreciation when, as here, there has been no challenge to the original estimates of useful life and salvage. Pp. 278–279.

(c) Respondent's position represents a sudden and unwarranted about-face from a consistent administrative and judicial practice followed until 1962. Pp. 279–283.

(d) The Commissioner's practice must be deemed to have received congressional approval by the repeated re-enactment over the same period of the depreciation provision without substantial change. P. 283.

(e) Respondent's position is not consistent: under his theory depreciation for 1955 and 1956 would also be disallowed since the use of the asset "cost" the taxpayer "nothing" in those years as well; nor will respondent permit additional depreciation to be taken where an asset is sold for less than its adjusted basis. Pp. 286–287.

335 F. 2d 15, reversed.

James B. Lewis argued the cause for petitioner. With him on the briefs were *Simon H. Rifkind* and *Ernest Rubenstein.*

Jack S. Levin argued the cause for respondent. With him on the brief were *Acting Solicitor General Spritzer, Acting Assistant Attorney General Roberts* and *Harry Baum.*

Briefs of *amici curiae,* urging reversal, were filed by *Ellis Lyons* and *Jess S. Raban* for the American Automotive Leasing Association, and by *Leland W. Scott* for S & A Co.

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

The question presented for determination is whether, as a matter of law, the sale of a depreciable asset for an amount in excess of its adjusted basis at the beginning of the year of sale bars deduction of depreciation for that year.

On December 21, 1955, the taxpayer, Fribourg Navigation Co., Inc., purchased the S. S. *Joseph Feuer,* a used Liberty ship, for $469,000. Prior to the acquisition, the taxpayer obtained a letter ruling from the Internal Revenue Service advising that the Service would accept straight-line depreciation of the ship over a useful economic life of three years, subject to change if warranted by subsequent experience. The letter ruling also advised that the Service would accept a salvage value on the *Feuer* of $5 per dead-weight ton, amounting to $54,000. Acting in accordance with the ruling the taxpayer computed allowable depreciation, and in its income tax returns for 1955 and 1956 claimed ratable depreciation deductions for the 10-day period from the date of purchase to the end of 1955 and for the full year 1956. The Internal Revenue Service audited the returns for each of these years and accepted the depreciation deductions claimed without adjustment. As a result of these depreciation deductions, the adjusted basis of the ship at the beginning of 1957 was $326,627.73.

In July of 1956, Egypt seized the Suez Canal. During the ensuing hostilities the canal became blocked by sunken vessels, thus forcing ships to take longer routes to ports otherwise reached by going through the canal. The resulting scarcity of available ships to carry cargoes caused sales prices of ships to rise sharply. In January and February of 1957, even the outmoded Liberty ships brought as much as $1,000,000 on the market. In June 1957, the taxpayer accepted an offer to sell the *Feuer* for $700,000. Delivery was accomplished on December 23, 1957, under modified contract terms which reduced the sale price to $695,500. Prior to the sale of the *Feuer,* the taxpayer adopted a plan of complete liquidation pursuant to the provisions of § 337 of the Internal Revenue Code of 1954, which it thereafter carried out within 12 months. Thus, no tax liability was incurred by the taxpayer on the capital gain from the sale of the ship. As

it developed, the taxpayer's timing was impeccable—by December 1957, the shipping shortage had abated and Liberty ships were being scrapped for amounts nearly identical to the $54,000 which the taxpayer and the Service had originally predicted for salvage value.

On its 1957 income tax return, for information purposes only, the taxpayer reported a capital gain of $504,239.51 on the disposition of the ship, measured by the selling price less the adjusted basis after taking a depreciation allowance of $135,367.24 for 357½ days of 1957. The taxpayer's deductions from gross income for 1957 included the depreciation taken on the *Feuer*. Although the Commissioner did not question the original ruling as to the useful life and salvage value of the *Feuer* and did not reconsider the allowance of depreciation for 1955 and 1956, he disallowed the entire depreciation deduction for 1957. His position was sustained by a single judge in the Tax Court and, with one dissent, by a panel of the Court of Appeals for the Second Circuit. 335 F. 2d 15. The taxpayer and the Commissioner agreed that the question is important, that it is currently being heavily litigated, and that there is a conflict between circuit courts of appeals on this issue. Therefore, we granted certiorari. 379 U. S. 998. We reverse.

I.

The Commissioner takes the position here and in a Revenue Ruling first published the day before the trial of this case in the Tax Court [1] that the deduction for

[1] Rev. Rul. 62–92, 1962–1 Cum. Bull. 29 (originally T. I. R. 384, June 7, 1962). That Ruling provides in part:

". . . the deduction for depreciation of an asset used in the trade or business or in the production of income shall be adjusted in the year of disposition so that the deduction, otherwise properly allowable for such year under the taxpayer's method of accounting for depreciation, is limited to the amount, if any, by which the adjusted basis of the property at the beginning of such year exceeds the amount realized from sale or exchange."

depreciation in the year of sale of a depreciable asset is limited to the amount by which the adjusted basis of the asset at the beginning of the year exceeds the amount realized from the sale. The Commissioner argues that depreciation deductions are designed to give a taxpayer deductions equal to the "actual net cost" of the asset to the taxpayer, and since the sale price of the *Feuer* exceeded the adjusted basis as of the first of the year, the use of the ship during 1957 "cost" the taxpayer "nothing." By tying depreciation to sale price in this manner, the Commissioner has commingled two distinct and established concepts of tax accounting—depreciation of an asset through wear and tear or gradual expiration of useful life and fluctuations in the value of that asset through changes in price levels or market values.

Section 167 (a) of the Internal Revenue Code of 1954 provides, in language substantially unchanged in over 50 years of revenue statutes: "There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—(1) of property used in the trade or business, or (2) of property held for the production of income." In *United States* v. *Ludey,* 274 U. S. 295, 300–301, the Court described depreciation as follows:

> "The depreciation charge permitted as a deduction from the gross income in determining the taxable income of a business for any year represents the reduction, during the year, of the capital assets through wear and tear of the plant used. The amount of the allowance for depreciation is the sum which should be set aside for the taxable year, in order that, at the end of the useful life of the plant in the business, the aggregate of the sums set aside will (with the salvage value) suffice to provide an amount equal to the original cost."

See also *Detroit Edison Co.* v. *Commissioner,* 319 U. S. 98, 101. In so defining depreciation, tax law has long recognized the accounting concept that depreciation is a process of estimated allocation which does not take account of fluctuations in valuation through market appreciation.[2]

It is, of course, undisputed that the Commissioner may require redetermination of useful life or salvage value when it becomes apparent that either of these factors has been miscalculated. The fact of sale of an asset at an amount greater than its depreciated basis may be evidence of such a miscalculation. See *Macabe Co.,* 42 T. C. 1105, 1115 (1964). But the fact alone of sale above adjusted basis does not establish an error in allocation. That is certainly true when, as here, the profit on sale resulted from an unexpected and short-lived, but spectacular, change in the world market.

The Commissioner contends that our decisions in *Massey Motors, Inc.* v. *United States,* 364 U. S. 92, and *Hertz Corp.* v. *United States,* 364 U. S. 122, confirm his theory. To the extent these cases are relevant here at all, they support the taxpayer's position. In *Massey* and *Hertz* we held that when a taxpayer, at the time he acquires an asset, reasonably expects he will use it for less than its full physical or economic life, he must, for purposes of computing depreciation, employ a useful life based on the period of expected use. We recognized in those cases that depreciation is based on estimates as to useful life and salvage value. Since the original estimates here were admittedly reasonable and proved to be accurate, there is no ground for disallowance of depreciation.

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[2] See, *e. g., Macabe Co.,* 42 T. C. 1105, 1109; *Wier Long Leaf Lumber Co.,* 9 T. C. 990, 999, rev'd on other grounds, 173 F. 2d 549; Note, 50 Va. L. Rev. 1431 (1964); Comment, 11 U. C. L. A. L. Rev. 593 (1964). See also Montgomery's Auditing 268 (8th ed. 1957).

II.

This concept of depreciation is reflected in the Commissioner's own regulations. The reasonable allowance provided for in § 167 is explained in Treas. Reg. § 1.167 (a)–1 as "that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan . . . so that the aggregate of the amounts set aside, plus the salvage value, will, at the end of the estimated useful life of the depreciable property, equal the cost or other basis of the property . . . . The allowance shall not reflect amounts representing a mere reduction in market value." Treas. Reg. § 1.167 (a)–1 (c) defines salvage value as the amount, determined at the time of acquisition, which is estimated will be realizable upon sale or when it is no longer useful in the taxpayer's trade or business. That section continues: "Salvage value shall not be changed at any time after the determination made at the time of acquisition merely because of changes in price levels. However, if there is a redetermination of useful life . . . salvage value may be redetermined based upon facts known at the time of such redetermination of useful life." Useful life may be redetermined "only when the change in the useful life is significant and there is a clear and convincing basis for the redetermination." Treas. Reg. § 1.167 (a)–1 (b). This carefully constructed regulatory scheme provides no basis for disallowances of depreciation when no challenge has been made to the reasonableness or accuracy of the original estimates of useful life or salvage value. Further, from 1951 until after certiorari was granted in this case, the regulations dealing with amortization in excess of depreciation contained an example expressly indicating that depreciation could be

taken on a depreciable asset in the year of profitable sale of that asset.[3]

The Commissioner relies heavily on Treas. Reg. § 1.167 (b)–0 providing that the reasonableness of a claim for depreciation shall be determined "upon the basis of conditions known to exist at the end of the period for which the return is made." He contends that after the sale the taxpayer "knew" that the *Feuer* had "cost" him "nothing" in 1957. This again ignores the distinction between depreciation and gains through market appreciation. The court below admitted that the increase in the value of the ship resulted from circumstances "normally associated with capital gain." The intended interplay of § 167 and the capital gains provisions is clearly reflected in Treas. Reg. § 1.167 (a)–8 (a)(1), which provides:

> "Where an asset is retired by sale at arm's length, recognition of gain or loss will be subject to the provisions of sections 1002, 1231, and other applicable provisions of law."

III.

The Commissioner's position represents a sudden and unwarranted volte-face from a consistent administrative and judicial practice followed prior to 1962. The taxpayer has cited a wealth of litigated cases [4] and several

[3] Treas. Reg. § 1.1238–1, Example (1), based on H. R. Rep. No. 3124, 81st Cong., 2d Sess., 29 (1950), amended to conform to the Commissioner's present position on June 1, 1965. 1965–1 Cum. Bull. 366.

[4] See, *e. g.*, *United States* v. *Ludey*, 274 U. S. 295 (1927); *Eldorado Coal & Mining Co.* v. *Mager*, 255 U. S. 522, 526 (1921); *Beckridge Corp.* v. *Commissioner*, 129 F. 2d 318 (C. A. 2d Cir. 1942); *Clark Thread Co.* v. *Commissioner*, 100 F. 2d 257 (C. A. 3d Cir. 1938), affirming 28 B. T. A. 1128, 1140 (1933); *Kittredge* v. *Commissioner*, 88 F. 2d 632 (C. A. 2d Cir. 1937); *Seymour Mfg. Co.* v. *Burnet*, 56 F. 2d 494, 495–496 (C. A. D. C. Cir. 1932); *Hall*

rulings [5] in which the Commissioner unhesitatingly allowed depreciation in the year of favorable sale. Against this array of authority, the Commissioner contends that he did not "focus" on the issue in most of these instances. This is hardly a persuasive response to the overwhelmingly consistent display of his position. One might well speculate that the Commissioner did not "focus" on the issue in many cases because he treated it as too well settled for consideration. Moreover, in several instances, the Commissioner did not merely consent to depreciation in the year of sale, but insisted over the taypayer's objection that it be taken.[6]

The Commissioner adds that in *Wier Long Leaf Lumber Co.*, 9 T. C. 990, rev'd on other grounds, 173 F. 2d 549, he did focus on the issue and there contended that no depreciation could be taken in the year of sale. However, in *Wier* the Tax Court allowed depreciation as to one class of assets and the Commissioner promptly acqui-

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v. *United States*, 95 Ct. Cl. 539, 43 F. Supp. 130, 131–132, cert. denied, 316 U. S. 664 (1942); *Herbert Simons*, 19 B. T. A. 711, 712–713 (1930); *Max Eichenberg*, 16 B. T. A. 1368, 1370 (1929); *Louis Kalb*, 15 B. T. A. 865, 866 (1929); *Even Realty Co.*, 1 B. T. A. 355, 356 (1925); *H. L. Gatlin*, 19 CCH Tax Ct. Mem. 131, 132 (1960); *P. H. & J. M. Brown Co.*, 18 CCH Tax Ct. Mem. 708, 709–710 (1959).

[5] G. C. M. 1597, VI–1 Cum. Bull. 71 (1927); S. M. 2112, III–2 Cum. Bull. 22 (1924); A. R. R. 6930, III–1 Cum. Bull. 45 (1924); I. T. 1494, I–2 Cum. Bull. 19 (1922). See also I. T. 1158, I–1 Cum. Bull. 173 (1922).

[6] In *Herbert Simons*, *supra*, note 4, the taxpayers tried without success to forgo the depreciation deduction for the year of sale since the taxes payable on the resulting increase in ordinary income would have been less than the increased amount payable under the existing capital gain provision if depreciation were taken. In several other cases the Commissioner expressly required a year-of-sale depreciation deduction, thus increasing the gain on the sale. See, *e. g.*, *Clark Thread Co.* v. *Commissioner*, *Kittredge* v. *Commissioner*, *Even Realty Co.*, *supra*, note 4.

esced in the decision.[7] 1948–1 Cum. Bull. 3. This acquiescence was not withdrawn until 14 years later when the Commissioner adopted his present position. 1962–1 Cum. Bull. 5. Although we recognize that such an acquiescence does not in and of itself commit the Commissioner to this interpretation of the law, it is a significant addition to the already convincing array of authority showing the Commissioner's consistent prior position.

The Commissioner attempts further to explain away the authority aligned against him by stating that most of the cases and rulings prior to 1942 (when capital gain treatment was provided for sales above adjusted basis) are irrelevant since the gain on sale was taxed at the same ordinary income rate that would have been applied had depreciation been disallowed. This contention does not explain away the Commissioner's sudden decision that allowance of such depreciation involves a fundamental error in the basic concept of depreciation. Further, other than his lack of "focus," the Commissioner has had no explanation for those cases in which capital gain on sale *was* involved.[8] Even in those cases before

[7] The Commissioner's argument that the decision in *Wier* was ambiguous since the court there disallowed depreciation of another asset in the year of sale is without merit. The court carefully rested its decision disallowing depreciation of that asset on the fact that there was no evidence in the record which would permit it to ascertain reasonable salvage value. With respect to the other class of assets, the court stated:

"The parties have by their stipulation narrowed the scope of controversy. They present for consideration only the question whether the price received from the sale of the depreciated automobiles precludes any depreciation allowance." 9 T. C. 990, 999.

The court held: "The depreciation deduction can not be disallowed merely by reason of the price received for the article without consideration of other factors." *Ibid.*

[8] See *Hall* v. *United States, Herbert Simons, Max Eichenberg, H. L. Gatlin, P. H. & J. M. Brown Co., supra,* note 4; G. C. M. 1597, VI–1 Cum. Bull. 71 (1927). See also cases cited, note 6, *supra.*

this Court upon which the Commissioner relies for support of his theory, depreciation was willingly allowed in the year of sale. In *Massey Motors, Inc.* v. *United States, supra,* although contesting the useful life of the automobiles involved, the Commissioner allowed depreciation to an estimated value of $1,325 despite sales for an average of $1,380. 364 U. S., at 94–95. And in *Hertz Corp.* v. *United States, supra,* the Commissioner accepted claims of depreciation deductions up to the date of sale, objecting only to the taxpayer's attempt to obtain refunds by changing retroactively to the double declining balance method of depreciation.[9] The fact that there are presently several hundred cases in litigation over this issue where before there were none adds testimony to the inescapable conclusion that the Commissioner has broken with consistent prior practice in espousing the novel theory he now urges upon us.

The authority relied on in Revenue Ruling 62–92, *Cohn* v. *United States,* 259 F. 2d 371, does not support this departure from established practice. *Cohn* was simply a case in which the taxpayer had assigned no salvage value to the property involved, and the Court of Appeals found no clear error in the selection of the amount realized on disposition of the asset at the end of its scheduled useful life as a reasonable yardstick by which to measure salvage value.[10] As has been aptly

[9] See 165 F. Supp. 261, 265, 269, and Transcript of Record in *Hertz* in this Court, at 13–18.

[10] Note, for example, the Court's reliance on *Wier Long Leaf Lumber Co.,* discussed in note 7, *supra.* 259 F. 2d, at 378–379. Indeed, the opinion in *Cohn* clearly recognizes the established practice of depreciation which the Commissioner would have us overthrow. The Court there noted:

"Necessarily, salvage value is also an estimate made at the time when the asset is first subject to a depreciation allowance. . . . If the asset is sold at a price in excess of its depreciated value, such excess is taxable in the nature of a capital gain." *Id.,* at 377.

stated of *Cohn,* "It does not purport to set up an automatic hindsight re-evalution which becomes a self-executing redetermination of salvage value triggered by the sale of depreciable assets." *Motorlease Corp.* v. *United States,* 215 F. Supp. 356, 363, rev'd, 334 F. 2d 617, pet. for cert. filed. In his brief in *Cohn,* the Commissioner did not rest his case on anything resembling his position here, but relied principally on the fact that the taxpayer himself had sought an adjustment of useful life and that, under the regulations, "if there is a redetermination of useful life, the salvage value may be redetermined." Brief for the United States, pp. 24–26, in *Cohn* v. *United States,* 259 F. 2d 371, quoted in Merritt, Government briefs in Cohn refute IRS disallowance of year-of-sale depreciation, 20 J. Taxation 156, 158 (1964).

IV.

Over the same extended period of years during which the foregoing administrative and judicial precedent was accumulating, Congress repeatedly re-enacted the depreciation provision without significant change. Thus, beyond the generally understood scope of the depreciation provision itself, the Commissioner's prior long-standing and consistent administrative practice must be deemed to have received congressional approval. See, *e. g., Cammarano* v. *United States,* 358 U. S. 498, 510–511; *United States* v. *Leslie Salt Co.,* 350 U. S. 383, 396–397; *Helvering* v. *Winmill,* 305 U. S. 79, 83.

The legislative history in this area makes it abundantly clear that Congress was cognizant of the revenue possibilities in sales above depreciated cost. In 1942 Congress restored capital gain treatment to sales of depreciable assets.[11] The accompanying House Report stated that it would be "an undue hardship" on taxpayers who

[11] Int. Rev. Code, 1939, § 117 (j), 56 Stat. 846 (now Int. Rev. Code, 1954, § 1231).

were able to sell depreciable property at a gain over depreciated cost to treat such gain as ordinary income. H. R. Rep. No. 2333, 77th Cong., 2d Sess., 54 (1942). This, of course, is *pro tanto* the effect of disallowing depreciation in the year of sale above adjusted basis. It would be strange indeed, especially in light of the House Report, to conclude that Congress labored to create a tax provision which, in application to depreciable property, could by administrative fiat be made applicable only to sales of assets for amounts exceeding their basis at the beginning of the year of sale, and then only to the excess. In succeeding years Congress was repeatedly asked to enact legislation treating gains on sales of depreciated property as ordinary income; [12] it declined to do so until 1962.

In 1961, in his Tax Message to Congress, the President observed that existing law permitted taxpayers to depreciate assets below their market value and, upon sale, to treat the difference as capital gain.[13] The Secretary of

[12] See, *e. g.*, Hearings before the House Ways and Means Committee, 80th Cong., 1st Sess., on Revenue Revisions, pt. 5, p. 3756 (1948), at which the Treasury recommended that gains on sales of depreciable assets should be subject to ordinary income taxation to the extent the gains arose from accelerated depreciation; Hearings before the Senate Finance Committee, 83d Cong., 2d Sess., on H. R. 8300, pt. 3, p. 1324 (1954), at which Congress was asked by the American Institute of Accountants to enact that all gains on sales of depreciable assets be treated as ordinary income. See also Treasury Department Release A–761, February 15, 1960.

[13] The President stated:

"Another flaw which should be corrected at this time relates to the taxation of gains on the sale of depreciable business property. Such gains are now taxed at the preferential rate applicable to capital gains, even though they represent ordinary income.

"This situation arises because the statutory rate of depreciation may not coincide with the actual decline in the value of the asset. While the taxpayer holds the property, depreciation is taken as a deduction from ordinary income. Upon its resale, where the amount

the Treasury concurred in this position.[14] The exhibits appended not only contain no mention of the Commissioner's power to require recalculation of depreciation in the year of sale, but refute the existence of such power. In example after example cited by the Treasury, the taxpayer had depreciated an asset, sold it for an amount in excess of its depreciated basis, and treated the difference as capital gain.[15] The Treasury asserted that existing law permitted this practice, and made no mention of the power which the Commissioner now alleges he possesses to disallow year-of-sale depreciation.

In 1962 Congress enacted § 1245 of the Internal Revenue Code of 1954, providing that gain on future dispositions of depreciable personal property be treated as ordinary income to the extent of depreciation taken. For post-1962 transactions § 1245 applies to the situation which occurred in the instant case and would produce greater revenue. The taxpayer must report as ordinary income *all* depreciation recouped on sale, and this notwithstanding that the sale was part of a nonrecognition liquidation within § 337. In 1964, a more complex re-

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of depreciation allowable exceeds the decline in the actual value of the asset so that a gain occurs, this gain under present law is taxed at the preferential capital gains rate. The advantages resulting from this practice have been increased by the liberalization of depreciation rates.

. . . . .

"I therefore recommend that capital gains treatment be withdrawn from gains on the disposition of depreciable property, both personal and real property, to the extent that depreciation has been deducted for such property by the seller in previous years, permitting only the excess of the sales price over the original cost to be treated as a capital gain." Message on Taxation, Hearings before the Committee on Ways and Means, House of Representatives, H. R. Doc. No. 140, 87th Cong., 1st Sess., 11 (1961).

[14] *Id.*, at 40.

[15] *Id.*, at 262–267. See also Treas. Reg. § 1.1238–1, note 3, *supra.*

capture provision dealing with real property was enacted. This time, however, Congress took into account the fact that increases in the value of real property are often attributable to a rise in the general price level and limited recapture of depreciation as ordinary income to a percentage of the excess over straight-line depreciation. H. R. Rep. No. 749, 88th Cong., 1st Sess., 101–102 (1963); S. Rep. No. 830, 88th Cong., 2d Sess., 132–133 (1964).[16] The Commissioner's position would ignore any such limitation. Compounding congressional activity in this area with repeated re-enactment of the depreciation provision in the face of the prior consistent administrative practice, we find the Commissioner's position untenable.

V.

Finally, the Commissioner's position contains inconsistencies. He contends that depreciation must be disallowed in 1957 since the amount received on sale shows that the use of the asset "cost" the taxpayer "nothing" in that year. But under this view, since the asset was sold at an amount greater than its original purchase price, it "cost" the taxpayer "nothing" in 1955 and 1956 as well. The Commissioner's reliance on the structure of the annual income tax reporting system does not cure the illogic of his theory. Further, the Commissioner apparently will not extend his new theory to sit-

[16] In 1963, with the instant case already in the courts, Congress for the first time alluded to the position now taken by the Commissioner, noting that:

". . . it has been held that depreciation deductions should not be allowed to the extent they reduce the adjusted basis of the property below the actual amount realized. This provision, in providing for ordinary income treatment for certain additional depreciation, is not intended to affect this holding." H. R. Rep. No. 749, 88th Cong., 1st Sess., 103 (1963); S. Rep. No. 830, 88th Cong., 2d Sess., 133 (1964).

uations where it would benefit the taxpayer. If a depreciable asset is sold for *less* than its adjusted basis, it would seem to follow from the Commissioner's construction that the asset has "cost" the taxpayer an additional amount and that further depreciation should be permitted. However, Revenue Ruling 62–92 does not extend to such a case and the Commissioner has expressly refused to make it do so.[17]

The conclusion we have reached finds support among nearly all lower federal courts that have recently dealt with this issue.[18] Upon consideration *en banc,* the Tax Court itself has concluded that the Commissioner's position is without authorization in the statute or the regulations.[19]

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[17] In *Engineers Limited Pipeline Co.,* 44 T. C. 226 (1965), the taxpayer contended that he should get a further depreciation deduction on assets which he sold for less than their depreciated basis. The Commissioner disallowed the additional deduction. See also *Whitaker* v. *Commissioner,* 259 F. 2d 379.

[18] See *United States* v. *S & A Co.,* 338 F. 2d 629 (C. A. 8th Cir.), affirming 218 F. Supp. 677 (D. C. D. Minn.), pet. for cert. filed; *Occidental Loan Co.* v. *United States,* 235 F. Supp. 519 (D. C. S. D. Calif.); *Wyoming Builders, Inc.* v. *United States,* 227 F. Supp. 534 (D. C. D. Wyo.); *Motorlease Corp.* v. *United States,* 215 F. Supp. 356 (D. C. D. Conn.), reversed on the authority of the decision below in the instant case, 334 F. 2d 617 (C. A. 2d Cir.), pet. for cert. filed; *Mountain States Mixed Feed Co.* v. *United States,* 245 F. Supp. 369 (D. C. D. Colo.). See also *Kimball Gas Products Co.* v. *United States,* CCH 63–2 U. S. Tax Cas. ¶ 9507 (D. C. W. D. Tex.). Contra, *Killebrew* v. *United States,* 234 F. Supp. 481 (D. C. E. D. Tenn.).

[19] *Macabe Co.,* 42 T. C. 1105 (1964). The attempt in *Macabe* to distinguish the instant case on the ground that here the taxpayer used inaccurate estimates and failed to sustain its burden of proof of market appreciation ignores the fact that the Commissioner does not contest the reasonableness of the original estimates of useful life and salvage value. See McNerney, Disallowance of Depreciation in the Year of Sale at a Gain, 20 Tax L. Rev. 615, 650 (1965).

In light of the foregoing, we conclude that the depreciation claimed by the taxpayer for 1957 was erroneously disallowed.

Reversed.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACK and MR. JUSTICE CLARK join, dissenting.

In my opinion, the Court of Appeals was faithful to the congressional concept of depreciation and to the Internal Revenue Code and applicable Treasury Regulations. Accordingly, I would affirm.

Section 167 (a) of the Internal Revenue Code of 1954 authorizes as a depreciation deduction only a "*reasonable* allowance" for exhaustion, wear and tear, and obsolescence. (Emphasis added.) This allowance was designed by Congress to enable the taxpayer to recover his net investment in wasting assets used in his trade or business or held for the production of income to the extent that the investment loses value through exhaustion, wear and tear, or obsolescence.[1] In this manner the tax-

[1] The House Report on the 1954 Internal Revenue Code has defined depreciation as "allowances [whereby] *capital invested in an asset* is recovered tax-free over the years it is used in a business." H. R. Rep. No. 1337, 83d Cong., 2d Sess., p. 22. (Emphasis added.) Similarly, in *Virginian Hotel Co.* v. *Helvering,* 319 U. S. 523, the Court discussed depreciation in terms of an amount "which, along with salvage value, will replace the original investment of the property . . . ." *Id.,* at 528. This Court has, on other occasions, spoken of depreciation in terms of a gradual sale of the depreciable asset as it is physically used up year by year in the trade or business. See *Massey Motors* v. *United States,* 364 U. S. 92, 104. However, this is to say the same thing in different words. Even if one views depreciation as representative of the physical exhaustion of an asset, it is not measured in terms of nuts and bolts but in terms of the "financial consequences to the taxpayer of the subtle effects of time and use on . . . his capital assets." *Detroit Edison Co.* v. *Commissioner,* 319 U. S. 98, 101. Investment is not to be measured in terms of original or initial cost, but in terms of "net investment," *Detroit*

payer will be taxed only on the net, rather than the gross, income produced by the depreciable asset in accordance with the general congressional scheme to tax only net income. It was not, however, the intent of Congress to enable the taxpayer to recover more than his actual net investment and thereby to convert ordinary income into a capital gain through excessive depreciation. "Congress intended by the depreciation allowance not to make taxpayers a profit thereby, but merely to protect them from a loss." *Massey Motors* v. *United States,* 364 U. S. 92, 101. See also *Detroit Edison* v. *Commissioner,* 319 U. S. 98, where the Court refused to allow the taxpayer to depreciate that portion of the initial investment of an asset that did not represent actual expenditure by it because borne by its customers. Accordingly, in judging whether a given depreciation deduction is "reasonable," we should determine whether the deduction is designed to recover tax-free only the actual investment in the asset, *Massey Motors, supra,* at 105, or whether it is calculated instead to return a greater amount.

It would be easy enough to compute depreciation if the taxpayer were required to wait until disposition of the asset, at which time he would know with precision his net investment, before he could claim a depreciation allowance. Whether he were then required to take the entire depreciation allowance in the year of sale or per-

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Edison Co. v. *Commissioner, supra,* at 103, or "actual cost," *Massey Motors* v. *United States, supra,* at 106. Accordingly, salvage value, Treas. Reg. § 1.167 (a)–1, and other reimbursements received by the taxpayer, *Detroit Edison Co.* v. *Commissioner, supra,* must be deducted from the taxpayer's initial investment in the asset in order to arrive at a depreciable "net investment." I use the word "investment" rather than "cost" because "cost" may have so many different meanings, both to the accountant and to the tax lawyer, and some of those meanings would do considerable violence to the congressional purpose for depreciation allowances.

mitted to reopen the previous tax years during which he held the asset and spread the allowance ratably among them, it could be ensured that he would then recover precisely, but no more than, his actual, net investment. However, both for administrative and economic reasons, Congress has chosen to allow the taxpayer to take depreciation deductions in advance of the disposition of the asset by estimating what portion of his net investment should be allocated for the use of the asset in any given year. This estimate involves two unknowns: the duration of its use by the taxpayer [2] and the salvage value (resale price of the asset if it is resold).[3] Every effort must be made, in estimating these two values, to come as close to the actual figures as possible. *Massey Motors* v. *United States, supra.* Indeed, it is reasonable to use estimates at all only because the actual figures are generally not knowable in advance. However, when the actual figures do become known and they differ materially from the estimates of them previously made and they can be substituted for the estimates with almost no inconvenience or unfairness, then it seems to me to be clearly unreasonable, and hence unauthorized by § 167,

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[2] Useful life is to reflect the realities of the taxpayer's actual experience rather than a possibly unrealistic conceptualized idea of inherent physical life. *Massey Motors* v. *United States, supra,* n. 1.

[3] As is the case with useful life, salvage value should reflect the actualities of the situation. When a depreciated asset is sold the economic reality is that the resale price is the salvage value. This practical definition of salvage value was clearly contemplated in *Massey Motors, supra,* n. 1, where the Court talked in terms of "real salvage *price*" and "*resale*" value. *Id.,* at 105, 107. (Emphasis added.) In *Hertz Corp.* v. *United States,* 364 U. S. 122, 127, the Court spoke in terms of "the price that will be received when the asset is retired." See also Treas. Reg. § 1.167 (a)–1 (c), which speaks in terms of an amount "realizable upon sale . . . of an asset when it is no longer useful in the taxpayer's trade or business or in the production of his income . . . ."

to continue to rely on the estimates. See *Hertz Corp.* v. *United States,* 364 U. S. 122, 128.

In the present case, Fribourg knew in 1957 what its actual net investment in the S. S. *Joseph Feuer* would be. It knew that if it claimed the previously estimated depreciation deduction for that year it would recover more than its net investment and would be immunizing other income from normal income tax rates.[4] It also knew that a readjustment could be made for 1957 with finality and without significant inconvenience because the resale value and useful life had been definitely determined. Nevertheless, Fribourg continued to use the previously estimated figures, known to it to be erroneous. This, to me, was patently unreasonable and, therefore, outside the scope of § 167.

Not only did Fribourg violate the terms of the statute, it also failed to comply with the applicable, long-standing Treasury Regulations. Treasury Regulation § 1.167(a)–1 (b) provides that the estimate of useful life is to be redetermined by reason of conditions known to exist at the end of the taxable year whenever the change in useful life is significant and there is a clear and convincing basis for the redetermination. As a companion provision, Treas. Reg. § 1.167 (a)–1 (c) provides that whenever there is a redetermination of useful life, salvage value should also be redetermined if required by facts known

[4] It is in this economic sense that the Commissioner means that it "cost" Fribourg nothing to use the S. S. *Joseph Feuer* in 1957. Obviously the ship suffered some physical wear and tear during use in 1957. But measured in economic terms Fribourg had already been compensated in advance for that wear and tear as it affected its net investment in the ship because excessive depreciation deductions had been taken in the earlier years. The Commissioner is asking now only that Fribourg be prevented from deliberately compounding the error innocently made in earlier years by continuing to claim depreciation deductions after it knew its entire net investment in the S. S. *Joseph Feuer* had already been recovered.

at the time of the redetermination. At the end of the taxable year 1957, Fribourg knew it had overestimated useful life by approximately one-third, which seems to me to be a significant error. At the same time, it knew its estimate of salvage value was only about one-thirteenth the actual salvage value. And, it had the clearest and most convincing basis possible for redetermination—it knew the actual figures. As I read the above regulations, they surely require a redetermination in this situation.

Further, Treas. Reg. § 1.167 (b)–0 says that "deductions for depreciation shall not exceed such amounts as may be necessary to recover the unrecovered cost or other basis less salvage . . . ." To the same effect are Treas. Reg. §§ 1.167 (a)–1 (a) and (c), which warn that "an asset shall not be depreciated below a reasonable salvage value," remembering that reasonableness is to be determined "upon the basis of conditions known to exist at the *end of the period for which the return is made.*" Treas. Reg. § 1.167 (b)–0. (Emphasis added.) See *Hertz Corp.* v. *United States, supra.* Yet here Fribourg knowingly recovered more than its "cost or other basis" less salvage. Here Fribourg knowingly depreciated its asset below a reasonable salvage value in light of conditions known at the end of 1957.

I think the majority misreads that provision in the regulations that says "Salvage value is the amount (determined at the time of acquisition) which is estimated will be realizable upon sale or other disposition of an asset . . . . Salvage value shall not be changed at any time after the determination made at the time of acquisition merely because of changes in price levels." Treas. Reg. § 1.167 (a)–1 (c). That provision merely recognizes the fact that in years prior to the concluding of a resale agreement the salvage value can only be estimated and it would be administratively burdensome and frequently futile to require redeterminations each year

merely because of price changes that may ultimately prove ephemeral. But those provisions certainly do not express a policy against redetermination, in the year of a premature sale, of salvage value when it can be known with finality what effect the price levels will have on the salvage value. Rev. Rul. 62–92, 1962–1 Cum. Bull. 29; *Cohn* v. *United States,* 259 F. 2d 371, 378. The very next sentence in that regulation seems to acknowledge the relevance of price levels, provided that such recognition does not cause undue administrative hardship: "However, if there is a redetermination of useful life . . . , salvage value may be redetermined based upon facts known at the time of such redetermination of useful life."

The majority opinion faults the Commissioner for having "commingled two distinct . . . concepts of tax accounting—depreciation of an asset through wear and tear or gradual expiration of useful life and fluctuations in the value of that asset through changes in price levels or market values." In my opinion these two concepts, as used in the Internal Revenue Code, are necessarily commingled and it is unrealistic to expect that one can be isolated from the other. One of the essential elements in the concept of depreciation deductions is salvage value, Treas. Reg. § 1.167 (a)–1 (a); salvage value is resale price if the asset is resold, *Massey Motors* v. *United States, supra,* at 105–107; *Edward V. Lane,* 37 T. C. 188; and resale price is directly influenced by fluctuations in market value. To the extent that such fluctuations are predictable, they must be considered in making a reasonable estimate of salvage or resale value of the investment. See *Bolta Co.,* 4 CCH Tax Ct. Mem. 1067.[5] In addition,

[5] The Tax Court's current position on the relevance of predictable market appreciation at the time of a determination of useful life and salvage value is not entirely clear. Compare *Smith Leasing Co.,* 43 T. C. 37, with *Macabe Co.,* 42 T. C. 1105.

as reflected by this case, predictable market fluctuations in value may also affect the useful life of the asset. To the extent that disposal of an asset by sale becomes more attractive through market appreciation it can be expected that useful life, as defined in *Massey Motors, supra,* will shorten. Although market appreciation in this case was more rapid than will normally be the case, it was predictable for more than a year before Fribourg sold its ship, and by the end of 1957 Fribourg knew exactly what effect market appreciation would have upon the resale value of useful life. In this situation market appreciation should not have been disregarded.

The majority also contends that the Commissioner's position contains an inconsistency because he disallowed depreciation only for the year in which the sale occurred and did not require a disallowance for previous years although the resale price was sufficiently high to indicate that the S. S. *Joseph Feuer* did not "cost" Fribourg anything in the earlier years either. However, in the earlier tax years it was reasonable to rely on the estimated salvage value, since the actual salvage value was not then known. At any rate, it is well established that a modification of the depreciation allowance (for whatever reason) will not be applied retroactively to previous tax years. For example, if the useful life is determined to be longer than originally believed, the allowable depreciation is not modified for the prior years in which excessive depreciation had been taken, but the remaining undepreciated basis minus salvage value is spread ratably over the new estimated remaining useful life and depreciation deductions taken accordingly for the current and succeeding years. *Commissioner* v. *Cleveland Adolph Mayer Realty Corp.,* 160 F. 2d 1012; *Commissioner* v. *Mutual Fertilizer Co.,* 159 F. 2d 470; 4 Mertens, Law of Federal Income Taxation, § 23.47; see also *Virginian Hotel Co.* v. *Helvering,* 319 U. S. 523; S. Rep. No. 665, 72d Cong., 1st Sess., 29.

There is a further alleged inconsistency because the Commissioner may be refusing to allow additional depreciation in the year of sale when salvage value turns out to be less than the adjusted basis at the time of sale. This alleged inconsistency, however, should be dealt with when it is properly presented to us.[6]

Finally, I turn to the majority's contention that the Commissioner's position represents a dramatic departure from previous administrative and judicial practice and that congressional re-enactment of the depreciation provision during this time reflects congressional approval of that previous interpretation.

Several of the cases and revenue rulings relied upon by the majority to establish past practice were concerned with tax years previous to 1922,[7] when the first capital gain provision became applicable.[8] I would not give precedential significance to positions taken during that time because the tax saving resulting from a depreciation deduction in the year of sale would have been exactly offset by the tax liability resulting from the correspondingly greater gain upon the sale of the asset due to the lower

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[6] Similarly, because our situation involves appreciated market values, we are not now concerned with that sentence in Treas. Reg. § 1.167 (a)–1 (a) that reads, "The allowance shall not reflect amounts representing a mere reduction in market value." At any rate, this sentence merely reflects the congressional intent that a taxpayer be permitted to recover his net investment in an asset to the extent that the net investment represents "exhaustion, wear and tear, [or] obsolescence."

[7] Of the rulings cited in n. 5 of the majority opinion, only one, G. C. M. 1597, VI–1 Cum. Bull. 71 (1927), involved a tax year after 1921. Both Supreme Court cases cited in n. 4 of the majority opinion, *United States* v. *Ludey*, 274 U. S. 295, and *Eldorado Coal & Mining Co.* v. *Mager*, 255 U. S. 522, were concerned with tax years prior to 1922. Similarly, *Louis Kalb*, 15 B. T. A. 865, and *Even Realty Co.*, 1 B. T. A. 355, involved tax years prior to 1922.

[8] 42 Stat. 232, § 206 (a).

basis. The remaining revenue ruling [9] and most of the remaining cases relied upon by the majority were concerned primarily with issues other than the one now before us.[10] In the absence of any indication that the Commissioner or the courts in those instances focused on the precise issue now before us these examples are without precedential value. There is one early decision of the Board of Tax Appeals, *Herbert Simons*, 19 B. T. A. 711, and one by the Tax Court, *Wier Long Leaf Lumber Co.*, 9 T. C. 990, that did expressly consider the problem whether a taxpayer could claim depreciation in the year he sells an asset at a price above his depreciated basis for that asset. In *Wier Long Leaf Lumber Co.* the Commissioner challenged the right of the taxpayer to take depreciation in the year of sale and at least part of that court's opinion seems to support the Commissioner's position.[11] This leaves only *Herbert Simons* in which the Commissioner and the Board appear to take a considered position inconsistent with that now urged by the Commissioner. In my opinion that decision should be disapproved as being inconsistent with the statutory provision for depreciation and the interpretative regulations. In recent years, it should be

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[9] G. C. M. 1597, VI–1 Cum. Bull. 71 (1927). See also Treas. Reg. § 1.1238–1, Example (1), which was designed to show the interaction between §§ 168 and 1238, not the allowance of depreciation of § 167. That example has now been retroactively amended to the date of its original adoption in 1951. T. D. 6825, 1965–1 Cum. Bull. 366.

[10] *Beckridge Corp.* v. *Commissioner*, 129 F. 2d 318; *Clark Thread Co.* v. *Commissioner*, 100 F. 2d 257; *Kittredge* v. *Commissioner*, 88 F. 2d 632; *Seymour Mfg. Co.* v. *Burnet*, 61 App. D. C. 22, 56 F. 2d 494; *Hall* v. *United States*, 95 Ct. Cl. 539, 43 F. Supp. 130; *Max Eichenberg*, 16 B. T. A. 1368; *H. L. Gatlin*, 19 CCH Tax Ct. Mem. 131; *P. H. & J. M. Brown Co.*, 18 CCH Tax Ct. Mem. 708.

[11] See also *Duncan-Homer Realty Co.*, 6 B. T. A. 730 (1927), where the Board of Tax Appeals sustained the Commissioner's refusal to allow depreciation in the year of a profitable sale.

observed, there is substantial judicial authority for the disallowance of depreciation in the year of a sale above depreciated basis.[12]

To the extent that the Commissioner took an inconsistent position in any of these early cases, I would certainly not now hold him to that position.[13] We have frequently in the past recognized the Commissioner's authority to re-evaluate a prior position upon the basis of greater experience and reflection and to adjust that position to the extent that he becomes convinced that an adjustment is necessary to comport with congressional intent, even when this results in a distinct reversal of a previous position and the taxpayer had relied upon the previous position.[14] *Dixon* v. *United States,* 381 U. S. 68; *Automobile Club of Michigan* v. *Commissioner,* 353 U. S. 180. Were the Commissioner denied this authority, it would be tantamount to freezing in acknowledged error. It seems strange, therefore, that the majority today would deny the Commissioner this authority when

[12] *Fribourg Navigation Co., Inc.* v. *Commissioner,* 335 F. 2d 15; *United States* v. *Motorlease Corp.,* 334 F. 2d 617, pet. for cert. filed; *Cohn* v. *United States,* 259 F. 2d 371; *Killebrew* v. *United States,* 234 F. Supp. 481.

[13] The Commissioner's acquiescence in *Wier Long Leaf Lumber* Co., 9 T. C. 990, can have no clearer significance than has the opinion itself, with its arguably inconsistent holdings. At any rate, at the front of each cumulative bulletin it is clearly explained that acquiescences "have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law." See *Dixon* v. *United States,* 381 U. S. 68.

[14] See 26 U. S. C. § 7805 (1964 ed.), which gives authority to the Secretary of the Treasury or his delegate to "prescribe all needful rules and regulations . . . , including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue." Subsection (b) of that section says "The Secretary or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect."

his earlier position was not clear and when Fribourg has made absolutely no showing that it would not have made arrangements to sell the S. S. *Joseph Feuer* when it did but for a reliance upon the alleged previously inconsistent position of the Commissioner.

Under these circumstances, it also seems unrealistic to me to argue that, by re-enacting the depreciation provision on several occasions prior to the promulgation of Rev. Rul. 62–92 in 1962, Congress intended to give force of statutory law to the position that depreciation should be allowed on an asset in the year it is sold at a price above its depreciated basis. This reasoning has been recognized as "no more than an aid in statutory construction," *Helvering* v. *Reynolds,* 313 U. S. 428, 432, and as "an unreliable indicium at best" by THE CHIEF JUSTICE writing for the Court in *Commissioner* v. *Glenshaw Glass Co.,* 348 U. S. 426, 431. It is a particularly unreliable aid in statutory construction unless the previous interpretation had been clearly and officially promulgated and Congress had been specifically advised of that interpretation in connection with the re-enactment of the relevant statutory provision. *Higgins* v. *Commissioner,* 312 U. S. 212; see generally, 1 Davis, Administrative Law § 5.07. Here there was no official Treasury Regulation or Treasury Decision clearly articulating the theory that depreciation should be allowed in the year of profitable sale. Indeed, as indicated earlier, the relevant Treasury Regulations seemed generally to indicate quite the opposite conclusion. Nor is there any indication that anyone asserted to Congress during a time that it was considering re-enactment of the depreciation provision that the Commissioner had embraced a position that depreciation had to be allowed on property in the year that it was sold at a price in excess of its adjusted basis. The legislative history and various requests made to Congress upon which the majority

relies were directed to the capital gain provisions of the Code, not the depreciation provision. And, there are indications that Congress intended to treat the two provisions separately. See H. R. Rep. No. 749, 88th Cong., 1st Sess., 103 (1963); S. Rep. No. 830, 88th Cong., 2d Sess., 133 (1964). For example, the "undue hardship" which prompted Congress to enact § 1231 was no doubt the hardship of paying tax on gain resulting from many years of appreciation when all of the gain is bunched into the year of sale. The Commissioner's refusal to allow depreciation in the year of profitable sale is in no way inconsistent with this attempt by Congress to alleviate hardships resulting from the bunching of income. Further, the fact that Congress was asked in the President's 1961 Tax Message to enact legislation treating gain upon the sale of depreciated property as regular income to the extent that the property had previously been depreciated should not be construed as a representation to Congress that the Commissioner did not have the authority he now claims. That recommendation was generally concerned with excessive depreciation in years "previous" to the year of sale, an abuse that the Commissioner has never claimed to be able to correct without congressional assistance. None of the examples cited to Congress in this Message are inconsistent with the Commissioner's authority to deny depreciation in the year of profitable sale.[15]

In 1962 and again in 1964 Congress enacted certain recapture provisions.[16] These provisions indicate a congressional attitude, consistent with the Commissioner's position, that depreciation should not exceed actual, net investment and that excessive depreciation should not be

[15] Similarly, the other requests addressed to Congress mentioned in the majority opinion were concerned with problems beyond the remedial power of the Commissioner to disallow depreciation in the year of profitable sale.

[16] 26 U. S. C. §§ 1245, 1250 (1964 ed.).

permitted to convert ordinary income into capital gain. The only concrete evidence that Congress was really aware of the Commissioner's position that depreciation should be disallowed in the year of profitable sale is to be found in the House and Senate Reports considering § 1250, the recapture provision dealing with depreciable real estate. I think the comments contained in those Reports on the position taken by the Commissioner are highly relevant:

> "[T]he enactment of this provision is not intended to affect the question of whether all or any part of a claimed deduction for depreciation is in fact allowable. For example, since in the year real property is sold the actual value of the property is known, it has been held that depreciation deductions should not be allowed to the extent they reduce the adjusted basis of the property below the actual amount realized. This provision, in providing for ordinary income treatment for certain additional depreciation, *is not intended to affect this holding.*" H. R. Rep. No. 749, 88th Cong., 1st Sess., p. 103 (1963); S. Rep. No. 830, 88th Cong., 2d Sess., p. 133 (1964). (Emphasis added.)

Congress gave to the Secretary of the Treasury or his delegate, not to this Court, the primary responsibility of determining what constitutes a "reasonable" allowance for depreciation. When the Commissioner adopts a rational position that is consistent with the purpose behind the depreciation deduction, congressional intent, and the language of the statute and interpretative Treasury Regulations, I would affirm that position.

Syllabus.

SOUTH CAROLINA *v.* KATZENBACH, ATTORNEY GENERAL.

ON BILL OF COMPLAINT.

No. 22, Orig. Argued January 17–18, 1966.—Decided March 7, 1966.

Invoking the Court's original jurisdiction under Art. III, § 2, of the Constitution, South Carolina filed a bill of complaint seeking a declaration of unconstitutionality as to certain provisions of the Voting Rights Act of 1965 and an injunction against their enforcement by defendant, the Attorney General. The Act's key features, aimed at areas where voting discrimination has been most flagrant, are: (1) A coverage formula or "triggering mechanism" in § 4 (b) determining applicability of its substantive provisions; (2) provision in § 4 (a) for temporary suspension of a State's voting tests or devices; (3) procedure in § 5 for review of new voting rules; and (4) a program in §§ 6 (b), 7, 9, and 13 (a) for using federal examiners to qualify applicants for registration who are thereafter entitled to vote in all elections. These remedial sections automatically apply to any State or its subdivision which the Attorney General has determined maintained on November 1, 1964, a registration or voting "test or device" (a literacy, educational, character, or voucher requirement as defined in § 4 (c)) and in which according to the Census Director's determination less than half the voting-age residents were registered or voted in the 1964 presidential election. Statutory coverage may be terminated by a declaratory judgment of a three-judge District of Columbia District Court that for the preceding five years racially discriminatory voting tests or devices have not been used. No person in a covered area may be denied voting rights because of failure to comply with a test or device. § 4 (a). Following administrative determinations, enforcement was temporarily suspended of South Carolina's literacy test as well as of tests and devices in certain other areas. The Act further provides in § 5 that during the suspension period, a State or subdivision may not apply new voting rules unless the Attorney General has interposed no objection within 60 days of their submission to him, or a three-judge District of Columbia District Court has issued a declaratory judgment that such rules are not racially discriminatory. South Carolina wishes to apply a recent amendment to its voting laws without following these procedures. In

any political subdivision where tests or devices have been suspended, the Civil Service Commission shall appoint voting examiners whenever the Attorney General has, after considering specified factors, duly certified receiving complaints of official racial voting discrimination from at least 20 residents or that the examiners' appointment is otherwise necessary under the Fifteenth Amendment. § 6 (b). Examiners are to transmit to the appropriate officials the names of applicants they find qualified; and such persons may vote in any election after 45 days following transmission of their names. § 7 (b). Removal by the examiners of names from voting lists is provided on loss of eligibility or on successful challenge under prescribed procedures. § 7 (d). The use of examiners is terminated if requested by the Attorney General or the political subdivision has obtained a declaratory judgment as specified in § 13 (a). Following certification by the Attorney General, federal examiners were appointed in two South Carolina counties as well as elsewhere in other States. Subsidiary cures for persistent voting discrimination and other special provisions are also contained in the Act. In addition to a general assault on the Act as unconstitutionally encroaching on States' rights, specific constitutional challenges by plaintiff and certain *amici curiae* are: The coverage formula violates the principle of equality between the States, denies due process through an invalid presumption, bars judicial review of administrative findings, is a bill of attainder, and legislatively adjudicates guilt; the review of new voting rules infringes Art. III by directing the District Court to issue advisory opinions; the assignment of federal examiners violates due process by foreclosing judicial review of administrative findings and impairs the separation of powers by giving the Attorney General judicial functions; the challenge procedure denies due process on account of its speed; and provisions for adjudication in the District of Columbia abridge due process by limiting litigation to a distant forum. *Held:*

1. This Court's judicial review does not cover portions of the Voting Rights Act of 1965 not challenged by plaintiff; nor does it extend to the Act's criminal provisions, as to which South Carolina's challenge is premature. Pp. 316–317.

2. The sections of the Act properly before this Court are a valid effectuation of the Fifteenth Amendment. Pp. 308–337.

(a) The Act's voluminous legislative history discloses unremitting and ingenious defiance in certain parts of the country of

the Fifteenth Amendment (see paragraphs (b)–(d), *infra*) which Congress concluded called for sterner and more elaborate measures than those previously used. P. 309.

(b) Beginning in 1890, a few years before repeal of most of the legislation to enforce the Fifteenth Amendment, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia enacted tests, still in use, specifically designed to prevent Negroes from voting while permitting white persons to vote. Pp. 310–311.

(c) A variety of methods was used thereafter to keep Negroes from voting, one of the principal means being through racially discriminatory application of voting tests. Pp. 311–313.

(d) Case-by-case litigation against voting discrimination under the Civil Rights Acts of 1957, 1960, and 1964, has not appreciably increased Negro registration. Voting suits have been onerous to prepare, protracted, and where successful have often been followed by a shift in discriminatory devices, defiance or evasion of court orders. Pp. 313–315.

(e) A State is not a "person" within the meaning of the Due Process Clause of the Fifth Amendment; nor does it have standing to invoke the Bill of Attainder Clause of Art. I or the principle of separation of powers, which exist only to protect private individuals or groups. Pp. 323–324.

(f) Congress, as against the reserved powers of the States, may use any rational means to effectuate the constitutional prohibition of racial voting discrimination. P. 324.

(g) The Fifteenth Amendment, which is self-executing, supersedes contrary exertions of state power, and its enforcement is not confined to judicial invalidation of racially discriminatory state statutes and procedures or to general legislative prohibitions against violations of the Amendment. Pp. 325, 327.

(h) Congress, whose power to enforce the Fifteenth Amendment has repeatedly been upheld in the past, is free to use whatever means are appropriate to carry out the objects of the Constitution. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Ex parte Virginia*, 100 U. S. 339, 345–346. Pp. 326–327.

(i) Having determined case-by-case litigation inadequate to deal with racial voting discrimination, Congress has ample authority to prescribe remedies not requiring prior adjudication. P. 328.

(j) Congress is well within its powers in focusing upon the geographic areas where substantial racial voting discrimination had occurred. Pp. 328–329.

(k) Congress had reliable evidence of voting discrimination in a great majority of the areas covered by § 4 (b) of the Act and is warranted in inferring a significant danger of racial voting discrimination in the few other areas to which the formula in § 4 (b) applies. Pp. 329–330.

(l) The coverage formula is rational in theory since tests or devices have so long been used for disenfranchisement and a lower voting rate obviously results from such disenfranchisement. P. 330.

(m) The coverage formula is rational as being aimed at areas where widespread discrimination has existed through misuse of tests or devices even though it excludes certain areas where there is voting discrimination through other means. The Act, moreover, strengthens existing remedies for such discrimination in those other areas. Pp. 330–331.

(n) The provision for termination at the behest of the States of § 4 (b) coverage adequately deals with possible overbreadth; nor is the burden of proof imposed on the States unreasonable. Pp. 331–332.

(o) Limiting litigation to a single court in the District of Columbia is a permissible exercise of power under Art. III, § 1, of the Constitution, previously exercised by Congress on other occasions. Pp. 331–332.

(p) The Act's bar of judicial review of findings of the Attorney General and Census Director as to objective data is not unreasonable. This Court has sanctioned withdrawal of judicial review of administrative determinations in numerous other situations. Pp. 332–333.

(q) Congress has power to suspend literacy tests, it having found that such tests were used for discriminatory purposes in most of the States covered; their continuance, even if fairly administered, would freeze the effect of past discrimination; and re-registration of all voters would be too harsh an alternative. Such States cannot sincerely complain of electoral dilution by Negro illiterates when they long permitted white illiterates to vote. P. 334.

(r) Congress is warranted in suspending, pending federal scrutiny, new voting regulations in view of the way in which some States have previously employed new rules to circumvent adverse federal court decrees. P. 335.

(s) The provision whereby a State whose voting laws have been suspended under § 4 (a) must obtain judicial review of an amendment to such laws by the District Court for the District of Columbia presents a "controversy" under Art. III of the Constitution and therefore does not involve an advisory opinion contravening that provision. P. 335.

(t) The procedure for appointing federal examiners is an appropriate congressional response to the local tactics used to defy or evade federal court decrees. The challenge procedures contain precautionary features against error or fraud and are amply warranted in view of Congress' knowledge of harassing challenging tactics against registered Negroes. P. 336.

(u) Section 6 (b) has adequate standards to guide determination by the Attorney General in his selection of areas where federal examiners are to be appointed; and the termination procedures in § 13 (b) provide for indirect judicial review. Pp. 336–337.

Bill of complaint dismissed.

David W. Robinson II and *Daniel R. McLeod,* Attorney General of South Carolina, argued the cause for the plaintiff. With them on the brief was *David W. Robinson.*

Attorney General Katzenbach, defendant, argued the cause *pro se.* With him on the brief were *Solicitor General Marshall, Assistant Attorney General Doar, Ralph S. Spritzer, Louis F. Claiborne, Robert S. Rifkind, David L. Norman* and *Alan G. Marer.*

R. D. McIlwaine III, Assistant Attorney General, argued the cause for the Commonwealth of Virginia, as *amicus curiae,* in support of the plaintiff. With him on the brief were *Robert Y. Button,* Attorney General, and *Henry T. Wickham. Jack P. F. Gremillion,* Attorney General, argued the cause for the State of Louisiana, as *amicus curiae,* in support of the plaintiff. With him on the brief were *Harry J. Kron,* Assistant Attorney General, *Thomas W. McFerrin, Sr., Sidney W. Provensal, Jr.,* and *Alfred Avins. Richmond M. Flowers,* Attorney General, and *Francis J. Mizell, Jr.,* argued the cause for

the State of Alabama, as *amicus curiae,* in support of the plaintiff. With them on the briefs were *George C. Wallace,* Governor of Alabama, *Gordon Madison,* Assistant Attorney General, and *Reid B. Barnes. Joe T. Patterson,* Attorney General, and *Charles Clark,* Special Assistant Attorney General, argued the cause for the State of Mississippi, as *amicus curiae,* in support of the plaintiff. With them on the brief was *Dugas Shands,* Assistant Attorney General. *E. Freeman Leverett,* Deputy Assistant Attorney General, argued the cause for the State of Georgia, as *amicus curiae,* in support of the plaintiff. With him on the brief was *Arthur K. Bolton,* Attorney General.

Levin H. Campbell, Assistant Attorney General, and *Archibald Cox,* Special Assistant Attorney General, argued the cause for the Commonwealth of Massachusetts, as *amicus curiae,* in support of the defendant. With *Mr. Campbell* on the brief was *Edward W. Brooke,* Attorney General, joined by the following States through their Attorneys General and other officials as follows: *Bert T. Kobayashi* of Hawaii; *John J. Dillon* of Indiana, *Theodore D. Wilson,* Assistant Attorney General, and *John O. Moss,* Deputy Attorney General; *Lawrence F. Scalise* of Iowa; *Robert C. Londerholm* of Kansas; *Richard J. Dubord* of Maine; *Thomas B. Finan* of Maryland; *Frank J. Kelley* of Michigan, and *Robert A. Derengoski,* Solicitor General; *Forrest H. Anderson* of Montana; *Arthur J. Sills* of New Jersey; *Louis J. Lefkowitz* of New York; *Charles Nesbitt* of Oklahoma, and *Charles L. Owens,* Assistant Attorney General; *Robert Y. Thornton* of Oregon; *Walter E. Alessandroni* of Pennsylvania; *J. Joseph Nugent* of Rhode Island; *John P. Connarn* of Vermont; *C. Donald Robertson* of West Virginia; and *Bronson C. LaFollette* of Wisconsin. *Alan B. Handler,* First Assistant Attorney General, argued the cause for the State of New Jersey, as *amicus curiae,* in

support of the defendant. Briefs of *amici curiae,* in support of the defendant, were filed by *Thomas C. Lynch,* Attorney General, *Miles J. Rubin,* Senior Assistant Attorney General, *Dan Kaufmann,* Assistant Attorney General, and *Charles B. McKesson, David N. Rakov* and *Philip M. Rosten,* Deputy Attorneys General, for the State of California; and by *William G. Clark,* Attorney General, *Richard E. Friedman,* First Assistant Attorney General, and *Richard A. Michael* and *Philip J. Rock,* Assistant Attorneys General, for the State of Illinois.

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

By leave of the Court, 382 U. S. 898, South Carolina has filed a bill of complaint, seeking a declaration that selected provisions of the Voting Rights Act of 1965 [1] violate the Federal Constitution, and asking for an injunction against enforcement of these provisions by the Attorney General. Original jurisdiction is founded on the presence of a controversy between a State and a citizen of another State under Art. III, § 2, of the Constitution. See *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439. Because no issues of fact were raised in the complaint, and because of South Carolina's desire to obtain a ruling prior to its primary elections in June 1966, we dispensed with appointment of a special master and expedited our hearing of the case.

Recognizing that the questions presented were of urgent concern to the entire country, we invited all of the States to participate in this proceeding as friends of the Court. A majority responded by submitting or joining in briefs on the merits, some supporting South Carolina and others the Attorney General.[2] Seven of these States

[1] 79 Stat. 437, 42 U. S. C. § 1973 (1964 ed., Supp. I).

[2] States supporting South Carolina: Alabama, Georgia, Louisiana, Mississippi, and Virginia. States supporting the Attorney General: California, Illinois, and Massachusetts, joined by Hawaii, Indiana,

also requested and received permission to argue the case orally at our hearing. Without exception, despite the emotional overtones of the proceeding, the briefs and oral arguments were temperate, lawyerlike and constructive. All viewpoints on the issues have been fully developed, and this additional assistance has been most helpful to the Court.

The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. The Act creates stringent new remedies for voting discrimination where it persists on a pervasive scale, and in addition the statute strengthens existing remedies for pockets of voting discrimination elsewhere in the country. Congress assumed the power to prescribe these remedies from § 2 of the Fifteenth Amendment, which authorizes the National Legislature to effectuate by "appropriate" measures the constitutional prohibition against racial discrimination in voting. We hold that the sections of the Act which are properly before us are an appropriate means for carrying out Congress' constitutional responsibilities and are consonant with all other provisions of the Constitution. We therefore deny South Carolina's request that enforcement of these sections of the Act be enjoined.

I.

The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects. Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting. The House and Senate Committees on the Judiciary each held hearings for nine days and received testimony from a total of 67 wit-

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Iowa, Kansas, Maine, Maryland, Michigan, Montana, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wisconsin.

nesses.[3] More than three full days were consumed discussing the bill on the floor of the House, while the debate in the Senate covered 26 days in all.[4] At the close of these deliberations, the verdict of both chambers was overwhelming. The House approved the bill by a vote of 328–74, and the measure passed the Senate by a margin of 79–18.

Two points emerge vividly from the voluminous legislative history of the Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment. We pause here to summarize the majority reports of the House and Senate Committees, which document in considerable detail the factual basis for these reactions by Congress.[5] See H. R. Rep. No. 439, 89th Cong., 1st Sess., 8–16 (hereinafter cited as House Report); S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess., 3–16 (hereinafter cited as Senate Report).

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[3] See Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess. (hereinafter cited as House Hearings); Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (hereinafter cited as Senate Hearings).

[4] See the Congressional Record for April 22, 23, 26, 27, 28, 29, 30; May 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26; July 6, 7, 8, 9; August 3 and 4, 1965.

[5] The facts contained in these reports are confirmed, among other sources, by *United States* v. *Louisiana*, 225 F. Supp. 353, 363–385 (Wisdom, J.), aff'd, 380 U. S. 145; *United States* v. *Mississippi*, 229 F. Supp. 925, 983–997 (dissenting opinion of Brown, J.), rev'd and rem'd, 380 U. S. 128; *United States* v. *Alabama*, 192 F. Supp. 677

The Fifteenth Amendment to the Constitution was ratified in 1870. Promptly thereafter Congress passed the Enforcement Act of 1870,[6] which made it a crime for public officers and private persons to obstruct exercise of the right to vote. The statute was amended in the following year[7] to provide for detailed federal supervision of the electoral process, from registration to the certification of returns. As the years passed and fervor for racial equality waned, enforcement of the laws became spotty and ineffective, and most of their provisions were repealed in 1894.[8] The remnants have had little significance in the recently renewed battle against voting discrimination.

Meanwhile, beginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting.[9] Typically, they made the ability to read and write

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(Johnson, J.), aff'd, 304 F. 2d 583, aff'd, 371 U. S. 37; Comm'n on Civil Rights, Voting in Mississippi; 1963 Comm'n on Civil Rights Rep., Voting; 1961 Comm'n on Civil Rights Rep., Voting, pt. 2; 1959 Comm'n on Civil Rights Rep., pt. 2. See generally Christopher, The Constitutionality of the Voting Rights Act of 1965, 18 Stan. L. Rev. 1; Note, Federal Protection of Negro Voting Rights, 51 Va. L. Rev. 1051.

[6] 16 Stat. 140.

[7] 16 Stat. 433.

[8] 28 Stat. 36.

[9] The South Carolina Constitutional Convention of 1895 was a leader in the widespread movement to disenfranchise Negroes. Key, Southern Politics, 537–539. Senator Ben Tillman frankly explained to the state delegates the aim of the new literacy test: "[T]he only thing we can do as patriots and as statesmen is to take from [the 'ignorant blacks'] every ballot that we can under the laws of our national government." He was equally candid about the exemption from the literacy test for persons who could "understand" and "explain" a section of the state constitution: "There is no particle of fraud or illegality in it. It is just simply showing partiality, perhaps, [laughter,] or discriminating." He described the alternative exemp-

a registration qualification and also required completion of a registration form. These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write.[10] At the same time, alternate tests were prescribed in all of the named States to assure that white illiterates would not be deprived of the franchise. These included grandfather clauses, property qualifications, "good character" tests, and the requirement that registrants "understand" or "interpret" certain matter.

The course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote. Grandfather clauses were invalidated in *Guinn* v. *United States,* 238 U. S. 347, and *Myers* v. *Anderson,* 238 U. S. 368. Procedural hurdles were struck down in *Lane* v. *Wilson,* 307 U. S. 268. The white primary was outlawed in *Smith* v. *Allwright,* 321 U. S. 649, and *Terry* v. *Adams,* 345 U. S. 461. Improper challenges were nullified in *United States* v. *Thomas,* 362 U. S. 58. Racial gerrymandering was forbidden by *Gomillion* v. *Lightfoot,* 364 U. S. 339. Finally, discriminatory application of voting tests was condemned in *Schnell* v. *Davis,* 336 U. S. 933; *Alabama*

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tion for persons paying state property taxes in the same vein: "By means of the $300 clause you simply reach out and take in some more white men and a few more colored men." Journal of the Constitutional Convention of the State of South Carolina 464, 469, 471 (1895). Senator Tillman was the dominant political figure in the state convention, and his entire address merits examination.

[10] Prior to the Civil War, most of the slave States made it a crime to teach Negroes how to read or write. Following the war, these States rapidly instituted racial segregation in their public schools. Throughout the period, free public education in the South had barely begun to develop. See *Brown* v. *Board of Education,* 347 U. S. 483, 489–490, n. 4; 1959 Comm'n on Civil Rights Rep. 147–151.

v. *United States,* 371 U. S. 37; and *Louisiana* v. *United States,* 380 U. S. 145.

According to the evidence in recent Justice Department voting suits, the latter stratagem is now the principal method used to bar Negroes from the polls. Discriminatory administration of voting qualifications has been found in all eight Alabama cases, in all nine Louisiana cases, and in all nine Mississippi cases which have gone to final judgment.[11] Moreover, in almost all of these cases, the courts have held that the discrimination was pursuant to a widespread "pattern or practice." White applicants for registration have often been excused altogether from the literacy and understanding tests or have been given easy versions, have received extensive help from voting officials, and have been registered despite serious errors in their answers.[12] Negroes, on the other hand, have typically been required to pass difficult versions of all the tests, without any outside assistance and without the slightest error.[13] The good-morals require-

[11] For example, see three voting suits brought against the States themselves: *United States* v. *Alabama,* 192 F. Supp. 677, aff'd, 304 F. 2d 583, aff'd, 371 U. S. 37; *United States* v. *Louisiana,* 225 F. Supp. 353, aff'd, 380 U. S. 145; *United States* v. *Mississippi,* 339 F. 2d 679.

[12] A white applicant in Louisiana satisfied the registrar of his ability to interpret the state constitution by writing, "FRDUM FOOF SPETGH." *United States* v. *Louisiana,* 225 F. Supp. 353, 384. A white applicant in Alabama who had never completed the first grade of school was enrolled after the registrar filled out the entire form for him. *United States* v. *Penton,* 212 F. Supp. 193, 210–211.

[13] In Panola County, Mississippi, the registrar required Negroes to interpret the provision of the state constitution concerning "the rate of interest on the fund known as the 'Chickasaw School Fund.'" *United States* v. *Duke,* 332 F. 2d 759, 764. In Forrest County, Mississippi, the registrar rejected six Negroes with baccalaureate degrees, three of whom were also Masters of Arts. *United States* v. *Lynd,* 301 F. 2d 818, 821.

ment is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials.[14] Negroes obliged to obtain vouchers from registered voters have found it virtually impossible to comply in areas where almost no Negroes are on the rolls.[15]

In recent years, Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination. The Civil Rights Act of 1957 [16] authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds. Perfecting amendments in the Civil Rights Act of 1960 [17] permitted the joinder of States as parties defendant, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systematic discrimination. Title I of the Civil Rights Act of 1964 [18] expedited the hearing of voting cases before three-judge courts and outlawed some of the tactics used to disqualify Negroes from voting in federal elections.

Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination. According to estimates by the Attorney General during hearings on the Act, registration of voting-age Negroes in Alabama rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964. In each instance, registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration.

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[14] For example, see *United States* v. *Atkins,* 323 F. 2d 733, 743.
[15] For example, see *United States* v. *Logue,* 344 F. 2d 290, 292.
[16] 71 Stat. 634.
[17] 74 Stat. 86.
[18] 78 Stat. 241, 42 U. S. C. § 1971 (1964 ed.).

The previous legislation has proved ineffective for a number of reasons. Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration.[19] Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls.[20] The provision of the 1960 law authorizing registration by federal officers has had little impact on local maladministration because of its procedural complexities.

During the hearings and debates on the Act, Selma, Alabama, was repeatedly referred to as the pre-eminent example of the ineffectiveness of existing legislation. In Dallas County, of which Selma is the seat, there were four years of litigation by the Justice Department and two findings by the federal courts of widespread voting discrimination. Yet in those four years, Negro registra-

[19] The Court of Appeals for the Fifth Circuit ordered the registrars of Forrest County, Mississippi, to give future Negro applicants the same assistance which white applicants had enjoyed in the past, and to register future Negro applicants despite errors which were not serious enough to disqualify white applicants in the past. The Mississippi Legislature promptly responded by requiring applicants to complete their registration forms without assistance or error, and by adding a good-morals and public-challenge provision to the registration laws. *United States* v. *Mississippi*, 229 F. Supp. 925, 996–997 (dissenting opinion).

[20] For example, see *United States* v. *Parker*, 236 F. Supp. 511; *United States* v. *Palmer*, 230 F. Supp. 716.

tion rose only from 156 to 383, although there are approximately 15,000 Negroes of voting age in the county. Any possibility that these figures were attributable to political apathy was dispelled by the protest demonstrations in Selma in the early months of 1965. The House Committee on the Judiciary summed up the reaction of Congress to these developments in the following words:

> "The litigation in Dallas County took more than 4 years to open the door to the exercise of constitutional rights conferred almost a century ago. The problem on a national scale is that the difficulties experienced in suits in Dallas County have been encountered over and over again under existing voting laws. Four years is too long. The burden is too heavy—the wrong to our citizens is too serious—the damage to our national conscience is too great not to adopt more effective measures than exist today.
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> "Such is the essential justification for the pending bill." House Report 11.

II.

The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting.[21] The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant. Section 4 (a)–(d) lays down a formula defining the States and political subdivisions to which these new remedies apply. The first of the remedies, contained in § 4 (a), is the suspension of literacy tests and similar voting qualifications for a period of five years from the last occurrence of substantial voting discrimination. Section 5 prescribes a second

[21] For convenient reference, the entire Act is reprinted in an Appendix to this opinion.

remedy, the suspension of all new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination. The third remedy, covered in §§ 6 (b), 7, 9, and 13 (a), is the assignment of federal examiners on certification by the Attorney General to list qualified applicants who are thereafter entitled to vote in all elections.

Other provisions of the Act prescribe subsidiary cures for persistent voting discrimination. Section 8 authorizes the appointment of federal poll-watchers in places to which federal examiners have already been assigned. Section 10 (d) excuses those made eligible to vote in sections of the country covered by § 4 (b) of the Act from paying accumulated past poll taxes for state and local elections. Section 12 (e) provides for balloting by persons denied access to the polls in areas where federal examiners have been appointed.

The remaining remedial portions of the Act are aimed at voting discrimination in any area of the country where it may occur. Section 2 broadly prohibits the use of voting rules to abridge exercise of the franchise on racial grounds. Sections 3, 6 (a), and 13 (b) strengthen existing procedures for attacking voting discrimination by means of litigation. Section 4 (e) excuses citizens educated in American schools conducted in a foreign language from passing English-language literacy tests. Section 10 (a)–(c) facilitates constitutional litigation challenging the imposition of all poll taxes for state and local elections. Sections 11 and 12 (a)–(d) authorize civil and criminal sanctions against interference with the exercise of rights guaranteed by the Act.

At the outset, we emphasize that only some of the many portions of the Act are properly before us. South Carolina has not challenged §§ 2, 3, 4 (e), 6 (a), 8, 10, 12 (d) and (e), 13 (b), and other miscellaneous provisions having nothing to do with this lawsuit. Judicial review of these sections must await subsequent litiga-

tion.[22] In addition, we find that South Carolina's attack on §§ 11 and 12 (a)–(c) is premature. No person has yet been subjected to, or even threatened with, the criminal sanctions which these sections of the Act authorize. See *United States* v. *Raines*, 362 U. S. 17, 20–24. Consequently, the only sections of the Act to be reviewed at this time are §§ 4 (a)–(d), 5, 6 (b), 7, 9, 13 (a), and certain procedural portions of § 14, all of which are presently in actual operation in South Carolina. We turn now to a detailed description of these provisions and their present status.

Coverage formula.

The remedial sections of the Act assailed by South Carolina automatically apply to any State, or to any separate political subdivision such as a county or parish, for which two findings have been made: (1) the Attorney General has determined that on November 1, 1964, it maintained a "test or device," and (2) the Director of the Census has determined that less than 50% of its voting-age residents were registered on November 1, 1964, or voted in the presidential election of November 1964. These findings are not reviewable in any court and are final upon publication in the Federal Register. § 4 (b). As used throughout the Act, the phrase "test or device" means any requirement that a registrant or voter must "(1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his quali-

[22] Section 4 (e) has been challenged in *Morgan* v. *Katzenbach*, 247 F. Supp. 196, prob. juris. noted, 382 U. S. 1007, and in *United States* v. *County Bd. of Elections*, 248 F. Supp. 316. Section 10 (a)–(c) is involved in *United States* v. *Texas*, 252 F. Supp. 234, and in *United States* v. *Alabama*, 252 F. Supp. 95; see also *Harper* v. *Virginia State Bd. of Elections*, No. 48, 1965 Term, and *Butts* v. *Harrison*, No. 655, 1965 Term, which were argued together before this Court on January 25 and 26, 1966.

fications by the voucher of registered voters or members of any other class." § 4 (c).

Statutory coverage of a State or political subdivision under § 4 (b) is terminated if the area obtains a declaratory judgment from the District Court for the District of Columbia, determining that tests and devices have not been used during the preceding five years to abridge the franchise on racial grounds. The Attorney General shall consent to entry of the judgment if he has no reason to believe that the facts are otherwise. § 4 (a). For the purposes of this section, tests and devices are not deemed to have been used in a forbidden manner if the incidents of discrimination are few in number and have been promptly corrected, if their continuing effects have been abated, and if they are unlikely to recur in the future. § 4 (d). On the other hand, no area may obtain a declaratory judgment for five years after the final decision of a federal court (other than the denial of a judgment under this section of the Act), determining that discrimination through the use of tests or devices has occurred anywhere in the State or political subdivision. These declaratory judgment actions are to be heard by a three-judge panel, with direct appeal to this Court. § 4 (a).

South Carolina was brought within the coverage formula of the Act on August 7, 1965, pursuant to appropriate administrative determinations which have not been challenged in this proceeding.[23] On the same day, coverage was also extended to Alabama, Alaska, Georgia, Louisiana, Mississippi, Virginia, 26 counties in North Carolina, and one county in Arizona.[24] Two more counties in Arizona, one county in Hawaii, and one county in Idaho were added to the list on November 19, 1965.[25]

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[23] 30 Fed. Reg. 9897.

[24] *Ibid.*

[25] 30 Fed. Reg. 14505.

Thus far Alaska, the three Arizona counties, and the single county in Idaho have asked the District Court for the District of Columbia to grant a declaratory judgment terminating statutory coverage.[26]

Suspension of tests.

In a State or political subdivision covered by § 4 (b) of the Act, no person may be denied the right to vote in any election because of his failure to comply with a "test or device." § 4 (a).

On account of this provision, South Carolina is temporarily barred from enforcing the portion of its voting laws which requires every applicant for registration to show that he:

> "Can both read and write any section of [the State] Constitution submitted to [him] by the registration officer or can show that he owns, and has paid all taxes collectible during the previous year on, property in this State assessed at three hundred dollars or more." S. C. Code Ann. § 23–62 (4) (1965 Supp.).

The Attorney General has determined that the property qualification is inseparable from the literacy test,[27] and South Carolina makes no objection to this finding. Similar tests and devices have been temporarily suspended in the other sections of the country listed above.[28]

Review of new rules.

In a State or political subdivision covered by § 4 (b) of the Act, no person may be denied the right to vote in any election because of his failure to comply with a voting qualification or procedure different from those in force on

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[26] *Alaska* v. *United States,* Civ. Act. 101–66; *Apache County* v. *United States,* Civ. Act. 292–66; *Elmore County* v. *United States,* Civ. Act. 320–66.

[27] 30 Fed. Reg. 14045–14046.

[28] For a chart of the tests and devices in effect at the time the Act was under consideration, see House Hearings 30–32; Senate Report 42–43.

November 1, 1964. This suspension of new rules is terminated, however, under either of the following circumstances: (1) if the area has submitted the rules to the Attorney General, and he has not interposed an objection within 60 days, or (2) if the area has obtained a declaratory judgment from the District Court for the District of Columbia, determining that the rules will not abridge the franchise on racial grounds. These declaratory judgment actions are to be heard by a three-judge panel, with direct appeal to this Court. § 5.

South Carolina altered its voting laws in 1965 to extend the closing hour at polling places from 6 p. m. to 7 p. m.[29] The State has not sought judicial review of this change in the District Court for the District of Columbia, nor has it submitted the new rule to the Attorney General for his scrutiny, although at our hearing the Attorney General announced that he does not challenge the amendment. There are indications in the record that other sections of the country listed above have also altered their voting laws since November 1, 1964.[30]

Federal examiners.

In any political subdivision covered by § 4 (b) of the Act, the Civil Service Commission shall appoint voting examiners whenever the Attorney General certifies either of the following facts: (1) that he has received meritorious written complaints from at least 20 residents alleging that they have been disenfranchised under color of law because of their race, or (2) that the appointment of examiners is otherwise necessary to effectuate the guarantees of the Fifteenth Amendment. In making the latter determination, the Attorney General must consider, among other factors, whether the registration ratio of non-whites to whites seems reasonably attributable to

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[29] S. C. Code Ann. § 23–342 (1965 Supp.).

[30] Brief for Mississippi as *amicus curiae*, App.

racial discrimination, or whether there is substantial evidence of good-faith efforts to comply with the Fifteenth Amendment. § 6 (b). These certifications are not reviewable in any court and are effective upon publication in the Federal Register. § 4 (b).

The examiners who have been appointed are to test the voting qualifications of applicants according to regulations of the Civil Service Commission prescribing times, places, procedures, and forms. §§ 7 (a) and 9 (b). Any person who meets the voting requirements of state law, insofar as these have not been suspended by the Act, must promptly be placed on a list of eligible voters. Examiners are to transmit their lists at least once a month to the appropriate state or local officials, who in turn are required to place the listed names on the official voting rolls. Any person listed by an examiner is entitled to vote in all elections held more than 45 days after his name has been transmitted. § 7 (b).

A person shall be removed from the voting list by an examiner if he has lost his eligibility under valid state law, or if he has been successfully challenged through the procedure prescribed in § 9 (a) of the Act. § 7 (d). The challenge must be filed at the office within the State designated by the Civil Service Commission; must be submitted within 10 days after the listing is made available for public inspection; must be supported by the affidavits of at least two people having personal knowledge of the relevant facts; and must be served on the person challenged by mail or at his residence. A hearing officer appointed by the Civil Service Commission shall hear the challenge and render a decision within 15 days after the challenge is filed. A petition for review of the hearing officer's decision must be submitted within an additional 15 days after service of the decision on the person seeking review. The court of appeals for the circuit in which the person challenged resides is to

hear the petition and affirm the hearing officer's decision unless it is clearly erroneous. Any person listed by an examiner is entitled to vote pending a final decision of the hearing officer or the court. § 9 (a).

The listing procedures in a political subdivision are terminated under either of the following circumstances: (1) if the Attorney General informs the Civil Service Commission that all persons listed by examiners have been placed on the official voting rolls, and that there is no longer reasonable cause to fear abridgment of the franchise on racial grounds, or (2) if the political subdivision has obtained a declaratory judgment from the District Court for the District of Columbia, ascertaining the same facts which govern termination by the Attorney General, and the Director of the Census has determined that more than 50% of the non-white residents of voting age are registered to vote. A political subdivision may petition the Attorney General to terminate listing procedures or to authorize the necessary census, and the District Court itself shall request the census if the Attorney General's refusal to do so is arbitrary or unreasonable. § 13 (a). The determinations by the Director of the Census are not reviewable in any court and are final upon publication in the Federal Register. § 4 (b).

On October 30, 1965, the Attorney General certified the need for federal examiners in two South Carolina counties,[31] and examiners appointed by the Civil Service Commission have been serving there since November 8, 1965. Examiners have also been assigned to 11 counties in Alabama, five parishes in Louisiana, and 19 counties in Mississippi.[32] The examiners are listing people found eligible to vote, and the challenge procedure has been

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[31] 30 Fed. Reg. 13850.

[32] 30 Fed. Reg. 9970–9971, 10863, 12363, 12654, 13849–13850, 15837; 31 Fed. Reg. 914.

employed extensively.[33] No political subdivision has yet sought to have federal examiners withdrawn through the Attorney General or the District Court for the District of Columbia.

III.

These provisions of the Voting Rights Act of 1965 are challenged on the fundamental ground that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution. South Carolina and certain of the *amici curiae* also attack specific sections of the Act for more particular reasons. They argue that the coverage formula prescribed in § 4 (a)–(d) violates the principle of the equality of States, denies due process by employing an invalid presumption and by barring judicial review of administrative findings, constitutes a forbidden bill of attainder, and impairs the separation of powers by adjudicating guilt through legislation. They claim that the review of new voting rules required in § 5 infringes Article III by directing the District Court to issue advisory opinions. They contend that the assignment of federal examiners authorized in § 6 (b) abridges due process by precluding judicial review of administrative findings and impairs the separation of powers by giving the Attorney General judicial functions; also that the challenge procedure prescribed in § 9 denies due process on account of its speed. Finally, South Carolina and certain of the *amici curiae* maintain that §§ 4 (a) and 5, buttressed by § 14 (b) of the Act, abridge due process by limiting litigation to a distant forum.

Some of these contentions may be dismissed at the outset. The word "person" in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge

[33] See Comm'n on Civil Rights, The Voting Rights Act (1965).

this has never been done by any court. See *International Shoe Co.* v. *Cocreham,* 246 La. 244, 266, 164 So. 2d 314, 322, n. 5; cf. *United States* v. *City of Jackson,* 318 F. 2d 1, 8 (C. A. 5th Cir.). Likewise, courts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as protections for individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt. See *United States* v. *Brown,* 381 U. S. 437; *Ex parte Garland,* 4 Wall. 333. Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen. *Massachusetts* v. *Mellon,* 262 U. S. 447, 485–486; *Florida* v. *Mellon,* 273 U. S. 12, 18. The objections to the Act which are raised under these provisions may therefore be considered only as additional aspects of the basic question presented by the case: Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?

The ground rules for resolving this question are clear. The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting. Cf. our rulings last Term, sustaining Title II of the Civil Rights Act of 1964, in *Heart of Atlanta Motel* v. *United States,* 379 U. S. 241, 258–259, 261–262; and *Katzenbach* v. *McClung,* 379 U. S. 294, 303–304. We turn now to a more detailed description of the standards which govern our review of the Act.

Section 1 of the Fifteenth Amendment declares that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." This declaration has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice. See *Neal* v. *Delaware,* 103 U. S. 370; *Guinn* v. *United States,* 238 U. S. 347; *Myers* v. *Anderson,* 238 U. S. 368; *Lane* v. *Wilson,* 307 U. S. 268; *Smith* v. *Allwright,* 321 U. S. 649; *Schnell* v. *Davis,* 336 U. S. 933; *Terry* v. *Adams,* 345 U. S. 461; *United States* v. *Thomas,* 362 U. S. 58; *Gomillion* v. *Lightfoot,* 364 U. S. 339; *Alabama* v. *United States,* 371 U. S. 37; *Louisiana* v. *United States,* 380 U. S. 145. These decisions have been rendered with full respect for the general rule, reiterated last Term in *Carrington* v. *Rash,* 380 U. S. 89, 91, that States "have broad powers to determine the conditions under which the right of suffrage may be exercised." The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power. "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." *Gomillion* v. *Lightfoot,* 364 U. S., at 347.

South Carolina contends that the cases cited above are precedents only for the authority of the judiciary to strike down state statutes and procedures—that to allow an exercise of this authority by Congress would be to rob the courts of their rightful constitutional role. On the contrary, § 2 of the Fifteenth Amendment expressly declares that "Congress shall have power to enforce this article by appropriate legislation." By adding this

authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1. "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective." *Ex parte Virginia,* 100 U. S. 339, 345. Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.

Congress has repeatedly exercised these powers in the past, and its enactments have repeatedly been upheld. For recent examples, see the Civil Rights Act of 1957, which was sustained in *United States* v. *Raines,* 362 U. S. 17; *United States* v. *Thomas, supra;* and *Hannah* v. *Larche,* 363 U. S. 420; and the Civil Rights Act of 1960, which was upheld in *Alabama* v. *United States, supra; Louisiana* v. *United States, supra;* and *United States* v. *Mississippi,* 380 U. S. 128. On the rare occasions when the Court has found an unconstitutional exercise of these powers, in its opinion Congress had attacked evils not comprehended by the Fifteenth Amendment. See *United States* v. *Reese,* 92 U. S. 214; *James* v. *Bowman,* 190 U. S. 127.

The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:

> "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." *McCulloch* v. *Maryland,* 4 Wheat. 316, 421.

The Court has subsequently echoed his language in describing each of the Civil War Amendments:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." *Ex parte Virginia,* 100 U. S., at 345–346.

This language was again employed, nearly 50 years later, with reference to Congress' related authority under § 2 of the Eighteenth Amendment. *James Everard's Breweries* v. *Day,* 265 U. S. 545, 558–559.

We therefore reject South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment. In the oft-repeated words of Chief Justice Marshall, referring to another specific legislative authorization in the Constitution, "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." *Gibbons* v. *Ogden,* 9 Wheat. 1, 196.

IV.

Congress exercised its authority under the Fifteenth Amendment in an inventive manner when it enacted the Voting Rights Act of 1965. First: The measure prescribes remedies for voting discrimination which go into

effect without any need for prior adjudication. This was clearly a legitimate response to the problem, for which there is ample precedent under other constitutional provisions. See *Katzenbach* v. *McClung,* 379 U. S. 294, 302–304; *United States* v. *Darby,* 312 U. S. 100, 120–121. Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits.[34] After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims. The question remains, of course, whether the specific remedies prescribed in the Act were an appropriate means of combatting the evil, and to this question we shall presently address ourselves.

Second: The Act intentionally confines these remedies to a small number of States and political subdivisions which in most instances were familiar to Congress by name.[35] This, too, was a permissible method of dealing with the problem. Congress had learned that substantial voting discrimination presently occurs in certain sections of the country, and it knew no way of accurately forecasting whether the evil might spread elsewhere in the future.[36] In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. See *McGowan* v. *Maryland,* 366 U. S. 420, 427; *Salsburg* v. *Maryland,* 346 U. S. 545, 550–554. The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms

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[34] House Report 9–11; Senate Report 6–9.

[35] House Report 13; Senate Report 52, 55.

[36] House Hearings 27; Senate Hearings 201.

upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared. See *Coyle* v. *Smith*, 221 U. S. 559, and cases cited therein.

Coverage formula.

We now consider the related question of whether the specific States and political subdivisions within § 4 (b) of the Act were an appropriate target for the new remedies. South Carolina contends that the coverage formula is awkwardly designed in a number of respects and that it disregards various local conditions which have nothing to do with racial discrimination. These arguments, however, are largely beside the point.[37] Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act. The formula eventually evolved to describe these areas was relevant to the problem of voting discrimination, and Congress was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by § 4 (b) of the Act. No more was required to justify the application to these areas of Congress' express powers under the Fifteenth Amendment. Cf. *North American Co.* v. *S. E. C.*, 327 U. S. 686, 710–711; *Assigned Car Cases*, 274 U. S. 564, 582–583.

To be specific, the new remedies of the Act are imposed on three States—Alabama, Louisiana, and Mississippi—in which federal courts have repeatedly found substantial voting discrimination.[38] Section 4 (b) of the Act also embraces two other States—Georgia and South Carolina—plus large portions of a third State—North Carolina—for which there was more fragmentary evidence of

[37] For Congress' defense of the formula, see House Report 13–14; Senate Report 13–14.

[38] House Report 12; Senate Report 9–10.

recent voting discrimination mainly adduced by the Justice Department and the Civil Rights Commission.[39] All of these areas were appropriately subjected to the new remedies. In identifying past evils, Congress obviously may avail itself of information from any probative source. See *Heart of Atlanta Motel* v. *United States,* 379 U. S. 241, 252–253; *Katzenbach* v. *McClung,* 379 U. S., at 299–301.

The areas listed above, for which there was evidence of actual voting discrimination, share two characteristics incorporated by Congress into the coverage formula: the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average. Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters. Accordingly, the coverage formula is rational in both practice and theory. It was therefore permissible to impose the new remedies on the few remaining States and political subdivisions covered by the formula, at least in the absence of proof that they have been free of substantial voting discrimination in recent years. Congress is clearly not bound by the rules relating to statutory presumptions in criminal cases when it prescribes civil remedies against other organs of government under § 2 of the Fifteenth Amendment. Compare *United States* v. *Romano,* 382 U. S. 136; *Tot* v. *United States,* 319 U. S. 463.

It is irrelevant that the coverage formula excludes certain localities which do not employ voting tests and

[39] Georgia: House Hearings 160–176; Senate Hearings 1182–1184, 1237, 1253, 1300–1301, 1336–1345. North Carolina: Senate Hearings 27–28, 39, 246–248. South Carolina: House Hearings 114–116, 196–201; Senate Hearings 1353–1354.

devices but for which there is evidence of voting discrimination by other means. Congress had learned that widespread and persistent discrimination in voting during recent years has typically entailed the misuse of tests and devices, and this was the evil for which the new remedies were specifically designed.[40] At the same time, through §§ 3, 6 (a), and 13 (b) of the Act, Congress strengthened existing remedies for voting discrimination in other areas of the country. Legislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience. See *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488–489; *Railway Express Agency* v. *New York*, 336 U. S. 106. There are no States or political subdivisions exempted from coverage under § 4 (b) in which the record reveals recent racial discrimination involving tests and devices. This fact confirms the rationality of the formula.

Acknowledging the possibility of overbreadth, the Act provides for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years. Despite South Carolina's argument to the contrary, Congress might appropriately limit litigation under this provision to a single court in the District of Columbia, pursuant to its constitutional power under Art. III, § 1, to "ordain and establish" inferior federal tribunals. See *Bowles* v. *Willingham*, 321 U. S. 503, 510–512; *Yakus* v. *United States*, 321 U. S. 414, 427–431; *Lockerty* v. *Phillips*, 319 U. S. 182. At the present time, contractual claims against the United States for more than $10,000 must be brought in the Court of Claims, and, until 1962, the District of Columbia was the sole venue of suits against

[40] House Hearings 75–77; Senate Hearings 241–243.

federal officers officially residing in the Nation's Capital.[41] We have discovered no suggestion that Congress exceeded constitutional bounds in imposing these limitations on litigation against the Federal Government, and the Act is no less reasonable in this respect.

South Carolina contends that these termination procedures are a nullity because they impose an impossible burden of proof upon States and political subdivisions entitled to relief. As the Attorney General pointed out during hearings on the Act, however, an area need do no more than submit affidavits from voting officials, asserting that they have not been guilty of racial discrimination through the use of tests and devices during the past five years, and then refute whatever evidence to the contrary may be adduced by the Federal Government.[42] Section 4 (d) further assures that an area need not disprove each isolated instance of voting discrimination in order to obtain relief in the termination proceedings. The burden of proof is therefore quite bearable, particularly since the relevant facts relating to the conduct of voting officials are peculiarly within the knowledge of the States and political subdivisions themselves. See *United States* v. *New York, N. H. & H. R. Co.*, 355 U. S. 253, 256, n. 5; cf. *S. E. C.* v. *Ralston Purina Co.*, 346 U. S. 119, 126.

The Act bars direct judicial review of the findings by the Attorney General and the Director of the Census which trigger application of the coverage formula. We reject the claim by Alabama as *amicus curiae* that this provision is invalid because it allows the new remedies of

[41] Regarding claims against the United States, see 28 U. S. C. §§ 1491, 1346 (a) (1964 ed.). Concerning suits against federal officers, see *Stroud* v. *Benson*, 254 F. 2d 448; H. R. Rep. No. 536, 87th Cong., 1st Sess.; S. Rep. No. 1992, 87th Cong., 2d Sess.; 28 U. S. C. § 1391 (e) (1964 ed.); 2 Moore, Federal Practice ¶ 4.29 (1964 ed.).

[42] House Hearings 92–93; Senate Hearings 26–27.

the Act to be imposed in an arbitrary way. The Court has already permitted Congress to withdraw judicial review of administrative determinations in numerous cases involving the statutory rights of private parties. For example, see *United States* v. *California Eastern Line*, 348 U. S. 351; *Switchmen's Union* v. *National Mediation Bd.*, 320 U. S. 297. In this instance, the findings not subject to review consist of objective statistical determinations by the Census Bureau and a routine analysis of state statutes by the Justice Department. These functions are unlikely to arouse any plausible dispute, as South Carolina apparently concedes. In the event that the formula is improperly applied, the area affected can always go into court and obtain termination of coverage under § 4 (b), provided of course that it has not been guilty of voting discrimination in recent years. This procedure serves as a partial substitute for direct judicial review.

Suspension of tests.

We now arrive at consideration of the specific remedies prescribed by the Act for areas included within the coverage formula. South Carolina assails the temporary suspension of existing voting qualifications, reciting the rule laid down by *Lassiter* v. *Northampton County Bd. of Elections*, 360 U. S. 45, that literacy tests and related devices are not in themselves contrary to the Fifteenth Amendment. In that very case, however, the Court went on to say, "Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot." *Id.*, at 53. The record shows that in most of the States covered by the Act, including South Carolina, various tests and devices have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been ad-

ministered in a discriminatory fashion for many years.[43] Under these circumstances, the Fifteenth Amendment has clearly been violated. See *Louisiana* v. *United States,* 380 U. S. 145; *Alabama* v. *United States,* 371 U. S. 37; *Schnell* v. *Davis,* 336 U. S. 933.

The Act suspends literacy tests and similar devices for a period of five years from the last occurrence of substantial voting discrimination. This was a legitimate response to the problem, for which there is ample precedent in Fifteenth Amendment cases. *Ibid.* Underlying the response was the feeling that States and political subdivisions which had been allowing white illiterates to vote for years could not sincerely complain about "dilution" of their electorates through the registration of Negro illiterates.[44] Congress knew that continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified white registrants.[45] Congress permissibly rejected the alternative of requiring a complete re-registration of all voters, believing that this would be too harsh on many whites who had enjoyed the franchise for their entire adult lives.[46]

Review of new rules.

The Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment. This may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate. See *Home*

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[43] House Report 11–13; Senate Report 4–5, 9–12.

[44] House Report 15; Senate Report 15–16.

[45] House Report 15; Senate Report 16.

[46] House Hearings 17; Senate Hearings 22–23.

Bldg. & Loan Assn. v. *Blaisdell,* 290 U. S. 398; *Wilson* v. *New,* 243 U. S. 332. Congress knew that some of the States covered by § 4 (b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.[47] Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.

For reasons already stated, there was nothing inappropriate about limiting litigation under this provision to the District Court for the District of Columbia, and in putting the burden of proof on the areas seeking relief. Nor has Congress authorized the District Court to issue advisory opinions, in violation of the principles of Article III invoked by Georgia as *amicus curiae.* The Act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension. A State or political subdivision wishing to make use of a recent amendment to its voting laws therefore has a concrete and immediate "controversy" with the Federal Government. Cf. *Public Utilities Comm'n* v. *United States,* 355 U. S. 534, 536–539; *United States* v. *California,* 332 U. S. 19, 24–25. An appropriate remedy is a judicial determination that continued suspension of the new rule is unnecessary to vindicate rights guaranteed by the Fifteenth Amendment.

Federal examiners.

The Act authorizes the appointment of federal examiners to list qualified applicants who are thereafter

[47] House Report 10–11; Senate Report 8, 12.

entitled to vote, subject to an expeditious challenge procedure. This was clearly an appropriate response to the problem, closely related to remedies authorized in prior cases. See *Alabama* v. *United States, supra; United States* v. *Thomas,* 362 U. S. 58. In many of the political subdivisions covered by § 4 (b) of the Act, voting officials have persistently employed a variety of procedural tactics to deny Negroes the franchise, often in direct defiance or evasion of federal court decrees.[48] Congress realized that merely to suspend voting rules which have been misused or are subject to misuse might leave this localized evil undisturbed. As for the briskness of the challenge procedure, Congress knew that in some of the areas affected, challenges had been persistently employed to harass registered Negroes. It chose to forestall this abuse, at the same time providing alternative ways for removing persons listed through error or fraud.[49] In addition to the judicial challenge procedure, § 7 (d) allows for the removal of names by the examiner himself, and § 11 (c) makes it a crime to obtain a listing through fraud.

In recognition of the fact that there were political subdivisions covered by § 4 (b) of the Act in which the appointment of federal examiners might be unnecessary, Congress assigned the Attorney General the task of determining the localities to which examiners should be sent.[50] There is no warrant for the claim, asserted by Georgia as *amicus curiae,* that the Attorney General is free to use this power in an arbitrary fashion, without regard to the purposes of the Act. Section 6 (b) sets adequate standards to guide the exercise of his discretion, by directing him to calculate the registration ratio of nonwhites to whites, and to weigh evidence of good-faith

[48] House Report 16; Senate Report 15.

[49] Senate Hearings 200.

[50] House Report 16.

efforts to avoid possible voting discrimination. At the same time, the special termination procedures of § 13 (a) provide indirect judicial review for the political subdivisions affected, assuring the withdrawal of federal examiners from areas where they are clearly not needed. Cf. *Carlson* v. *Landon,* 342 U. S. 524, 542–544; *Mulford* v. *Smith,* 307 U. S. 38, 48–49.

After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively. Many of the areas directly affected by this development have indicated their willingness to abide by any restraints legitimately imposed upon them.[51] We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteeenth Amendment. Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live. We may finally look forward to the day when truly "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

The bill of complaint is

Dismissed.

APPENDIX TO OPINION OF THE COURT.

Voting Rights Act of 1965.

AN ACT

To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

[51] See Comm'n on Civil Rights, The Voting Rights Act (1965).

assembled, That this Act shall be known as the "Voting Rights Act of 1965."

SEC. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

SEC. 3. (a) Whenever the Attorney General institutes a proceeding under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal examiners by the United States Civil Service Commission in accordance with section 6 to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the guarantees of the fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such examiners is necessary to enforce such guarantees or (2) as part of any final judgment if the court finds that violations of the fifteenth amendment justifying equitable relief have occurred in such State or subdivision: *Provided,* That the court need not authorize the appointment of examiners if any incidents of denial or abridgement of the right to vote on account of race or color (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(b) If in a proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, it shall suspend the use of

tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary.

(c) If in any proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that violations of the fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

SEC. 4. (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been

made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e)(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant

classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

SEC. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4 (a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, prac-

tice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

SEC. 6. Whenever (a) a court has authorized the appointment of examiners pursuant to the provisions of section 3 (a), or (b) unless a declaratory judgment has been rendered under section 4 (a), the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 4 (b) that (1) he has received complaints in writing from twenty or more residents of such political subdivision alleging that they have been denied the right to vote under color of law on account of race or color, and that he believes such complaints to be meritorious, or (2) that in his judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to him to be reasonably attributable to violations of the fifteenth amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the fifteenth amendment), the appointment of examiners is otherwise necessary to

enforce the guarantees of the fifteenth amendment, the Civil Service Commission shall appoint as many examiners for such subdivision as it may deem appropriate to prepare and maintain lists of persons eligible to vote in Federal, State, and local elections. Such examiners, hearing officers provided for in section 9 (a), and other persons deemed necessary by the Commission to carry out the provisions and purposes of this Act shall be appointed, compensated, and separated without regard to the provisions of any statute administered by the Civil Service Commission, and service under this Act shall not be considered employment for the purposes of any statute administered by the Civil Service Commission, except the provisions of section 9 of the Act of August 2, 1939, as amended (5 U. S. C. 118i), prohibiting partisan political activity: *Provided,* That the Commission is authorized, after consulting the head of the appropriate department or agency, to designate suitable persons in the official service of the United States, with their consent, to serve in these positions. Examiners and hearing officers shall have the power to administer oaths.

SEC. 7. (a) The examiners for each political subdivision shall, at such places as the Civil Service Commission shall by regulation designate, examine applicants concerning their qualifications for voting. An application to an examiner shall be in such form as the Commission may require and shall contain allegations that the applicant is not otherwise registered to vote.

(b) Any person whom the examiner finds, in accordance with instructions received under section 9 (b), to have the qualifications prescribed by State law not inconsistent with the Constitution and laws of the United States shall promptly be placed on a list of eligible voters. A challenge to such listing may be made in accordance with section 9 (a) and shall not be the basis for a prosecution under section 12 of this Act. The ex-

aminer shall certify and transmit such list, and any supplements as appropriate, at least once a month, to the offices of the appropriate election officials, with copies to the Attorney General and the attorney general of the State, and any such lists and supplements thereto transmitted during the month shall be available for public inspection on the last business day of the month and in any event not later than the forty-fifth day prior to any election. The appropriate State or local election official shall place such names on the official voting list. Any person whose name appears on the examiner's list shall be entitled and allowed to vote in the election district of his residence unless and until the appropriate election officials shall have been notified that such person has been removed from such list in accordance with subsection (d): *Provided,* That no person shall be entitled to vote in any election by virtue of this Act unless his name shall have been certified and transmitted on such a list to the offices of the appropriate election officials at least forty-five days prior to such election.

(c) The examiner shall issue to each person whose name appears on such a list a certificate evidencing his eligibility to vote.

(d) A person whose name appears on such a list shall be removed therefrom by an examiner if (1) such person has been successfully challenged in accordance with the procedure prescribed in section 9, or (2) he has been determined by an examiner to have lost his eligibility to vote under State law not inconsistent with the Constitution and the laws of the United States.

Sec. 8. Whenever an examiner is serving under this Act in any political subdivision, the Civil Service Commission may assign, at the request of the Attorney General, one or more persons, who may be officers of the United States, (1) to enter and attend at any place for holding an election in such subdivision for the purpose

of observing whether persons who are entitled to vote are being permitted to vote, and (2) to enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated. Such persons so assigned shall report to an examiner appointed for such political subdivision, to the Attorney General, and if the appointment of examiners has been authorized pursuant to section 3 (a), to the court.

SEC. 9. (a) Any challenge to a listing on an eligibility list prepared by an examiner shall be heard and determined by a hearing officer appointed by and responsible to the Civil Service Commission and under such rules as the Commission shall by regulation prescribe. Such challenge shall be entertained only if filed at such office within the State as the Civil Service Commission shall by regulation designate, and within ten days after the listing of the challenged person is made available for public inspection, and if supported by (1) the affidavits of at least two persons having personal knowledge of the facts constituting grounds for the challenge, and (2) a certification that a copy of the challenge and affidavits have been served by mail or in person upon the person challenged at his place of residence set out in the application. Such challenge shall be determined within fifteen days after it has been filed. A petition for review of the decision of the hearing officer may be filed in the United States court of appeals for the circuit in which the person challenged resides within fifteen days after service of such decision by mail on the person petitioning for review but no decision of a hearing officer shall be reversed unless clearly erroneous. Any person listed shall be entitled and allowed to vote pending final determination by the hearing officer and by the court.

(b) The times, places, procedures, and form for application and listing pursuant to this Act and removals from the eligibility lists shall be prescribed by regulations promulgated by the Civil Service Commission and the Commision shall, after consultation with the Attorney General, instruct examiners concerning applicable State law not inconsistent with the Constitution and laws of the United States with respect to (1) the qualifications required for listing, and (2) loss of eligibility to vote.

(c) Upon the request of the applicant or the challenger or on its own motion the Civil Service Commission shall have the power to require by subpena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter pending before it under the authority of this section. In case of contumacy or refusal to obey a subpena, any district court of the United States or the United States court of any territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or is domiciled or transacts business, or has appointed an agent for receipt of service of process, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a hearing officer, there to produce pertinent, relevant, and nonprivileged documentary evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

SEC. 10. (a) The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such per-

sons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.

(b) In the exercise of the powers of Congress under section 5 of the fourteenth amendment and section 2 of the fifteenth amendment, the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) and the purposes of this section.

(c) The district courts of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case 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.

(d) During the pendency of such actions, and thereafter if the courts, notwithstanding this action by the Congress, should declare the requirement of the payment of a poll tax to be constitutional, no citizen of the United States who is a resident of a State or political

subdivision with respect to which determinations have been made under subsection 4 (b) and a declaratory judgment has not been entered under subsection 4 (a), during the first year he becomes otherwise entitled to vote by reason of registration by State or local officials or listing by an examiner, shall be denied the right to vote for failure to pay a poll tax if he tenders payment of such tax for the current year to an examiner or to the appropriate State or local official at least forty-five days prior to election, whether or not such tender would be timely or adequate under State law. An examiner shall have authority to accept such payment from any person authorized by this Act to make an application for listing, and shall issue a receipt for such payment. The examiner shall transmit promptly any such poll tax payment to the office of the State or local official authorized to receive such payment under State law, together with the name and address of the applicant.

SEC. 11. (a) No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this Act or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3 (a), 6, 8, 9, 10, or 12 (e).

(c) Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another

individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, or Delegates or Commissioners from the territories or possessions, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

SEC. 12. (a) Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, 7, or 10 or shall violate section 11 (a) or (b), shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) Whoever, within a year following an election in a political subdivision in which an examiner has been appointed (1) destroys, defaces, mutilates, or otherwise alters the marking of a paper ballot which has been cast in such election, or (2) alters any official record of voting in such election tabulated from a voting machine or otherwise, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(c) Whoever conspires to violate the provisions of subsection (a) or (b) of this section, or interferes with any right secured by section 2, 3, 4, 5, 7, 10, or 11 (a) or (b) shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(d) 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 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes.

(e) Whenever in any political subdivision in which there are examiners appointed pursuant to this Act any persons allege to such an examiner within forty-eight hours after the closing of the polls that notwithstanding (1) their listing under this Act or registration by an appropriate election official and (2) their eligibilty to vote, they have not been permitted to vote in such election, the examiner shall forthwith notify the Attorney General if such allegations in his opinion appear to be well founded. Upon receipt of such notification, the Attorney General may forthwith file with the district court an application for an order providing for the marking, casting, and counting of the ballots of such persons and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto. The district court shall hear and determine such matters immediately after the filing of such application. The remedy pro-

vided in this subsection shall not preclude any remedy available under State or Federal law.

(f) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.

SEC. 13. Listing procedures shall be terminated in any political subdivision of any State (a) with respect to examiners appointed pursuant to clause (b) of section 6 whenever the Attorney General notifies the Civil Service Commission, or whenever the District Court for the District of Columbia determines in an action for declaratory judgment brought by any political subdivision with respect to which the Director of the Census has determined that more than 50 per centum of the nonwhite persons of voting age residing therein are registered to vote, (1) that all persons listed by an examiner for such subdivision have been placed on the appropriate voting registration roll, and (2) that there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color in such subdivision, and (b), with respect to examiners appointed pursuant to section 3 (a), upon order of the authorizing court. A political subdivision may petition the Attorney General for the termination of listing procedures under clause (a) of this section, and may petition the Attorney General to request the Director of the Census to take such survey or census as may be appropriate for the making of the determination provided for in this section. The District Court for the District of Columbia shall have jurisdiction to require such survey or census to be made by the Director of the Census and it shall require him to do so if it deems the Attorney

General's refusal to request such survey or census to be arbitrary or unreasonable.

SEC. 14. (a) All cases of criminal contempt arising under the provisions of this Act shall be governed by section 151 of the Civil Rights Act of 1957 (42 U. S. C. 1995).

(b) No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.

(c) (1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(d) In any action for a declaratory judgment brought pursuant to section 4 or section 5 of this Act, subpenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: *Provided,* That no writ of subpena shall issue for witnesses without the District of Columbia at a greater distance than one hun-

dred miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

SEC. 15. Section 2004 of the Revised Statutes (42 U. S. C. 1971), as amended by section 131 of the Civil Rights Act of 1957 (71 Stat. 637), and amended by section 601 of the Civil Rights Act of 1960 (74 Stat. 90), and as further amended by section 101 of the Civil Rights Act of 1964 (78 Stat. 241), is further amended as follows:

(a) Delete the word "Federal" wherever it appears in subsections (a) and (c);

(b) Repeal subsection (f) and designate the present subsections (g) and (h) as (f) and (g), respectively.

SEC. 16. The Attorney General and the Secretary of Defense, jointly, shall make a full and complete study to determine whether, under the laws or practices of any State or States, there are preconditions to voting, which might tend to result in discrimination against citizens serving in the Armed Forces of the United States seeking to vote. Such officials shall, jointly, make a report to the Congress not later than June 30, 1966, containing the results of such study, together with a list of any States in which such preconditions exist, and shall include in such report such recommendations for legislation as they deem advisable to prevent discrimination in voting against citizens serving in the Armed Forces of the United States.

SEC. 17. Nothing in this Act shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision.

SEC. 18. There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

SEC. 19. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

Approved August 6, 1965.

MR. JUSTICE BLACK, concurring and dissenting.

I agree with substantially all of the Court's opinion sustaining the power of Congress under § 2 of the Fifteenth Amendment to suspend state literacy tests and similar voting qualifications and to authorize the Attorney General to secure the appointment of federal examiners to register qualified voters in various sections of the country. Section 1 of the Fifteenth Amendment provides that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." In addition to this unequivocal command to the States and the Federal Government that no citizen shall have his right to vote denied or abridged because of race or color, § 2 of the Amendment unmistakably gives Congress specific power to go further and pass appropriate legislation to protect this right to vote against any method of abridgment no matter how subtle. Compare my dissenting opinion in *Bell* v. *Maryland,* 378 U. S. 226, 318. I have no doubt whatever as to the power of Congress under § 2 to enact the provisions of the Voting Rights Act of 1965 dealing with the suspension of state voting tests that have been used as notorious means to deny and abridge voting rights on racial grounds. This same congressional power necessarily exists to authorize appointment of federal examiners. I also agree with the judgment of the Court upholding § 4 (b) of

the Act which sets out a formula for determining when and where the major remedial sections of the Act take effect. I reach this conclusion, however, for a somewhat different reason than that stated by the Court, which is that "the coverage formula is rational in both practice and theory." I do not base my conclusion on the fact that the formula is rational, for it is enough for me that Congress by creating this formula has merely exercised its hitherto unquestioned and undisputed power to decide when, where, and upon what conditions its laws shall go into effect. By stating in specific detail that the major remedial sections of the Act are to be applied in areas where certain conditions exist, and by granting the Attorney General and the Director of the Census unreviewable power to make the mechanical determination of which areas come within the formula of § 4 (b), I believe that Congress has acted within its established power to set out preconditions upon which the Act is to go into effect. See, *e. g., Martin* v. *Mott,* 12 Wheat. 19; *United States* v. *Bush & Co.,* 310 U. S. 371; *Hirabayashi* v. *United States,* 320 U. S. 81.

Though, as I have said, I agree with most of the Court's conclusions, I dissent from its holding that every part of § 5 of the Act is constitutional. Section 4 (a), to which § 5 is linked, suspends for five years all literacy tests and similar devices in those States coming within the formula of § 4 (b). Section 5 goes on to provide that a State covered by § 4 (b) can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General of the United States or the Federal District Court for the District of Columbia that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color. I think this section is unconstitutional on at least two grounds.

(a) The Constitution gives federal courts jurisdiction over cases and controversies only. If it can be said that any case or controversy arises under this section which gives the District Court for the District of Columbia jurisdiction to approve or reject state laws or constitutional amendments, then the case or controversy must be between a State and the United States Government. But it is hard for me to believe that a justiciable controversy can arise in the constitutional sense from a desire by the United States Government or some of its officials to determine in advance what legislative provisions a State may enact or what constitutional amendments it may adopt. If this dispute between the Federal Government and the States amounts to a case or controversy it is a far cry from the traditional constitutional notion of a case or controversy as a dispute over the meaning of enforceable laws or the manner in which they are applied. And if by this section Congress has created a case or controversy, and I do not believe it has, then it seems to me that the most appropriate judicial forum for settling these important questions is this Court acting under its original Art. III, § 2, jurisdiction to try cases in which a State is a party.[1] At least a trial in this Court would treat the States with the dignity to which they should be entitled as constituent members of our Federal Union.

The form of words and the manipulation of presumptions used in § 5 to create the illusion of a case or controversy should not be allowed to cloud the effect of that section. By requiring a State to ask a federal court to approve the validity of a proposed law which has in no way become operative, Congress has asked the State to

[1] If § 14 (b) of the Act by stating that no court other than the District Court for the District of Columbia shall issue a judgment under § 5 is an attempt to limit the constitutionally created original jurisdiction of this Court, then I think that section is also unconstitutional.

secure precisely the type of advisory opinion our Constitution forbids. As I have pointed out elsewhere, see my dissenting opinion in *Griswold* v. *Connecticut,* 381 U. S. 479, 507, n. 6, pp. 513–515, some of those drafting our Constitution wanted to give the federal courts the power to issue advisory opinions and propose new laws to the legislative body. These suggestions were rejected. We should likewise reject any attempt by Congress to flout constitutional limitations by authorizing federal courts to render advisory opinions when there is no case or controversy before them. Congress has ample power to protect the rights of citizens to vote without resorting to the unnecessarily circuitous, indirect and unconstitutional route it has adopted in this section.

(b) My second and more basic objection to § 5 is that Congress has here exercised its power under § 2 of the Fifteenth Amendment through the adoption of means that conflict with the most basic principles of the Constitution. As the Court says the limitations of the power granted under § 2 are the same as the limitations imposed on the exercise of any of the powers expressly granted Congress by the Constitution. The classic formulation of these constitutional limitations was stated by Chief Justice Marshall when he said in *McCulloch* v. *Maryland,* 4 Wheat. 316, 421, "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." (Emphasis added.) Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless. One

of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no others, and all other power was to be reserved either "to the States respectively, or to the people." Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them.[2] Moreover, it seems to me that § 5 which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that "The United States shall guarantee to every State in this Union a Republican Form of Government." I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to

[2] The requirement that States come to Washington to have their laws judged is reminiscent of the deeply resented practices used by the English crown in dealing with the American colonies. One of the abuses complained of most bitterly was the King's practice of holding legislative and judicial proceedings in inconvenient and distant places. The signers of the Declaration of Independence protested that the King "has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures," and they objected to the King's "transporting us beyond Seas to be tried for pretended offences." These abuses were fresh in the minds of the Framers of our Constitution and in part caused them to include in Art. 3, § 2, the provision that criminal trials "shall be held in the State where the said Crimes shall have been committed." Also included in the Sixth Amendment was the requirement that a defendant in a criminal prosecution be tried by a "jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

create the impression that the State or States treated in this way are little more than conquered provinces. And if one law concerning voting can make the States plead for this approval by a distant federal court or the United States Attorney General, other laws on different subjects can force the States to seek the advance approval not only of the Attorney General but of the President himself or any other chosen members of his staff. It is inconceivable to me that such a radical degradation of state power was intended in any of the provisions of our Constitution or its Amendments. Of course I do not mean to cast any doubt whatever upon the indisputable power of the Federal Government to invalidate a state law once enacted and operative on the ground that it intrudes into the area of supreme federal power. But the Federal Government has heretofore always been content to exercise this power to protect federal supremacy by authorizing its agents to bring lawsuits against state officials once an operative state law has created an actual case and controversy. A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country. I cannot agree to any constitutional interpretation that leads inevitably to such a result.

I see no reason to read into the Constitution meanings it did not have when it was adopted and which have not been put into it since. The proceedings of the original Constitutional Convention show beyond all doubt that the power to veto or negative state laws was denied Congress. On several occasions proposals were submitted to the convention to grant this power to Congress. These proposals were debated extensively and on every occasion when submitted for vote they were overwhelmingly re-

jected.[3] The refusal to give Congress this extraordinary power to veto state laws was based on the belief that if such power resided in Congress the States would be helpless to function as effective governments.[4] Since that time neither the Fifteenth Amendment nor any other Amendment to the Constitution has given the slightest indication of a purpose to grant Congress the power to veto state laws either by itself or its agents. Nor does any provision in the Constitution endow the federal courts with power to participate with state legislative bodies in determining what state policies shall be enacted into law. The judicial power to invalidate a law in a case or controversy after the law has become effective is a long way from the power to prevent a State from passing a law. I cannot agree with the Court that Congress—denied a power in itself to veto a state law—can delegate this same power to the Attorney General or the District Court for the District of Columbia. For the effect on the States is the same in both cases—they cannot pass their laws without sending their agents to the City of Washington to plead to federal officials for their advance approval.

In this and other prior Acts Congress has quite properly vested the Attorney General with extremely broad power to protect voting rights of citizens against discrimination on account of race or color. Section 5 viewed in this context is of very minor importance and in my judgment is likely to serve more as an irritant to

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[3] See Debates in the Federal Convention of 1787 as reported by James Madison in Documents Illustrative of the Formation of the Union of the American States (1927), pp. 605, 789, 856.

[4] One speaker expressing what seemed to be the prevailing opinion of the delegates said of the proposal, "Will any State ever agree to be bound hand & foot in this manner. It is worse than making mere corporations of them . . . ." *Id.*, at 604.

the States than as an aid to the enforcement of the Act. I would hold § 5 invalid for the reasons stated above with full confidence that the Attorney General has ample power to give vigorous, expeditious and effective protection to the voting rights of all citizens.[5]

[5] Section 19 of the Act provides as follows:

"If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby."

SUROWITZ *v.* HILTON HOTELS CORP. ET AL.

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

No. 161. Argued January 20, 1966.—Decided March 7, 1966.

Petitioner, a stockholder in Hilton Hotels Corporation, brought this action on behalf of herself and other stockholders charging the corporation's officers and directors with fraud. The 60-odd-page complaint was signed by petitioner's counsel in compliance with Rule 11 of the Federal Rules of Civil Procedure. Pursuant to Rule 23 (b) the complaint was verified by petitioner, who stated that some of the allegations were true and that "on information and belief" she thought the others were true. In an oral examination by respondents' counsel, petitioner, an immigrant with practically no formal education and limited knowledge of the English language, showed that she did not understand the complaint and that in signing the verification she relied on her son-in-law's explanation of the facts. Respondents then moved to dismiss the complaint on the ground that it was a sham and that petitioner was not a proper party plaintiff. Petitioner's counsel filed two affidavits, one by himself and the other by petitioner's son-in-law, an investment advisor, demonstrating that extensive investigation had preceded the filing of the complaint. Despite the affidavits the District Court dismissed the suit with prejudice on the ground that petitioner's affidavit was false and a sham. The Court of Appeals affirmed although noting that "many of the material allegations of the complaint are obviously true and cannot be refuted." *Held:*

1. While Rule 23 (b) was adopted and has served to discourage "strike suits" based on worthless claims, it was not written to bar derivative suits which have played an important part in protecting stockholders from management frauds. P. 371.

2. The record here discloses that this is not a strike suit, but a suit by a small stockholder who, to protect her investment, acted in good faith on the basis of advice by her counsel and financial advisor son-in-law. Pp. 371–372.

3. The purpose of the Federal Rules is to administer justice through fair trials and Rule 23 cannot be construed as compelling

dismissal of cases like this where the record shows grave fraud charges based on reasonable beliefs growing out of careful investigation. P. 373.

342 F. 2d 596, reversed and remanded.

Richard F. Watt argued the cause for petitioner. With him on the brief were *Sidney M. Davis, Walter J. Rockler* and *Lionel G. Gross.*

Samuel W. Block argued the cause for respondents. On the brief for Hilton Hotels Corp. were *Leslie Hodson, Don H. Reuben* and *Lawrence Gunnels.* With *Mr. Block* on the brief for the individual respondents were *Albert E. Jenner, Jr., Keith F. Bode, William J. Friedman* and *Stanley R. Zax.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner, Dora Surowitz, a stockholder in Hilton Hotels Corporation, brought this action in a United States District Court on behalf of herself and other stockholders charging that the officers and directors of the corporation had defrauded it of several million dollars by illegal devices and schemes designed to cheat the corporation and enrich the individual defendants. The acts charged, if true, would constitute frauds of the grossest kind against the corporation, and would be in violation of the Securities Act of 1933,[1] the Securities Exchange Act of 1934,[2] and the Delaware General Corporation Law.[3] Summarily stated, the detailed complaint, which takes up over 60 printed pages, charges first that defendants conceived and carried out a deceptive plan under which the Hilton Hotels Corporation through a formal "offer" mailed to all the stockholders, purchased from them some 300,000 shares of its outstanding com-

[1] 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.* (1964 ed.).
[2] 48 Stat. 881, as amended, 15 U. S. C. § 78a *et seq.* (1964 ed.).
[3] Del. Code Ann. Tit. 8, § 101 *et seq.* (1953 ed.).

mon stock, that these defendants manipulated the stock's market price to an artificially high level and then at this inflated price sold some 100,000 shares of their own stock to the corporation, and that the effect of this offer and purchase was to reduce the corporation's working capital more than $8,000,000 at a time when its financial condition was weak, and the funds were badly needed to run the corporation's business. The second deceptive scheme charged in the complaint was that the same defendants, all of whom were stockholders of the Hilton Credit Corporation, caused the Hilton Hotels Corporation to purchase, also at an artificially high price, more than a million shares of Hilton Credit Corporation stock, paying about $3,441,000 for it, of which over $2,000,000 was personally received by the defendants. The complaint was signed by counsel for Mrs. Surowitz in compliance with Rule 11 of the Federal Rules of Civil Procedure which provides that "The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." Also pursuant to Rule 23 (b) of the Federal Rules, the complaint was verified by Mrs. Surowitz, the petitioner, who stated that some of the allegations in the complaint were true and that she "on information and belief" thought that all the other allegations were true.

So far as the language of the complaint and of Mrs. Surowitz's verification was concerned, both were in strict compliance with the provisions of Rule 23 (b) which states that a shareholder's complaint in a secondary action must contain certain averments and be verified by the plaintiff.[4] Notwithstanding the sufficiency

[4] "(b) *Secondary Action by Shareholders.* In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the asso-

of the complaint and verification under Rule 23 (b), however, the court, without requiring defendants to file an answer and over petitioner's protest, granted defendants' motion to require Mrs. Surowitz to submit herself to an oral examination by the defendants' counsel. In this examination Mrs. Surowitz showed in her answers to questions that she did not understand the complaint at all, that she could not explain the statements made in the complaint, that she had a very small degree of knowledge as to what the lawsuit was about, that she did not know any of the defendants by name, that she did not know the nature of their alleged misconduct, and in fact that in signing the verification she had merely relied on what her son-in-law had explained to her about the facts in the case. On the basis of this examination, defendants moved to dismiss the complaint, alleging that "1. It is a sham pleading, and 2. Plaintiff, Dora Surowitz, is not a proper party plaintiff . . . ." In response, Mrs. Surowitz's lawyer, in an effort to cure whatever infirmity the court might possibly find in Mrs. Surowitz's verification in light of her deposition, filed two affidavits which shed much additional light on an extensive investigation which had preceded the filing of the complaint. Despite these affidavits the District Judge dismissed the case holding that Mrs. Surowitz's affidavit was "false," that

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ciation refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

being wholly false it was a nullity, that being a nullity it was as though no affidavit had been made in compliance with Rule 23, that being false the affidavit was a "sham" and Rule 23 (b) required that he dismiss her case, and he did so, "with prejudice."

The Court of Appeals affirmed the District Court's dismissal, saying in part:

> "We can only conclude, as did the court below, that plaintiff's verification of the complaint was false because she swore to the verity of alleged facts of which she was wholly ignorant." 342 F. 2d, at 606.

The Court of Appeals reached its conclusion that the case must be dismissed under Rule 23 (b) and Rule 41 (b) despite the fact that the charges made against the defendants were viewed as very serious and grave charges of fraud and that "many of the material allegations of the complaint are obviously true and cannot be refuted." 342 F. 2d, at 607. We cannot agree with either of the courts below and reverse their judgments. We do not find it necessary in reversing, however, to consider all the numerous arguments made by respondents based on the origin, history and utility of Rule 23, and of derivative causes of action and class suits. No matter how much weight we give to the function of the Rule and of class action proceedings in protecting corporate management against so-called "nuisance" or "strike suits," we hold that the Rule cannot justify dismissal of this case on the record shown here.

At the time the District Court dismissed and the Court of Appeals approved, there were pending before those courts not merely the complaint, the verified statements by counsel and by Mrs. Surowitz, and the deposition of Mrs. Surowitz, but, as noted above, two affidavits, one signed by Mrs. Surowitz's attorney in this case, Mr.

Walter J. Rockler, and the other signed by her son-in-law, Mr. Irving Brilliant, had been submitted in response to the defendants' motion that the complaint be dismissed. These affidavits, as well as Mrs. Surowitz's deposition, are a part of the record before us here and we shall now state the facts as they are illuminated by these affidavits.

Mrs. Surowitz, the plaintiff and petitioner here, is a Polish immigrant with a very limited English vocabulary and practically no formal education. For many years she has worked as a seamstress in New York where by reason of frugality she saved enough money to buy some thousands of dollars worth of stocks. She was of course not able to select stocks for herself with any degree of assurance of their value. Under these circumstances she had to receive advice and counsel and quite naturally she went to her son-in-law, Irving Brilliant. Mr. Brilliant had graduated from the Harvard Law School, possessed a master's degree in economics from Columbia University, was a professional investment advisor, and in addition to his degrees and his financial acumen, he wore a Phi Beta Kappa key. In 1957, six years before this litigation began, he bought some stock for his mother-in-law in the Hilton Hotels Corporation, paying a little more than $2,000 of her own money for it. He evidently had confidence in that corporation because by 1960 he had purchased for his wife, his deceased mother's estate, a trust fund created for his children, and Mrs. Surowitz some 2,350 shares of the corporation's common stock, at a cost of about $45,000 in addition to one of the corporation's $10,000 debentures.

About December 1962, Mrs. Surowitz received through the mails a notice from the Hilton Hotels Corporation announcing its plan to purchase a large amount of its own stock. Because she wanted it explained to her, she took the notice to Mr. Brilliant. Apparently disturbed

by it, he straightway set out to make an investigation. Shortly thereafter he went to Chicago, Illinois, where Hilton Hotels has its home office and talked the matter over with Mr. Rockler. Mr. Brilliant and Mr. Rockler had been friends for many years, apparently ever since both of them served as a part of the legal staff representing the United States in the Nuremberg trials. The two decided to investigate further, and for a number of months both pursued whatever avenues of information that were open to them. By August of 1963 on the basis of their investigation, both of them had reached the conclusion that the time had come to do something about the matter. In the meantime the value of the corporation's stock had declined steadily, and in August the corporation failed to pay its usual dividend. In October, while a complaint was being prepared charging defendants with fraud and multiple violations of the federal securities acts and state law, Mr. Rockler met with defendants' lawyers. This conference, instead of producing an understanding, merely provided Mr. Brilliant and Mr. Rockler with information, not previously available to them, which increased their grave suspicions about the corporation's stock purchase and its management. For instance it was learned at this meeting that at the time of the stock purchase the president and chairman of the board of Hilton Hotels Corporation had purchased for an unusually high price over 100,000 shares of the corporation's stock from several trusts established by a vice president and director of the corporation. Finally, in December, or almost exactly one year after the corporation had submitted its questionable offer to purchase stock from its shareholders, this complaint was filed charging the defendants with creating and participating in a fraudulent scheme which had taken millions of dollars out of the corporation's treasury and transferred the money to the defendants' pockets.

Soon after these investigations began Rockler prepared a letter for Mrs. Surowitz to send to the corporation protesting the alleged fraudulent scheme. Mr. Brilliant, her son-in-law, took the communication to Mrs. Surowitz, explained it to her, and she signed it. Later, in August 1963, when the corporation declined to pay its dividend, Mrs. Surowitz, who had purchased the stock for the specific purpose of gaining a source of income, was sufficiently disturbed to seek Mr. Brilliant's counsel. He explained to her that he and Mr. Rockler were of the opinion that the corporation's management had wrongfully damaged the corporation, and together at that time Mrs. Surowitz and her son-in-law discussed the matter of her bringing this suit. When, on the basis of this conversation, Mrs. Surowitz stated that she agreed that suit be filed in her name, Mr. Rockler prepared a formal complaint which he mailed to Mr. Brilliant. Mr. Brilliant then, according to both his affidavit and Mrs. Surowitz's testimony, read and explained the complaint to his mother-in-law before she verified it. Her limited education and her small knowledge about any of the English language, except the most ordinarily used words, probably is sufficient guarantee that the courts below were right in finding that she did not understand any of the legal relationships or comprehend any of the business transactions described in the complaint. She did know, however, that she had put over $2,000 of her hard-earned money into Hilton Hotels stock, that she was not getting her dividends, and that her son-in-law who had looked into the matter thought that something was wrong. She also knew that her son-in-law was qualified to help her and she trusted him. It is difficult to believe that anyone could be shocked or harmed in any way when, in the light of all these circumstances, Mrs. Surowitz verified the complaint, not on the basis of her own knowledge and understanding, but in the faith that her

son-in-law had correctly advised her either that the statements in the complaint were true or to the best of his knowledge he believed them to be true.

We assume it may be possible that there can be circumstances under which a district court could stop all proceedings in a derivative cause of action, relieve the defendants from filing an answer to charges of fraud, and conduct a pre-trial investigation to determine whether the plaintiff had falsely sworn either that the facts alleged in the complaint were true or that he had information which led him to believe they were true. And conceivably such a pre-trial investigation might possibly reveal facts surrounding the verification of the complaint which could justify dismissal of the complaint with prejudice. However, here we need not consider the question of whether, if ever, Federal Rule 23 (b) might call for such summary action. Certainly it cannot justify the court's summary dismissal in this case. Rule 23 (b) was not written in order to bar derivative suits. Unquestionably it was originally adopted and has served since in part as a means to discourage "strike suits" by people who might be interested in getting quick dollars by making charges without regard to their truth so as to coerce corporate managers to settle worthless claims in order to get rid of them. On the other hand, however, derivative suits have played a rather important role in protecting shareholders of corporations from the designing schemes and wiles of insiders who are willing to betray their company's interests in order to enrich themselves. And it is not easy to conceive of anyone more in need of protection against such schemes than little investors like Mrs. Surowitz.

When the record of this case is reviewed in the light of the purpose of Rule 23 (b)'s verification requirement, there emerges the plain, inescapable fact that this is not a strike suit or anything akin to it. Mrs. Surowitz was

not interested in anything but her own investment made with her own money. Moreover, there is not one iota of evidence that Mr. Brilliant, her son-in-law and counselor, sought to do the corporation any injury in this litigation. In fact his purchases for the benefit of his family of more than $50,000 of securities in the corporation, including a $10,000 debenture, all made years before this suit was brought, manifest confidence in the corporation, not a desire to harm it in any way. The Court of Appeals in affirming the District Court's dismissal, however, indicated that whether Mrs. Surowitz and her counselors acted in good faith and whether the charges they made were truthful were irrelevant once Mrs. Surowitz demonstrated in her oral testimony that she knew nothing about the content of the suit. That court said:

> "Those affidavits reveal that substantial and diligent investigation by Brilliant, Rockler and others preceded the filing of this complaint. . . . Neither affidavit, however, does anything, if anything could be done, to offset plaintiff's positive disavowal of any relevant knowledge or information other than the fact of her stock ownership." 342 F. 2d, at 607.

In fact the opinion of the Court of Appeals indicates in several places that a woman like Mrs. Surowitz, who is uneducated generally and illiterate in economic matters, could never under any circumstances be a plaintiff in a derivative suit brought in the federal courts to protect her stock interests.[5]

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[5] Consider, for example, these three excerpts taken from separate paragraphs in the Court of Appeals' opinion:

"We have considered all arguments advanced by the plaintiff. We have considered the record in the light of plaintiff's limited grasp of the English language and the intricacies of corporate finance. We have considered the peculiar position of a plaintiff in a suit such as this as, principally, the instrument through which the judicial machinery is set in motion. It is not unreasonable to

We cannot construe Rule 23 or any other one of the Federal Rules as compelling courts to summarily dismiss, without any answer or argument at all, cases like this where grave charges of fraud are shown by the record to be based on reasonable beliefs growing out of careful investigation. The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Rule 23 (b), like the other civil rules, was written to further, not defeat the ends of justice. The serious fraud charged here,

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state as a minimum requirement that the plaintiff have general knowledge of the acts of which she complains and the connection of the defendants to those acts which she alleges. We conclude that any lesser requirement would make the verification provision farcical.

. . . . .

"But if the verification provision of the Rule is to have any real meaning, it requires that a plaintiff must have knowledge of his own position and relationship to the suit, of the official identity of the parties against whom the suit is brought and general knowledge of the wrongful acts which he alleges as a foundation for his complaint.

. . . . .

"We think the court below correctly held that a pleading governed by Rule 23 (b) is sham when it clearly appears that the ostensible verification is a mere formality without knowledgeable or informative comprehension in the party plaintiff whose verification gives it the breath of life. That breath is not instilled by the reading of words to that plaintiff which she obviously did not understand." 342 F. 2d, at 608, 606, and 607–608.

which of course has not been proven, is clearly in that class of deceitful conduct which the federal securities laws were largely passed to prohibit and protect against. There is, moreover, not one word or one line of actual evidence in this record indicating that there has been any collusive conduct or trickery by those who filed this suit except through intimations and insinuations without any support from anything any witness has said. The dismissal of this case was error. It has now been practically three years since the complaint was filed and as yet none of the defendants have even been compelled to admit or deny the wrongdoings charged. They should be. The cause is reversed and remanded to the District Court for trial on the merits.

Reversed and remanded.

MR. JUSTICE FORTAS took no part in the decision of this case.

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

MR. JUSTICE HARLAN, concurring.

Rule 23 (b) directs that in a derivative suit "the complaint shall be verified by oath" but nothing dictates that the verification be that of the plaintiff shareholder. See *Bosc* v. *39 Broadway, Inc.*, 80 F. Supp. 825. In the present circumstances, it seems to me the affidavit of Walter J. Rockler, counsel for Mrs. Surowitz, amounts to an adequate verification by counsel, which I think is permitted by a reasonable interpretation of the Rule at least in cases such as this. On this premise, I agree with the decision of the Court.

PATE, WARDEN *v.* ROBINSON.

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

No. 382. Argued January 26, 1966.—Decided March 7, 1966.

Respondent was convicted in 1959 of murdering his common-law wife and given a life sentence. It was conceded at trial that he had shot and killed her but counsel claimed that respondent was insane at the time of the incident and also not competent to stand trial. It was uncontradicted that respondent had a long history of disturbed behavior, had been confined as a psychopathic patient, and had committed acts of violence including the killing of his infant son and an attempted suicide. Four defense witnesses testified that respondent was insane. The trial court declined rebuttal medical testimony as to respondent's sanity, deeming sufficient a stipulation that a doctor would testify that when respondent was examined a few months before trial he knew the nature of the charges and could cooperate with his counsel. The trial court's rejection of contentions as to respondent's sanity was challenged on appeal as a deprivation of due process of law under the Fourteenth Amendment. The State Supreme Court affirmed the conviction on the grounds that no hearing on mental capacity to stand trial had been requested and that the evidence was insufficient to require the trial court to conduct a sanity hearing *sua sponte* or to raise a "reasonable doubt" as to respondent's sanity at the time of the homicide. This Court denied certiorari. The District Court denied respondent's subsequently filed petition for writ of habeas corpus. The Court of Appeals reversed, holding that the unduly hurried trial did not provide a fair opportunity for development of facts on the insanity issues and remanded the case to the District Court for a limited hearing as to the sanity of respondent at the time of the homicide and as to whether he was constitutionally entitled to a hearing upon his competence to stand trial. *Held:*

1. The evidence raised a sufficient doubt as to respondent's competence to stand trial so that respondent was deprived of due process of law under the Fourteenth Amendment by the trial court's failure to afford him a hearing on that issue. Pp. 378–386.

(a) The conviction of a legally incompetent defendant violates due process. *Bishop* v. *United States,* 350 U. S. 961. P. 378.

(b) The record shows that respondent did not waive the defense of incompetence to stand trial. P. 384.

(c) In view of evidence raising a doubt on the competence issue, the court was required to impanel a jury and conduct a sanity hearing and could not rely in lieu thereof on respondent's demeanor at trial or on the stipulated medical testimony. Pp. 385–386.

2. In view of the difficulty of retrospectively determining the issue of an accused's competence to stand trial (particularly where, as here, the time lapse is over six years), a hearing limited to that issue will not suffice; respondent must therefore be discharged unless the State gives him a new trial within a reasonable time. P. 387.

345 F. 2d 691, affirmed in part and remanded.

Richard A. Michael, Assistant Attorney General of Illinois, argued the cause for petitioner. With him on the brief were *William G. Clark,* Attorney General, and *Philip J. Rock,* Assistant Attorney General.

John C. Tucker argued the cause for respondent. With him on the brief was *Albert E. Jenner, Jr.*

Mr. Justice Clark delivered the opinion of the Court.

In 1959 respondent Robinson was convicted of the murder of his common-law wife, Flossie May Ward, and was sentenced to imprisonment for life. Being an indigent he was defended by court-appointed counsel. It was conceded at trial that Robinson shot and killed Flossie May, but his counsel claimed that he was insane at the time of the shooting and raised the issue of his incompetence to stand trial. On writ of error to the Supreme Court of Illinois it was asserted that the trial court's rejection of these contentions deprived Robinson of due process of law under the Fourteenth Amendment. His conviction was affirmed, the court finding that no hearing on mental capacity to stand trial had been requested, that the evidence failed to raise sufficient doubt as to his competence to require the trial court to

conduct a hearing on its own motion, and further that the evidence did not raise a "reasonable doubt" as to his sanity at the time of the offense. 22 Ill. 2d 162, 174 N. E. 2d 820 (1961). We denied certiorari. 368 U. S. 995 (1962). Thereupon, Robinson filed this petition for habeas corpus, which was denied without a hearing by the United States District Court for the Northern District of Illinois. The Court of Appeals reversed, 345 F. 2d 691 (1965), on the ground that Robinson was convicted in an unduly hurried trial without a fair opportunity to obtain expert psychiatric testimony, and without sufficient development of the facts on the issues of Robinson's insanity when he committed the homicide and his present incompetence. It remanded the case to the District Court with directions to appoint counsel for Robinson; to hold a hearing as to his sanity when he committed the alleged offense; and, if it found him to have been insane at that time, to order his release, subject to an examination into his present mental condition. The Court of Appeals directed that the District Court should also determine upon the hearing whether Robinson was denied due process by the state court's failure to conduct a hearing upon his competence to stand trial; and, if it were found his rights had been violated in this respect, that Robinson "should be ordered released, but such release may be delayed for a reasonable time . . . to permit the State of Illinois to grant Robinson a new trial." 345 F. 2d, at 698. We granted certiorari to resolve the difficult questions of state-federal relations posed by these rulings. 382 U. S. 890 (1965). We have concluded that Robinson was constitutionally entitled to a hearing on the issue of his competence to stand trial. Since we do not think there could be a meaningful hearing on that issue at this late date, we direct that the District Court, after affording the State another opportunity to put Robinson to trial on its charges within a reasonable time, order him

discharged. Accordingly, we affirm the decision of the Court of Appeals in this respect, except insofar as it contemplated a hearing in the District Court on Robinson's competence. Our disposition makes it unnecessary to reach the other reasons given by the Court of Appeals for reversal.[1]

I.

The State concedes that the conviction of an accused person while he is legally incompetent violates due process, *Bishop* v. *United States,* 350 U. S. 961 (1956), and that state procedures must be adequate to protect this right. It insists, however, that Robinson intelligently waived this issue by his failure to request a hearing on his competence at the trial; and, further, that on the basis of the evidence before the trial judge no duty rested upon him to order a hearing *sua sponte.* A determination of these claims necessitates a detailed discussion of the conduct of the trial and the evidence touching upon the question of Robinson's competence at that time.

The uncontradicted testimony of four witnesses [2] called by the defense revealed that Robinson had a long history of disturbed behavior. His mother testified that when he was between seven and eight years of age a brick dropped from a third floor hit Robinson on the head. "He blacked out and the blood run from his head like a faucet." Thereafter "he acted a little peculiar." The blow knocked him "cockeyed" and his mother took him to a specialist "to correct the crossness of his eyes." He also suffered headaches during his childhood, apparently stemming from the same event. His conduct became

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[1] Nor do we pass on the contention that Robinson was denied his Sixth Amendment rights by the trial judge's refusal to issue summonses for material witnesses.

[2] These witnesses were Miss Willie Ceola Peterson, Robinson's mother; Mr. William H. Langham, his grandfather; Mrs. Helen Calhoun, his aunt; and Mrs. Alice Moore, a family friend.

noticeably erratic about 1946 or 1947 when he was visiting his mother on a furlough from the Army. While Robinson was sitting and talking with a guest, "he jumped up and run to a bar and kicked a hole in the bar and he run up in the front." His mother asked "what on earth was wrong with him and he just stared at [her], and paced the floor with both hands in his pockets." On other occasions he appeared in a daze, with a "glare in his eyes," and would not speak or respond to questions. In 1951, a few years after his discharge from the service, he "lost his mind and was pacing the floor saying something was after him." This incident occurred at the home of his aunt, Helen Calhoun. Disturbed by Robinson's conduct, Mrs. Calhoun called his mother about six o'clock in the morning, and she "went to see about him." Robinson tried to prevent Mrs. Calhoun from opening the door, saying "that someone was going to shoot him or someone was going to come in after him." His mother testified that, after gaining admittance, "I went to him and hugged him to ask him what was wrong and he went to pushing me back, telling me to get back, somebody was going to shoot him, somebody was going to shoot him." Upon being questioned as to Robinson's facial expression at the time, the mother stated that he "had that starey look and seemed to be just a little foamy at the mouth." A policeman was finally called. He put Robinson, his mother and aunt in a cab which drove them to Hines Hospital. On the way Robinson tried to jump from the cab, and upon arrival at the hospital he was so violent that he had to be strapped in a wheel chair. He then was taken in an ambulance to the County Psychopathic Hospital, from which he was transferred to the Kankakee State Hospital. The medical records there recited:

> "The reason for admission: The patient was admitted to this hospital on the 5th day of June, 1952,

from the Hines Hospital. Patient began presenting symptoms of mental illness about a year ago at which time he came to his mother's house. He requested money and when it was refused, he suddenly kicked a hole in her bar.

. . . . .

"Was drinking and went to the Psychopathic Hospital. He imagined he heard voices, voices of men and women and he also saw things. He saw a little bit of everything. He saw animals, snakes and elephants and this lasted for about two days. He went to Hines. They sent him to the Psychopathic Hospital. The voices threatened him. He imagined someone was outside with a pistol aimed at him. He was very, very scared and he tried to call the police and his aunt then called the police. He thought he was going to be harmed. And he says this all seems very foolish to him now. Patient is friendly and tries to cooperate.

. . . . .

"He went through an acute toxic episode from which he has some insight. He had been drinking heavily. I am wondering possibly he isn't schizophrenic. I think he has recovered from this condition. I have seen the wife and she is in a pathetic state. I have no objection to giving him a try."

After his release from the state hospital Robinson's irrational episodes became more serious. His grandfather testified that while Robinson was working with him as a painter's assistant, "all at once, he would come down [from the ladder] and walk on out and never say where he is going and whatnot and he would be out two or three hours, and at times he would be in a daze and when he comes out, he comes back just as fresh. He just

says he didn't do anything. I noticed that he wasn't at all himself." The grandfather also related that one night when Robinson was staying at his house Robinson and his wife had a "ruckus," which caused his wife to flee to the grandfather's bedroom. Robinson first tried to kick down the door. He then grabbed all of his wife's clothes from their room and threw them out in the yard, intending to set them on fire. Robinson got so unruly that the grandfather called the police to lock him up.

In 1953 Robinson, then separated from his wife, brought their 18-month-old son to Mrs. Calhoun's home and asked permission to stay there for a couple of days. She observed that he was highly nervous, prancing about and staring wildly. While she was at work the next day Robinson shot and killed his son and attempted suicide by shooting himself in the head. It appeared that after Robinson shot his son, he went to a nearby park and tried to take his life again by jumping into a lagoon. By his mother's description, he "was wandering around" the park, and walked up to a policeman and "asked him for a cigarette." It was stipulated that he went to the South Park Station on March 10, 1953, and said that he wanted to confess to a crime. When he removed his hat the police saw that he had shot himself in the head. They took him to the hospital for treatment of his wound.

Robinson served almost four years in prison for killing his son, being released in September 1956. A few months thereafter he began to live with Flossie May Ward at her home. In the summer of 1957 or 1958 Robinson "jumped on" his mother's brother-in-law and "beat him up terrible." She went to the police station and swore out a warrant for his arrest. She described his abnormalities and told the officers that Robinson "seemed to have a disturbed mind." She asked the police "to pick him up so I can have him put away." Later she went

back to see why they had not taken him into custody because of "the way he was fighting around in the streets, people were beating him up." She made another complaint a month or so before Robinson killed Flossie May Ward. However, no warrant was ever served on him.

The killing occurred about 10:30 p. m. at a small barbecue house where Flossie May Ward worked. At that time there were 10 customers in the restaurant, six of them sitting at the counter. It appears from the record that Robinson entered the restaurant with a gun in his hand. As he approached the counter, Flossie May said, "Don't start nothing tonight." After staring at her for about a minute, he walked to the rear of the room and, with the use of his hand, leaped over the counter. He then rushed back toward the front of the restaurant, past two other employees working behind the counter, and fired once or twice at Flossie May. She jumped over the counter and ran out the front door with Robinson in pursuit. She was found dead on the sidewalk.[3] Robinson never spoke a word during the three-to-four-minute episode.

Subsequently Robinson went to the apartment of a friend, Mr. Moore, who summoned the police. When three officers, two in uniform, arrived, Robinson was standing in the hall approximately half way between the elevator and the apartment. Unaware of his identity, the officers walked past him and went to the door of the apartment. Mrs. Moore answered the door and told them that Robinson had left a short time earlier. As the officers turned around they saw Robinson still standing where they had first observed him. Robinson made no attempt to avoid being arrested. When asked his address

[3] The Reverend Elmer Clemons was also shot and killed in the fracas. The indictment covering that offense was dismissed at the close of the trial in question.

he gave several evasive answers. He also denied knowing anything about the killing.[4]

Four defense witnesses expressed the opinion that Robinson was insane.[5] In rebuttal the State introduced only a stipulation that Dr. William H. Haines, Director of the Behavior Clinic of the Criminal Court of Cook County would, if present, testify that in his opinion Robinson knew the nature of the charges against him and was able to cooperate with counsel when he examined him two or three months before trial. However, since the stipulation did not include a finding of sanity the prosecutor advised the court that "we should have

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[4] According to the testimony of an arresting officer the following exchange took place:

"I asked him what his name was and he said, 'My name is Ted.' I said, 'What is your real name?' And he said, 'Theodore Robinson.' Then I asked him—I told him he was under arrest and he said, 'For what?' I said, 'Well, you are supposed to be wanted for killing two people on the south side.' I asked him did he know anything about it. He said, 'No, I don't know what you are talking about.' So then I asked him where he lived and he said, 'I don't live no place.'

"I said, 'What do you mean you don't live no place?' He said, 'That's what I said.'

"So then pretty soon asked him again and he said, 'Sometimes I stay with my mother.' And I said, 'Where does she live?' He said, 'Some address on East 44th Street.'

"So then we took him on to the 27th District and while we were making the arrest slip, asked him again his address and he said he lived at 7320 South Parkway. That's about all he said. He didn't know anything about any killing or anything."

[5] His mother stated: "I think he is insane." Mrs. Calhoun testified as follows:

"Q. Do you have an opinion as to whether or not presently he is sane or insane?

"A. He is sick. He is insane.

"Q. First of all, do you have an opinion?

"A. Yes.

"Q. What is your opinion as to his present sanity? . . .

"A. He is mentally sick."

Dr. Haines' testimony as to his opinion whether this man is sane or insane. It is possible that the man might be insane and know the nature of the charge or be able to cooperate with his counsel. I think it should be in evidence, your Honor, that Dr. Haines' opinion is that this defendant was sane when he was examined." However, the court told the prosecutor, "You have enough in the record now. I don't think you need Dr. Haines." In his summation defense counsel emphasized "our defense is clear . . . . It is as to the sanity of the defendant at the time of the crime and also as to the present time." The court, after closing argument by the defense, found Robinson guilty and sentenced him to prison for his natural life.

II.

The State insists that Robinson deliberately waived the defense of his competence to stand trial by failing to demand a sanity hearing as provided by Illinois law. But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial. See *Taylor* v. *United States*, 282 F. 2d 16, 23 (C. A. 8th Cir. 1960). In any event, the record shows that counsel throughout the proceedings insisted that Robinson's present sanity was very much in issue. He made a point to elicit Mrs. Robinson's opinion of Robinson's "present sanity." And in his argument to the judge, he asserted that Robinson "should be found not guilty and presently insane on the basis of the testimony that we have heard." Moreover, the prosecutor himself suggested at trial that "we should have Dr. Haines' testimony as to his opinion whether this man is sane or insane." With this record we cannot say that Robinson waived the defense of incompetence to stand trial.[6]

[6] Although defense counsel phrased his questions and argument in terms of Robinson's present insanity, we interpret his language as

We believe that the evidence introduced on Robinson's behalf entitled him to a hearing on this issue. The court's failure to make such inquiry thus deprived Robinson of his constitutional right to a fair trial.[7] See *Thomas* v. *Cunningham*, 313 F. 2d 934 (C. A. 4th Cir. 1963). Illinois jealously guards this right. Where the evidence raises a "*bona fide* doubt" as to a defendant's competence to stand trial, the judge on his own motion must impanel a jury and conduct a sanity hearing pursuant to Ill. Rev. Stat., c. 38, § 104–2 (1963). *People* v. *Shrake*, 25 Ill. 2d 141, 182 N. E. 2d 754 (1962). The Supreme Court of Illinois held that the evidence here was not sufficient to require a hearing in light of the mental alertness and understanding displayed in Robinson's "colloquies" with the trial judge. 22 Ill. 2d, at 168, 174 N. E. 2d, at 823. But this reasoning offers no justification for ignoring the uncontradicted testimony

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necessarily placing in issue the question of Robinson's mental competence to stand trial. Counsel was simply borrowing the terminology of the relevant Illinois statutes and decisions. The state law in effect at the time of Robinson's trial differentiated between lack of criminal responsibility and competence to stand trial, but used "insanity" to describe both concepts. Ill. Rev. Stat., c. 38, §§ 592, 593 (1963). The judges likewise phrased their decisions only in terms of sanity and insanity. See, *e. g.*, *People* v. *Baker*, 26 Ill. 2d 484, 187 N. E. 2d 227 (1962). The statutory provisions and terminology in this field have now been clarified by the enactment of an article dealing with the "competency of accused." Ill. Rev. Stat., c. 38, §§ 104–1 to 104–3 (1963), as amended by the Code of Criminal Procedure of 1963. Even if counsel may also have meant to refer to the statutory provisions dealing with commitment for present insanity, Ill. Rev. Stat., c. 38, § 592 (1963), this fact would not affect the determination that counsel's words raised a question as to competence that the trial judge should have considered.

[7] Moreover, as the Court of Appeals stressed, the trial judge did not give Robinson an opportunity to introduce expert testimony on the question of his sanity. The judge denied counsel's request for a continuance of several hours in order to secure the appearance of a psychiatrist from the Illinois Psychiatric Institute.

of Robinson's history of pronounced irrational behavior. While Robinson's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue. Cf. *Bishop* v. *United States,* 350 U. S. 961 (1956), reversing 96 U. S. App. D. C. 117, 120, 223 F. 2d 582, 585 (1955). Likewise, the stipulation of Dr. Haines' testimony was some evidence of Robinson's ability to assist in his defense. But, as the state prosecutor seemingly admitted, on the facts presented to the trial court it could not properly have been deemed dispositive on the issue of Robinson's competence.[8]

III.

Having determined that Robinson's constitutional rights were abridged by his failure to receive an adequate hearing on his competence to stand trial, we direct that the writ of habeas corpus must issue and Robinson be discharged, unless the State gives him a new trial within a reasonable time. This disposition accords with the procedure adopted in *Rogers* v. *Richmond,* 365 U. S. 534 (1961). We there determined that since the state court had applied an erroneous standard to judge the admissibility of a confession, the "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 which conform to the requirements of the Fourteenth Amendment." At 547–

[8] As defense counsel insisted in his closing argument:

"In this case, which is a very serious case, the defendant has been able to cooperate with counsel with some reservations. . . . However, I do not feel that this present . . . lucidity bears on the issue of his sanity at the time of the crime and his sanity at the present time. I think the words sanity and insanity, the words are legal terms. I think that presently Mr. Theodore Robinson is in a lucid interval. I believe that from the witness stand you have heard testimony to indicate and prove that Mr. Theodore Robinson is presently insane. . . ."

548. It has been pressed upon us that it would be sufficient for the state court to hold a limited hearing as to Robinson's mental competence at the time he was tried in 1959. If he were found competent, the judgment against him would stand. But we have previously emphasized the difficulty of retrospectively determining an accused's competence to stand trial. *Dusky* v. *United States,* 362 U. S. 402 (1960). The jury would not be able to observe the subject of their inquiry, and expert witnesses would have to testify solely from information contained in the printed record. That Robinson's hearing would be held six years after the fact aggravates these difficulties. This need for concurrent determination distinguishes the present case from *Jackson* v. *Denno,* 378 U. S. 368 (1964), where we held that on remand the State could discharge its constitutional obligation by giving the accused a separate hearing on the voluntariness of his confession.

If the State elects to retry Robinson, it will of course be open to him to raise the question of his competence to stand trial at that time and to request a special hearing thereon. In the event a sufficient doubt exists as to his present competence such a hearing must be held. If found competent to stand trial, Robinson would have the usual defenses available to an accused.

The case is remanded to the District Court for action consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK joins, dissenting.

The facts now canvassed by this Court to support its constitutional holding were fully sifted by the Illinois Supreme Court. I cannot agree that the state court's unanimous appraisal was erroneous and still less that it was error of constitutional proportions.

The Court appears to hold that a defendant's present incompetence may become sufficiently manifest during a trial that it denies him due process for the trial court to fail to conduct a hearing on that question on its own initiative. I do not dissent from this very general proposition, and I agree also that such an error is not "waived" by failure to raise it and that it may entitle the defendant to a new trial without further proof. Waiver is not an apposite concept where we premise a defendant so deranged that he cannot oversee his lawyers. Since our further premise is that the trial judge should and could have avoided the error, a new trial seems not too drastic an exaction in view of the proof problems arising after a significant lapse of time.[1] However, I do not believe the facts known to the trial judge in this case suggested Robinson's incompetence at time of trial with anything like the force necessary to make out a violation of due process in the failure to pursue the question.

Before turning to the facts, it is pertinent to consider the quality of the incompetence they are supposed to indicate. In federal courts—and I assume no more is asked of state courts—the test of incompetence that warrants postponing the trial is reasonably well settled. In language this Court adopted on the one occasion it faced the issue, "the 'test must be whether . . . [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.' " *Dusky* v. *United States*, 362 U. S. 402. In short, emphasis is on capacity to consult with counsel and to comprehend the proceed-

[1] The constitutional violation alleged is the failure to make an inquiry. In the more usual case, the simple claim that a defendant was convicted while incompetent during the trial, there is of course no proof of a constitutional violation until that incompetence is established in appropriate proceedings.

ings, and lower courts have recognized that this is by no means the same test as those which determine criminal responsibility at the time of the crime.[2] The question, then, is not whether the facts before the trial judge suggested that Robinson's crime was an insane act but whether they suggested he was incompetent to stand trial.

The Court's affirmative answer seemingly rests on two kinds of evidence, principally adduced by Robinson to prove an insanity defense after the State rested its main case. First, there was evidence of a number of episodes of severe irrationality in Robinson's past. Among them were the slaying of his infant son, his attempted suicide, his efforts to burn his wife's clothing, his fits of temper and of abstraction, and his seven-week incarceration in a state hospital eight years before the trial. This evidence may be tempered by the State's counterarguments, for example, that Robinson was found guilty of his son's killing and that alcoholism may explain his hospitalization, but it cannot be written off entirely. The difficulty remains that while this testimony may suggest that Flossie May Ward's killing was just one more irrational act, I cannot say as a matter of common knowledge that it evidences incapacity during the trial. Indeed, the pattern revealed may best indicate that Robinson did function adequately during most of his life interrupted by periods of severe derangement that would have been quite apparent had they occurred at trial. The second class of data pertinent to the Court's theory, remarks by witnesses and counsel that Robinson was "presently insane," deserves little comment. I think it apparent that these statements were addressed to Robinson's re-

[2] See *James* v. *Boles*, 339 F. 2d 431; *United States* v. *Kendrick*, 331 F. 2d 110; *Lyles* v. *United States*, 103 U. S. App. D. C. 22, 254 F. 2d 725.

sponsibility for the killing, that is, his ability to do insane acts, and not to his general competency to stand trial.[3]

Whatever mild doubts this evidence may stir are surely allayed by positive indications of Robinson's competence at the trial. Foremost is his own behavior in the courtroom. The record reveals colloquies between Robinson and the trial judge which undoubtedly permitted a reasonable inference that Robinson was quite cognizant of the proceedings and able to assist counsel in his defense.[4] Turning from lay impressions to those of an expert, it was stipulated at trial that a Dr. Haines, Director of the Behavior Clinic of the Criminal Court of Cook County, had examined Robinson several months earlier and, if called, would testify that Robinson "knows

[3] At the time Robinson's mother and Mrs. Calhoun made the statements noted in the Court's opinion, p. 383, n. 5, *ante*, they also stated Robinson did not know the difference between right and wrong. Counsel's statement, too, quoted by the Court at p. 386, n. 8, *ante*, was directed to acquittal, not postponement. See, n. 5, *infra*. Mrs. Moore, a family friend, responded to the question on Robinson's sanity by saying: "When he is in those moods, I think he is insane; when he is in those moods, because he is terrible."

[4] The Illinois Supreme Court stated in its opinion: "[T]he record reflects several instances where defendant displayed his ability to assist in the conduct of his defense in a reasonable and rational manner. Typical instances of when defendant displayed mental alertness, as well as understanding and knowledge of the proceeding, appear in his remarks to the court as follows: 'Your honor, they were on the State's witness list and the State said they have several witnesses. They produced two. For what reason, I don't know, but I am on trial here and I would like to be given every consideration, and I would like that the court be adjourned until tomorrow morning—to give me time to confer with counsel for the calling of witnesses.' Again, when discussing witnesses with the court, defendant said: 'Well, the police are contending that the clothes they have found in Moore's apartment was mine. That is the reason at the beginning of trial, I asked the attorney to have a pre-trial preliminary to determine the admissibility and validity of the evidence that the State was intending to use against me.'" 22 Ill. 2d, at 168, 174 N. E. 2d, at 823.

the nature of the charge and is able to cooperate with his counsel." The conclusive factor is that Robinson's own lawyers, the two men who apparently had the closest contact with the defendant during the proceedings, never suggested he was incompetent to stand trial and never moved to have him examined on incompetency grounds during trial; [5] indeed, counsel's remarks to the jury seem best read as an affirmation of Robinson's present "lucidity" which would be highly peculiar if Robinson had been unable to assist properly in his defense. See p. 386, n. 8, *ante,* of the Court's opinion.

Thus, I cannot agree with the Court that the requirements of due process were violated by the failure of the trial judge, who had opportunities for personal observation of the defendant that we do not possess, to halt the trial and hold a competency hearing on his own motion.

Several other grounds have been urged as a basis for habeas corpus relief for Robinson. These other grounds are understandably not discussed in the Court's opinion, and I think it is sufficient for me to say I do not believe that they warrant further proceedings. In my view, the Court of Appeals should be reversed and the District Court's dismissal of the petition reinstated.

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[5] The record in my view does not bear out any suggestion that Robinson's counsel apprised the trial judge that he believed Robinson incompetent to stand trial, even granting that "insane" was a synonym for "incompetent" under then-existing state law (pp. 384–385, n. 6, *ante*). Under Illinois law, as one would naturally expect, incompetence at the time of trial has been a ground not for acquitting the defendant but for postponing his trial; and nowhere in the record does Robinson's counsel even hint to the judge that he believes the trial should be deferred or abated because his client is not fit to continue. The ready explanation for counsel's references to "present insanity," apart from emphasizing Robinson's general lack of criminal responsibility, is that Illinois law provided that one acquitted on grounds of insanity at the time of the crime shall by the same verdict be found cured of or still afflicted with "such insanity" and committed in the latter instance. Ill. Rev. Stat., c. 38, § 592 (1959).

PERRY *v.* COMMERCE LOAN CO.

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

No. 694. Argued January 26, 1966.—Decided March 7, 1966.

Petitioner sought confirmation of his plan for an extension of time to pay his debts out of future wages, pursuant to Chapter XIII of the Bankruptcy Act. On motion of respondent, a creditor, the referee dismissed the plan on the ground that petitioner's discharge in a straight bankruptcy proceeding within six years of this proceeding barred confirmation under § 14 (c)(5) of the Act. That section provides for discharge unless the bankrupt has "within six years prior to bankruptcy been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this Act . . . ." Section 656 (a)(3) requires confirmation of a wage-earner's extension plan if "the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt . . . ." The District Court upheld the referee's dismissal and the Court of Appeals affirmed. *Held:*

1. Confirmation of a wage-earner extension plan is not barred under § 14 (c)(5) of the Bankruptcy Act by a discharge in bankruptcy within the previous six years. Pp. 394–402.

(a) Congress has clearly intended by Chapter XIII to encourage the use of wage-earner extension plans by which debtors arrange to pay their debts in full rather than go into straight bankruptcy or composition. Pp. 394–397.

(b) The purpose of the six-year bar, which was enacted long before the adoption of Chapter XIII, was to prevent the creation of habitual bankrupts (*i. e.*, debtors who escape their obligations by repeated bankruptcy) and is completely opposed to the purpose of the wage-earner extension plan whereby the debtor meets the claims of his creditors. Pp. 399–400.

(c) The ambiguous language used in § 656 (a)(3) concerning "guilty" acts and unfulfilled duties impels recourse to the legislative purposes of the Act. Pp. 400–401.

(d) The absence of legislative history bearing on the adoption in Chapter XIII of § 656 (a)(3) indicates that its inclusion was

a legislative oversight, at least insofar as it bears on wage-earners' extension plans. P. 401.

2. This Court's construction that the six-year bar is inapplicable to wage-earner extension plans does not preclude application of § 14 (c)(5) to confirmations of general arrangements under Chapter XI, real property arrangements under Chapter XII, and to wage-earner compositions under Chapter XIII. Pp. 402–403.

3. If a wage earner is unable to comply with his extension plan and seeks discharge under § 661, thus transposing the extension plan into a composition, the six-year bar would apply. P. 404.

340 F. 2d 588, reversed and remanded.

Robert J. Harris argued the cause and filed a brief for petitioner.

R. Howard Smith argued the cause and filed a brief for respondent.

MR. JUSTICE CLARK delivered the opinion of the Court.

Perry, a furnace operator employed by Moore Lead Company, filed a petition in the District Court under Chapter XIII of the Bankruptcy Act, 52 Stat. 930 (1938), as amended, 11 U. S. C. §§ 1001–1086,[1] requesting confirmation of his plan for an extension of time within which to pay his debts out of his future wages. In his plan he proposed to pay his debts of $1,412 in 28 equal monthly installments of $60 from his wages of $265 a month. On the hearing for confirmation of the plan, however, it appeared that Perry had previously filed a petition in straight bankruptcy and obtained a discharge therein in 1959, within six years of the filing of this proceeding. On motion of the respondent, Commerce Loan Company, the referee dismissed the plan on the ground that the previous bankruptcy was a bar thereto under

[1] All United States Code citations herein refer to the 1964 edition.

the provisions of § 14 (c)(5) of the Act.[2] On review the District Court upheld the dismissal. The Court of Appeals affirmed. 340 F. 2d 588. We granted certiorari, 382 U. S. 889, in view of a conflict on the point among the courts of appeals.[3] We conclude that confirmations of wage-earner plans by way of extensions are not affected by § 14 (c)(5), and, therefore, reverse the judgment below.

I.

Although statutory relief for the financially distressed wage earner had been available to some extent as early as the Bankruptcy Act of 1867, 14 Stat. 517, Congress found in its study prior to the 1938 revision of the bankruptcy laws that there were no effective provisions for the complete repayment of the wage earner's debts suited to his problems. H. R. Rep. No. 1409, 75th Cong., 1st Sess., 53 (1937). For example, compositions under § 12 of the 1898 Act, 30 Stat. 549, were available to the wage earner, but the relief afforded was unsatisfactory. Section 12 proceedings, which were primarily adaptable for use by business entities, were disproportionately expensive in view of the small sums ordinarily involved in wage-earner cases; they lacked flexibility;

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[2] 52 Stat. 850 (1938), as amended, 11 U. S. C. § 32 (c)(5): "(c) The court shall grant the discharge [in bankruptcy] unless satisfied that the bankrupt has . . . (5) in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy . . . been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this title . . . ." 11 U. S. C. § 32 (c)(5).

[3] Compare *In re Schlageter*, 319 F. 2d 821 (C. A. 3d Cir. 1963), and *Perry* v. *Commerce Loan Co.*, 340 F. 2d 588, with *Edins* v. *Helzberg's Diamond Shops, Inc.*, 315 F. 2d 223 (C. A. 10th Cir. 1963), and *In re Mahaley*, 187 F. Supp. 229 (D. C. S. D. Cal. 1960). See also *In re Mayorga*, 355 F. 2d 89 (C. A. 9th Cir. 1966).

and they did not provide for jurisdiction of the court subsequent to confirmation. Other provisions of the Act had similar disadvantages. Faced with inadequate relief under the federal bankruptcy laws and often with little protection from creditors under state law, the only course usually open to the wage-earning debtor was straight bankruptcy. In such proceedings, everyone lost—the creditors by receiving a mere fraction of their claims, the debtor by bearing thereafter the stigma of having been adjudged a bankrupt. In designing a remedy for the dilemma facing a debtor seeking to repay, rather than avoid, his obligations, the Congress settled upon the wage-earner extension-of-time procedures of Chapter XIII. The chapter gave—and was intended to give—to the wage earner a reasonable opportunity to arrange installment payments to be made out of his future earnings. Congress clearly intended to encourage wage earners to pay their debts in full, rather than to go into straight bankruptcy or composition, by offering two inducements: (1) avoidance of an adjudication of bankruptcy with its attendant stigma; and, at the same time, (2) temporary freedom during the extension from garnishments, attachments and other harassment by creditors. H. R. Rep. No. 1409, 75th Cong., 1st Sess., at 52–55.

History demonstrates that extension plans under Chapter XIII are fulfilling the purposes intended. The records of the Administrative Office of the United States Courts show that over the past 20 years more than 20% of all proceedings filed under the Bankruptcy Act by wage earners have been for plans under Chapter XIII, the overwhelming majority of these being for extension plans.[4] Since many wage earners who go into bank-

[4] Chapter XIII also provides for wage-earner plans by way of composition. Compositions under that chapter, however, are almost insignificant in the operation of wage-earner plans because most

ruptcy do not proceed under Chapter XIII because they are unemployed (and consequently have no earnings to use for extension arrangements), have an inextricably large indebtedness, or are simply unaware of the existence of an alternative to straight bankruptcy, the 20% figure is even more significant. Moreover, large sums of money are annually returned to creditors under extension plans, the current rate being well over $26,000,000. As wage earners ordinarily have little or no assets available for distribution in straight bankruptcy, these sums represent settlements which the debtors would otherwise be unable to effect and the creditors unable to obtain. See Note, The Wage Earner Plan—A Superior Alternative to Straight Bankruptcy, 9 Utah L. Rev. 730 (1965); Allgood, Operation of the Wage Earners' Plan in the Northern District of Alabama, 14 Rutgers L. Rev. 578 (1960).

In light of the proven advantages of extension plans, the Congress has re-expressed its legislative purpose in amendments to Chapter XIII adopted since the original enactment. A report to the House of Representatives expresses it in these words:

> "[C]hapter XIII provides a highly desirable method for dealing with the financial difficulties of individuals. It creates an equitable and feasible way for the honest and conscientious debtor to pay off his debts rather than having them discharged in bankruptcy. The power of the court to change the amount and maturity of installment payments without affecting the aggregate amount of such pay-

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creditors will not give the necessary approval. The latest published statistics show that 95% of the funds paid to creditors under Chapter XIII proceedings derive from extensions rather than compositions. Administrative Office of the United States Courts, Tables of Bankruptcy Statistics, Table F 11 (1964) (by computation).

ments makes chapter XIII particularly applicable to the present-day financial problems generated by heavy installment buying." H. R. Rep. No. 193, 86th Cong., 1st Sess., 2 (1959).

And similarly, the Senate report states:

"We think there can be no doubt . . . that a procedure by which a debtor who is financially involved and unable to meet his debts as they mature, over a period of time, works out of his involvement and pays his debts in full is good for his creditors and good for him." S. Rep. No. 179, 86th Cong., 1st Sess., 2 (1959).

It is with this underlying policy in mind that we turn to a consideration of the problem posed here, *i. e.*, whether confirmation of an extension plan is barred by a discharge in bankruptcy obtained within the previous six years.

II.

Chapter XIII requires the confirmation of a wage-earner extension plan if "the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt . . . ." § 656 (a)(3). And Chapter III commands that a discharge of a bankrupt shall be granted unless the court is satisfied that the bankrupt has "within six years prior to the date of the filing of the petition in bankruptcy . . . been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this Act . . . ." § 14 (c)(5). The "discharge" of a debtor under a wage-earner plan shall issue after compliance with the provisions of the confirmed plan, § 660, c. XIII, 11 U. S. C. § 1060. If at the expiration of three years from the date of confirmation of the plan

the debtor has not completed his payments in accordance with his plan the court may, after notice and hearing, discharge the debts and liabilities dischargeable under the plan, *provided* the court is satisfied that the debtor's failure to make all of his payments "was due to circumstances for which he could not be justly held accountable." § 661, c. XIII, 11 U. S. C. § 1061. And finally, § 602, of Chapter XIII [5] declares that the provisions of Chapters I through VII of the Bankruptcy Act, insofar as they are not inconsistent or in conflict with the provisions of Chapter XIII, apply in proceedings thereunder.

We should note at the outset that in his present application for relief Perry did not file a straight, voluntary bankruptcy action in the District Court, nor "a composition or an arrangement by way of composition or a wage earner's plan by way of composition." He proposed to pay all his debts, secured and unsecured, and sought only an extension of time—28 months—in which to pay them in equal installments from his future wages. Ordinarily, a wage earner seeking to obtain the benefits of extension proceedings under Chapter XIII need only file a plan that meets the approval of the majority of his creditors, § 652, 11 U. S. C. § 1052, and is confirmed by the court; whereupon the plan becomes binding, § 657, 11 U. S. C. § 1057, and the appointed trustee commences collecting and disbursing to the creditors the periodic payments provided under the plan. Extension plans, therefore, differ materially from straight bankruptcy, arrangements under Chapters XI and XII, and wage-earner plans by way of composition, all of which contemplate only a partial payment of the wage earner's debts. Indeed, under an extension plan, the wage earner who makes the required payments will

[5] 11 U. S. C. § 1002: "The provisions of chapters 1–7 of this title shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter . . . ."

have paid his debts in full and will not need a discharge, even though the Act provides for a formal one. § 660.

In view of these considerations and the purposes of Chapter XIII as outlined above, we do not believe that the Congress intended to apply the six-year bar of § 14 (c)(5) to the confirmation of wage-earner extension plans. The six-year bar was enacted 35 years prior to the adoption of Chapter XIII, 32 Stat. 797 (1903), at a time when no relief corresponding to extension plans existed under the Bankruptcy Act. The unmistakable purpose of the six-year provision was to prevent the creation of a class of habitual bankrupts—debtors who might repeatedly escape their obligations as frequently as they chose by going through repeated bankruptcy. See H. R. Rep. No. 1698, 57th Cong., 1st Sess., 2 (1902); *In re Thompson*, 51 F. Supp. 12, 13 (1943). But an extension plan has no escape hatch for debtors, it is "a method by which, without resorting to bankruptcy proceedings in the usual sense, a wage earner may meet the claims of creditors." S. Rep. No. 179, 86th Cong., 1st Sess., 2 (1959). To apply the six-year bar at the time of ruling on the confirmation of an extension plan would be both illogical and in head-on collision with the congressional purpose as announced in the adoption and design of extension plans under Chapter XIII.[6] Even if a literal reading of these provisions suggested the application of § 14 (c)(5) to extension plans, we would have little hesitation in construing the Act to give effect to the clear

[6] Such a collision undoubtedly affects the functioning of the Act. The Administrative Office of the United States Courts reports that a "pronounced drop in Chapter XIII filings" has been noted in the districts in the Sixth Circuit as a result of the holding in *Perry*. Administrative Office of the United States Courts, Memorandum for the Committee on Bankruptcy Administration of the Judicial Conference of the United States, Report on the Use of Chapter XIII, p. 2 (June 22, 1965).

policy underlying Chapter XIII. As was said in *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543 (1940):

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."

But such a literal reading is not apparent in this case. Section 656 (a)(3) does not, on its face, state that a court may confirm an extension plan only if the debtor is eligible for a discharge in bankruptcy. Rather, the language of the section speaks, ambiguously, of "guilty" acts and unfulfilled duties. There is, of course, no unfulfilled duty involved in § 14 (c)(5). Moreover, a prior bankruptcy is hardly a "guilty" act within the usual meaning of that word, and its use as a reference to § 14 (c)(5) is strained indeed. In fact, the legislative history of § 14 (c) lends some support to a view that a prior discharge is not a "guilty" act. In 1903, when the forerunners of subdivisions (3) through (6) were originally added to § 14 (c), the House report stated:

> "This amendment also provides four additional grounds for refusing a discharge in bankruptcy: (1) Obtaining property on credit on materially false statements; (2) making a fraudulent transfer of

property; (3) having been granted or denied a discharge in bankruptcy within six years, and (4) having refused to obey the lawful orders of the court or having refused to answer material questions approved by the court. *No person who has been guilty of any of these fraudulent acts should be discharged, and a person who has refused to obey the order of the court ought not to be discharged, and it is quite clear that no person should have the benefit of the act as a voluntary bankrupt oftener than once in six years.*" H. R. Rep. No. 1698, 57th Cong., 1st Sess., 2 (1902). (Italics added.)

This language might be construed to set apart acts which are criminal or reprehensible in nature and to consider a prior bankruptcy to be something other than a "guilty" act. But we need not, and do not, go so far as to place this interpretation on the words "guilty acts." It suffices that we find in them sufficient ambiguity to impel recourse to the legislative purposes, outlined above, underlying § 14 (c)(5). And while the identical language of § 656 (a)(3) has been a part of the Bankruptcy Act since 1898, as a restriction to confirmation of compositions under what is now § 366 (3), 52 Stat. 911, as amended, 11 U. S. C. § 766 (3) and § 472 (3), 52 Stat. 923, as amended, 11 U. S. C. § 872 (3), there is no indication that its enactment in Chapter XIII was intended to bar confirmation of wage-earner extensions. Indeed, it would seem that the absence of any legislative history bearing on the adoption of this provision in Chapter XIII indicates that its inclusion was a legislative oversight,[7] at least insofar as it bears on wage-earners' extension plans.

[7] This is not the only example of drafting oversights in the Act. Although § 14 (c)(5) was amended in 1938 to include a reference to wage-earner compositions, the provision in that section relating

This oversight is, of course, cured by the provisions of § 602, which further buttress our conclusion. That section directs that the provisions of Chapters I through VII, which include § 14 (c)(5), are incorporated into Chapter XIII only "insofar as they are not inconsistent or in conflict with the provisions of this chapter." The rationale of § 14 (c)(5)—the prevention of recurrent avoidance of debts—is so inconsistent with the aims of extension plans as to fall squarely within the exception of § 602.

It is claimed, however, that § 686 (5) of Chapter XIII, 11 U. S. C. § 1086 (5), indicates a contrary result. We think not. This provision, in setting the effective date of the chapter, provides that confirmations thereunder "shall not be refused because of a discharge granted or a composition confirmed prior to the effective date of this amendatory Act." It must be remembered that extension-plan relief of Chapter XIII was novel to the law of bankruptcy. However, both compositions and straight bankruptcies were old on the books. The Congress, we believe, was only making certain, insofar as extensions were concerned, that the old procedures would not affect the new. This would be consistent with the purpose of the Congress not to make § 14 (c)(5) applicable to confirmations in extension-plan cases. Rather than making an illogical exemption from the six-year bar, given in cases where a discharge had been received before—but not after—the new Act, § 686 (5) merely gave expansive effect to the congressional purpose by making it clear that the remedy afforded be available retroactively as well as prospectively.

We emphasize that our construction of the Act does not preclude application of § 14 (c)(5) to confirmations

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to confirmation of a composition was not deleted even though § 12 of the 1898 Act, 30 Stat. 549, under which such a composition might have been confirmed, was repealed in the same enactment.

of general arrangements under Chapter XI or to real property arrangements under Chapter XII. It is true that restrictions identical in phrasing to § 656 (a)(3) appear both in Chapter XI, § 366 (3), and in Chapter XII, § 472 (3). The relief afforded in those chapters, however, represents a wholly different statutory scheme from wage-earners' extensions, and the restrictive provisions are not, therefore, in *pari materia.* Sections 366 (3) and 472 (3) neither impart to nor receive from § 656 (a)(3) a meaningful effect. Nor does our construction imply an immunity from the six-year bar to those seeking confirmation of wage-earner compositions. A composition under Chapter XIII, unlike an extension, is closely akin to straight bankruptcy and to proceedings under Chapters XI and XII, for under such a plan the debtor is discharged from his debts and claims of the creditors are only partially paid. *In re Jensen,* 200 F. 2d 58 (1952), cert. denied, 345 U. S. 926 (1953), but see *In re Goldberg,* 53 F. 2d 454 (1931). It is both logical and consistent with the underlying purposes of § 14 (c)(5) that confirmation of wage-earner compositions be barred by prior bankruptcy, since repeated use of such plans would, in effect, provide an opportunity for abuse of the Act.

It has been argued that extension plans do not completely avoid the possibility of adjusting the wage earner's debts. It is true that § 660 provides for discharge after compliance with the provisions of a Chapter XIII plan. While this section applies to wage-earner compositions as well as to extensions, a "discharge" thereunder has a wholly different impact where an extension is involved. In the latter case a discharge is little more than a mere formality. It is also claimed that § 661 presents a somewhat more troublesome objection. That section as we have noted may allow a wage earner to obtain a release from all dischargeable debts if, after notice and hearing, the court is satisfied that the failure

of the debtor to comply with the plan was due to circumstances for which he could not be held justly accountable. However, we see no serious problems in this section. First, experience has shown that almost all plans approved under the Act envision repayment within three years. The problem, therefore, is not likely to arise. Second, there are adequate provisions for notice and hearing prior to a discharge under § 661. Objecting creditors may raise § 14 (c)(5) as a bar to relief if and when the debtor seeks such relief. A request for relief under § 661 would, in effect, constitute an attempt to transpose an extension plan into a composition, and a grant of relief thereunder would, at that time, be tantamount to a confirmation of a composition. The six-year bar would, therefore, be operative in such a situation. In view of this, as well as the power of the court to make certain that the provisions of the chapter are not abused, we see no reason to allow this section alone to destroy the beneficial purposes of enactment.[8]

For the foregoing reasons, we conclude that petitioner's plan should have been confirmed.

Reversed and remanded.

MR. JUSTICE HARLAN, dissenting.

The result reached by the Court may well be desirable, but in my opinion it is one that cannot be attained under

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[8] We note that the National Bankruptcy Conference has proposed amendments to the Act which are intended to clarify the interrelationship of §§ 14 (c)(5), 656 (a)(3), and 661. The proposed clarification is in accord with our construction of the Act. See H. R. 20, 89th Cong., 1st Sess. (1965). The Judicial Conference, upon request of the Congress, has submitted its views approving the bill. Letter from the Director of the Administrative Office of the United States Courts to the Chairman of the Committee on the Judiciary, House of Representatives (September 29, 1965). See also Report of the Proceedings of the Judicial Conference of the United States, at 68 (September 22–23, 1965).

the present statute within the proper limits of the judicial function.

Chapter XIII of the Bankruptcy Act establishes procedures for the relief of wage earners who are unable to meet their debts as they mature. Two types of procedures are made available: extension plans under which the wage earner's debts are intended to be paid off in full over a period of time, and composition plans under which only a percentage of debts are recoverable. Referring to both types of plans, § 656 of the Bankruptcy Act, 11 U. S. C. § 1056 (1964 ed.), provides that "a plan" shall not be confirmed if the debtor has "been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt . . . ." To ascertain what would be a bar to the discharge of a bankrupt one must turn to § 14 (c), 11 U. S. C. § 32 (c) (1964 ed.), which provides, among other things, that no discharge may be granted if the bankrupt has been granted a previous discharge within six years. § 14 (c)(5). It is undisputed that petitioner here was so discharged, and there is no question but that he would have been refused another discharge in bankruptcy at the time he applied for this extension plan. The statutory scheme thus plainly seems to bar him from obtaining Chapter XIII relief as well.

The process by which the Court has undertaken to release the debtor from the impact of these straightforward statutory provisions seems to me wholly unavailing. The Court's major argument is built upon its reading of the word "guilty" in § 656 (a)(3). As already noted that section denies confirmation to an extension plan if the debtor has been "guilty" of any act that would bar a discharge in bankruptcy. The argument is that since receiving a prior discharge is neither unlawful nor morally reprehensible one cannot be "guilty" of it, and hence that the six-year "discharge" provision cannot be a bar to a Chapter XIII extension plan.

This argument presupposes that the word "guilty" was intentionally used in § 656 in a discriminating sense, that is, to distinguish among those acts catalogued in § 14 (c) which under § 656 would bar confirmation of an extension plan. The fact of the matter is, however, that when Congress in 1938 enacted Chapter XIII, 52 Stat. 930–938, it took as its model the form and language of the prior bankruptcy act, more specifically § 12d, 30 Stat. 550, dealing with compositions.[1] The "guilty" phrase was appropriate in that 1898 statute because at that time the only bars to a discharge in the predecessor of § 14 (c) were offenses punishable by imprisonment or fraudulent concealment. Section 14b, 30 Stat. 550. In 1903, Congress amended § 14b to include the six-year bar, 32 Stat. 797, and over the years other grounds for refusing confirmation have been added to that section. But the word "guilty" was never changed, and has obviously remained in several chapters of the Act merely as a shorthand way of referring back to those items that preclude the granting of a discharge. Thus, Chapter XI of the Bankruptcy Act, which deals with arrangements, has almost an exact duplicate of § 656 (a)(3) containing the same "guilty" phraseology. § 366 (3), 11 U. S. C. § 766 (3) (1964 ed.). Chapter XII, which deals with real property arrangements, contains a similar provision. § 472 (3), 11 U. S. C. § 872 (3) (1964 ed.). And of course Chapter XIII, dealing with *both* compositions and extensions for wage earners, uses this language. These parallel provisions all derive from the same section framed in 1898.

This history and this parallelism indubitably demonstrate two things: first, that the Congress did not devise

[1] "The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge . . . ." § 12d, 30 Stat. 550.

the "guilty" terminology in 1938 as a means of making a subtle distinction between the morally reprehensible bars to bankruptcy contained in § 14 (c) and the other bars there enumerated; and second, that the word "guilty" means the same thing when applied to general arrangements in § 366, to real property arrangements in § 472, and to compositions and extensions in § 656. If the word "guilty" excludes the six-year bar for extension plans, it is impossible to see what sort of statutory interpretative sleight of hand would save it for general arrangements, real property arrangements, and wage-earner composition plans. Moreover, it seems already accepted that as applied to Chapter XI arrangements, the "guilty" provision does refer back to the six-year bar. See *In re Jensen*, 200 F. 2d 58; 9 Collier, Bankruptcy ¶ 9.19, at 310–311 (14th ed. 1964); Kennedy, Hospitality for Repeaters Under the Bankruptcy Act, 68 Com. L. J. 117, 119–120 (1963). The same would appear to be true of the meaning of "guilty" in Chapter XII. See 9 Collier, *supra*, ¶ 9.07, at 1146. And the Court in its present opinion appears to concede that when applied to compositions, § 656 is somehow transformed to include the six-year bar.

In short, construing "guilty" to refer only to "reprehensible" aspects of § 14 (c) has no basis in legislative history, and requires a strained attempt to distinguish other applications of the identical section and of parallel sections which concededly are applied more generally. Because of its ramifications, this construction may do serious harm to the administration of Chapter XIII compositions, Chapter XII real property arrangements, and Chapter XI arrangements.

The Court also advances another argument in support of its conclusion that confirmation of this extension plan was not barred by virtue of §§ 656 and 14 (c). This argument rests essentially on § 602 of the Bankruptcy

Act, 11 U. S. C. § 1002 (1964 ed.). Section 602 provides that the provisions of Chapters I through VII shall apply to Chapter XIII "insofar as they are not inconsistent or in conflict with the provisions of this chapter . . . ." It seems to be said that the six-year bar is inconsistent with the provisions of Chapter XIII because the extension plan is designed to give wage earners relief, and the six-year bar would preclude some such people from receiving that relief without good reason.

This argument likewise does not withstand analysis. To be sure the six-year bar makes it impossible for certain wage earners to get relief by way of extension plans, but so do all the other restrictions on this form of relief. Nobody would suggest that it is "inconsistent" with Chapter XIII to withhold extension-plan relief from those who engage in fraud on the ground that such a restriction cuts down the number of people who can take advantage of Chapter XIII. Section 656 clearly does establish restrictions on the class of people to whom relief is available; the question before us is whether the six-year bar is such a limitation; citation of § 602 is conclusory only, and makes no positive contribution to a meaningful analysis.

My conclusion that the statute should be read literally to preclude the confirmation of an extension plan if the applicant has been granted a discharge within the previous six years is reinforced by § 686 (5) of Chapter XIII, 11 U. S. C. § 1086 (5) (1964 ed.). Section 686 (5) in its entirety declares that "confirmation of a plan under this chapter shall not be refused because of a discharge granted or a composition confirmed prior to the effective date of this amendatory Act." The inclusion of this provision indicates quite clearly that Congress did believe that a prior discharge would be a bar to a Chapter XIII plan, and that it decided to remove that restriction only for discharges granted *before* September 22, 1938, the

effective date of the statute in question. See 10 Collier, *supra,* ¶ 33.05, at 477. Such a provision is perfectly understandable. Before the enactment of the extension-plan amendment, wage earners who sought a bankruptcy remedy could obtain only a discharge through straight bankruptcy or composition. There would be no reason to preclude wage earners who availed themselves of such relief prior to September 1938 from obtaining a more favorable extension plan subsequently. On the other hand, after enactment of Chapter XIII, wage earners would have the opportunity to apply for an extension plan. It is not difficult to understand why Congress should have refused to permit wage earners who chose a discharge in bankruptcy rather than an extension plan a second opportunity, within six years, to receive statutory relief. I am frank to say that I am unable to perceive the basis for the Court's contrary explanation of this provision.

The short of the matter is that the Court's arguments do not support the conclusion it reaches. The conclusion is of course supportable as a legislative judgment, even though arguments can be made for both sides. Thus, it might be argued for the six-year bar in a Chapter XIII context somewhat as follows: the wage-earner extension plan is a new and very advantageous procedure for the debtor, but it is a burden on the courts. It is also a constraint on creditors who will be delayed in collecting, will be precluded from garnishing, and may not receive full repayment if the debtor obtains a discharge under § 661 of the Act, 11 U. S. C. § 1061 (1964 ed.). It is therefore reasonable to limit the availability of this kind of relief to those wage earners who have not had the advantage of a discharge in bankruptcy in the previous six years. Furthermore, it is certainly arguable that the six-year bar encourages wage earners to make use of the Chapter XIII procedure. With the prior-discharge bar eliminated, a

debtor might eschew an extension plan and decide instead to go through straight bankruptcy first, waiting a few months until the going once again "gets tough" to take advantage of the extension plan.

I venture considerations such as these not as overcoming the countervailing ones relied on by the Court, and heretofore espoused by others,[2] but simply to point up the fact that this is not one of those cases where seemingly straightforward statutory language must yield its literal meaning to a contrary congressional intent. What we have here are but two contrasting legislative policies, wherein the Court's duty is to take the statute as it is presently plainly written.

I would affirm the judgment of the Court of Appeals.

[2] See the proposed amendments of the Bankruptcy Act by the National Bankruptcy Conference, note 8, *ante*, p. 404; Kennedy, Hospitality for Repeaters Under the Bankruptcy Act, 68 Com. L. J. 117 (1963).

UNITED TRANSPORTS, INC., ET AL. *v.* UNITED STATES ET AL.

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

No. 868. Decided March 7, 1966.

245 F. Supp. 561, 570, affirmed.

James W. Wrape, Robert E. Joyner and *Reagan Sayers* for appellants.

Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and *Robert S. Burk* for the United States et al.; *Paul F. Sullivan* for Kenosha Auto Transport Corp., and *Donald W. Smith* for Commercial Carriers, Inc., appellees.

PER CURIAM.

The motions to affirm are granted and the judgments are affirmed.

CIESIELSKI *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 920. Decided March 7, 1966.

Appeal dismissed and certiorari denied.

Theodore R. Saker for appellant.

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.

SOCIEDAD DE MARIO MERCADO E HIJOS *v.* PUERTO RICO.

APPEAL FROM THE SUPREME COURT OF PUERTO RICO.

No. 786. Decided March 7, 1966.

Appeal dismissed and certiorari denied.

Pedro M. Porrata and *Charles Cuprill Oppenheimer* for appellant.

J. B. Fernandez Badillo, Solicitor General of Puerto Rico, and *Irene Curbelo,* Assistant Solicitor 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.

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

Syllabus.

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" ET AL. *v.* ATTORNEY GENERAL OF MASSACHUSETTS.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 368. Argued December 7–8, 1965.—Decided March 21, 1966.

Appellee, the Attorney General of Massachusetts, brought this civil equity action for an adjudication of obscenity of Cleland's *Memoirs of a Woman of Pleasure* (*Fanny Hill*), and appellant publisher intervened. Following a hearing, including expert testimony and other evidence, assessing the book's character but not the mode of distribution, the trial court decreed the book obscene and not entitled to the protection of the First and Fourteenth Amendments. The Massachusetts Supreme Judicial Court affirmed, holding that a patently offensive book which appeals to prurient interest need not be unqualifiedly worthless before it can be deemed obscene. *Held:* The judgment is reversed. Pp. 415–433.

349 Mass. 69, 206 N. E. 2d 403, reversed.

MR. JUSTICE BRENNAN, joined by THE CHIEF JUSTICE and MR. JUSTICE FORTAS, concluded that:

1. Under the test in *Roth* v. *United States*, 354 U. S. 476, as elaborated in subsequent cases, each of three elements must independently be satisfied before a book can be held obscene: (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value. P. 418.

2. Since a book cannot be proscribed as obscene unless found to be *utterly* without redeeming social value, the Supreme Judicial Court erroneously interpreted the federal constitutional standard. Pp. 419–420.

3. On the premise, not assessed here, that it has the requisite prurient appeal, is patently offensive, and has only a modicum of social importance, evidence of commercial exploitation of the book for the sake of prurient appeal to the exclusion of all other values

might in a different proceeding justify the conclusion that the publication and distribution of *Memoirs* was not constitutionally protected. *Ginzburg* v. *United States, post,* p. 463. Pp. 420–421.

MR. JUSTICE BLACK and MR. JUSTICE STEWART concur in the reversal for the reasons given in their respective dissenting opinions in *Ginzburg* v. *United States, post,* p. 476 and p. 497 and *Mishkin* v. *New York, post,* p. 515 and p. 518. P. 421.

MR. JUSTICE DOUGLAS concluded that:

1. Since the First Amendment forbids censorship of expression of ideas not linked with illegal action, *Fanny Hill* cannot be proscribed. Pp. 426; 427–433.

2. Even under the prevailing view of the *Roth* test the book cannot be held to be obscene in view of substantial evidence showing that it has literary, historical, and social importance. P. 426.

3. Since there is no power under the First Amendment to control mere expression, the manner in which a book that concededly has social worth is advertised and sold is irrelevant. P. 427.

4. There is no basis in history for the view expressed in *Roth* that "obscene" speech is "outside" the protection of the First Amendment. Pp. 428–431.

5. No interest of society justifies overriding the guarantees of free speech and press and establishing a regime of censorship. Pp. 431–433.

Charles Rembar argued the cause and filed briefs for appellants.

William I. Cowin, Assistant Attorney General of Massachusetts, argued the cause for appellee. With him on the brief were *Edward W. Brooke,* Attorney General, and *John E. Sullivan,* Assistant Attorney General.

Charles H. Keating, Jr., and *James J. Clancy* filed a brief for Citizens for Decent Literature, Inc., et al., as *amici curiae,* urging affirmance.

MR. JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and MR. JUSTICE FORTAS join.

This is an obscenity case in which *Memoirs of a Woman of Pleasure* (commonly known as *Fanny Hill*), written by John Cleland in about 1750, was adjudged obscene in a proceeding that put on trial the book itself, and not its publisher or distributor. The proceeding was a civil equity suit brought by the Attorney General of Massachusetts, pursuant to General Laws of Massachusetts, Chapter 272, §§ 28C–28H, to have the book declared obscene.[1] Section 28C requires that the petition commencing the suit be "directed against [the] book by name" and that an order to show cause "why said book should not be judicially determined to be obscene" be published in a daily newspaper and sent by registered mail "to all persons interested in the publication." Publication of the order in this case occurred in a Boston daily newspaper, and a copy of the order was sent by registered mail to G. P. Putnam's Sons, alleged to be the publisher and copyright holder of the book.

As authorized by § 28D, G. P. Putnam's Sons intervened in the proceedings in behalf of the book, but it did not claim the right provided by that section to have the issue of obscenity tried by a jury. At the hearing before a justice of the Superior Court, which was conducted, under § 28F, "in accordance with the usual course of proceedings in equity," the court received the book in evidence and also, as allowed by the section, heard the testimony of experts[2] and accepted other evidence, such

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[1] The text of the statute appears in the Appendix.

[2] In dissenting from the Supreme Judicial Court's disposition in this case, 349 Mass. 69, 74–75, 206 N. E. 2d 403, 406–407 (1965), Justice Whittemore summarized this testimony:

"In the view of one or another or all of the following viz., the chairman of the English department at Williams College, a professor of English at Harvard College, an associate professor of English literature at Boston University, an associate professor of English at Massachusetts Institute of Technology, and an assistant

as book reviews, in order to assess the literary, cultural, or educational character of the book. This constituted the entire evidence, as neither side availed itself of the

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professor of English and American literature at Brandeis University, the book is a minor 'work of art' having 'literary merit' and 'historical value' and containing a good deal of 'deliberate, calculated comedy.' It is a piece of 'social history of interest to anyone who is interested in fiction as a way of understanding society in the past.' [1] A saving grace is that although many scenes, if translated

"[1] One of the witnesses testified in part as follows: 'Cleland is part of what I should call this cultural battle that is going on in the 18th century, a battle between a restricted Puritan, moralistic ethic that attempts to suppress freedom of the spirit, freedom of the flesh, and this element is competing with a freer attitude towards life, a more generous attitude towards life, a more wholesome attitude towards life, and this very attitude that is manifested in Fielding's great novel "Tom Jones" is also evident in Cleland's novel. . . . [Richardson's] "Pamela" is the story of a young country girl; [his] "Clarissa" is the story of a woman trapped in a house of prostitution. Obviously, then Cleland takes both these themes, the country girl, her initiation into life and into experience, and the story of a woman in a house of prostitution, and what he simply does is to take the situation and reverse the moral standards. Richardson believed that chastity was the most important thing in the world; Cleland and Fielding obviously did not and thought there were more important significant moral values.' "

into the present day language of 'the realistic, naturalistic novel, could be quite offensive' these scenes are not described in such language. The book contains no dirty words and its language 'functions . . . to create a distance, even when the sexual experiences are portrayed.' The response, therefore, is a literary response. The descriptions of depravity are not obscene because 'they are subordinate to an interest which is primarily literary'; Fanny's reaction to the scenes of depravity was 'anger,' 'disgust, horror, [and] indignation.' The book 'belongs to the history of English literature rather than the history of smut.' [2] "

"[2] In the opinion of the other academic witness, the headmaster of a private school, whose field is English literature, the book is without literary merit and is obscene, impure, hard core pornography, and is patently offensive."

opportunity provided by the section to introduce evidence "as to the manner and form of its publication, advertisement, and distribution." [3] The trial justice entered a final decree, which adjudged *Memoirs* obscene and declared that the book "is not entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States against action by the Attorney General or other law enforcement officer pursuant to the provisions of . . . § 28B, or otherwise." [4] The Massachusetts Supreme Judicial Court affirmed the decree. 349 Mass. 69, 206 N. E. 2d 403 (1965). We noted probable jurisdiction. 382 U. S. 900. We reverse.[5]

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[3] The record in this case is thus significantly different from the records in *Ginzburg* v. *United States, post,* p. 463, and *Mishkin* v. *New York, post,* p. 502. See pp. 420–421, *infra.*

[4] Section 28B makes it a criminal offense, *inter alia,* to import, print, publish, sell, loan, distribute, buy, procure, receive, or possess for the purpose of sale, loan, or distribution, "a book, knowing it to be obscene." Section 28H provides that in any prosecution under § 28B the decree obtained in a proceeding against the book "shall be admissible in evidence" and further that "[i]f prior to the said offence a final decree had been entered against the book, the defendant, if the book be obscene . . . shall be conclusively presumed to have known said book to be obscene . . . ." Thus a declaration of obscenity such as that obtained in this proceeding is likely to result in the total suppression of the book in the Commonwealth.

The constitutionality of § 28H has not been challenged in this appeal.

[5] Although the final decree provides no coercive relief but only a declaration of the book's obscenity, our adjudication of the merits of the issue tendered, viz., whether the state courts erred in declaring the book obscene, is not premature. There is no uncertainty as to the content of the material challenged, and the Attorney General's petition commencing this suit states that the book "is being imported, sold, loaned, or distributed in the Commonwealth." The declaration of obscenity is likely to have a serious inhibitory effect on the distribution of the book, and this probable impact is to no small measure derived from possible collateral uses of the declaration in subsequent prosecutions under the Massachusetts criminal obscenity statute. See n. 4, *supra.*

I.

The term "obscene" appearing in the Massachusetts statute has been interpreted by the Supreme Judicial Court to be as expansive as the Constitution permits: the "statute covers all material that is obscene in the constitutional sense." *Attorney General* v. *The Book Named "Tropic of Cancer,"* 345 Mass. 11, 13, 184 N. E. 2d 328, 330 (1962). Indeed, the final decree before us equates the finding that *Memoirs* is obscene within the meaning of the statute with the declaration that the book is not entitled to the protection of the First Amendment.[6] Thus the sole question before the state courts was whether *Memoirs* satisfies the test of obscenity established in *Roth* v. *United States,* 354 U. S. 476.

We defined obscenity in *Roth* in the following terms: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U. S., at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

The Supreme Judicial Court purported to apply the *Roth* definition of obscenity and held all three criteria satisfied. We need not consider the claim that the court erred in concluding that *Memoirs* satisfied the prurient

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[6] We infer from the opinions below that the other adjectives describing the proscribed books in §§ 28C–28H, "indecent" and "impure," have either been read out of the statute or deemed synonymous with "obscene."

appeal and patent offensiveness criteria; for reversal is required because the court misinterpreted the social value criterion. The court applied the criterion in this passage:

> "It remains to consider whether the book can be said to be 'utterly without social importance.' We are mindful that there was expert testimony, much of which was strained, to the effect that Memoirs is a structural novel with literary merit; that the book displays a skill in characterization and a gift for comedy; that it plays a part in the history of the development of the English novel; and that it contains a moral, namely, that sex with love is superior to sex in a brothel. But the fact that the testimony may indicate this book has some minimal literary value does not mean it is of any social importance. We do not interpret the 'social importance' test as requiring that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene." 349 Mass., at 73, 206 N. E. 2d, at 406.

The Supreme Judicial Court erred in holding that a book need not be "unqualifiedly worthless before it can be deemed obscene." A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness.[7] Hence,

[7] "[M]aterial dealing with sex in a manner that advocates ideas . . . or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be pro-

even on the view of the court below that *Memoirs* possessed only a modicum of social value, its judgment must be reversed as being founded on an erroneous interpretation of a federal constitutional standard.

II.

It does not necessarily follow from this reversal that a determination that *Memoirs* is obscene in the constitutional sense would be improper under all circumstances. On the premise, which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance. It is not that in such a setting the social value test is relaxed so as to dispense with the requirement that a book be *utterly* devoid of social value, but rather that, as we elaborate in *Ginzburg* v. *United States, post,* pp. 470–473, where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value. In this proceeding, however, the courts were asked to judge the obscenity of *Memoirs* in the abstract, and the declaration of obscenity was neither aided nor limited by a specific set of circumstances of production, sale, and pub-

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scribed unless it is 'utterly' without social importance. See *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 920, 383 P. 2d 152, 165, 31 Cal. Rptr. 800, 813 (1963)." *Jacobellis* v. *Ohio,* 378 U. S. 184, 191 (opinion of BRENNAN, J.). Followed in, *e. g., People* v. *Bruce,* 31 Ill. 2d 459, 461, 202 N. E. 2d 497, 498 (1964); *Trans-Lux Distributing Corp.* v. *Maryland Bd. of Censors,* 240 Md. 98, 104–105, 213 A. 2d 235, 238–239 (1965).

licity.[8] All possible uses of the book must therefore be considered, and the mere risk that the book might be exploited by panderers because it so pervasively treats sexual matters cannot alter the fact—given the view of the Massachusetts court attributing to *Memoirs* a modicum of literary and historical value—that the book will have redeeming social importance in the hands of those who publish or distribute it on the basis of that value.

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE STEWART concur in the reversal for the reasons stated in their respective dissenting opinions in *Ginzburg* v. *United States*, *post*, p. 476 and p. 497, and *Mishkin* v. *New York*, *post*, p. 515 and p. 518.

APPENDIX TO OPINION OF MR. JUSTICE BRENNAN.

STATE STATUTE.

MASSACHUSETTS GENERAL LAWS, CHAPTER 272.

. . . . .

SECTION 28B. Whoever imports, prints, publishes, sells, loans or distributes, or buys, procures, receives, or

[8] In his dissenting opinion, 349 Mass., at 76–78, 206 N. E. 2d, at 408–409, Justice Cutter stated that, although in his view the book was not "obscene" within the meaning of *Roth*, "it could reasonably be found that distribution of the book to persons under the age of eighteen would be a violation of G. L. c. 272, § 28, as tending to corrupt the morals of youth." (Section 28 makes it a crime to sell to "a person under the age of eighteen years a book . . . which is obscene . . . or manifestly tends to corrupt the morals of youth.") He concluded that the court should "limit the relief granted to a declaration that distribution of this book to persons under the age of eighteen may be found to constitute a violation of [G. L.] c. 272, § 28, if that section is reasonably applied . . . ." However, the decree was not so limited and we intimate no view concerning the constitutionality of such a limited declaration regarding *Memoirs*. Cf. *Jacobellis* v. *Ohio*, 378 U. S., at 195.

has in his possession for the purpose of sale, loan or distribution, a book, knowing it to be obscene, indecent or impure, or whoever, being a wholesale distributor, a jobber, or publisher sends or delivers to a retail storekeeper a book, pamphlet, magazine or other form of printed or written material, knowing it to be obscene, indecent or impure, which said storekeeper had not previously ordered in writing, specifying the title and quantity of such publication he desired, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction.

SECTION 28C. Whenever there is reasonable cause to believe that a book which is being imported, sold, loaned or distributed, or is in the possession of any person who intends to import, sell, loan or distribute the same, is obscene, indecent or impure, the attorney general, or any district attorney within his district, shall bring an information or petition in equity in the superior court directed against said book by name. Upon the filing of such information or petition in equity, a justice of the superior court shall, if, upon a summary examination of the book, he is of opinion that there is reasonable cause to believe that such book is obscene, indecent or impure, issue an order of notice, returnable in or within thirty days, directed against such book by name and addressed to all persons interested in the publication, sale, loan or distribution thereof, to show cause why said book should not be judicially determined to be obscene, indecent or impure. Notice of such order shall be given by publication once each week for two successive weeks in a daily newspaper published in the city of Boston and, if such information or petition be filed in any county other than

Suffolk county, then by publication also in a daily newspaper published in such other county. A copy of such order of notice shall be sent by registered mail to the publisher of said book, to the person holding the copyrights, and to the author, in case the names of any such persons appear upon said book, fourteen days at least before the return day of such order of notice. After the issuance of an order of notice under the provisions of this section, the court shall, on motion of the attorney general or district attorney, make an interlocutory finding and adjudication that said book is obscene, indecent or impure, which finding and adjudication shall be of the same force and effect as the final finding and adjudication provided in section twenty-eight E or section twenty-eight F, but only until such final finding and adjudication is made or until further order of the court.

SECTION 28D. Any person interested in the sale, loan or distribution of said book may appear and file an answer on or before the return day named in said notice or within such further time as the court may allow, and may claim a right to trial by jury on the issue whether said book is obscene, indecent or impure.

SECTION 28E. If no person appears and answers within the time allowed, the court may at once upon motion of the petitioner, or of its own motion, no reason to the contrary appearing, order a general default and if the court finds that the book is obscene, indecent or impure, may make an adjudication against the book that the same is obscene, indecent and impure.

SECTION 28F. If an appearance is entered and answer filed, the case shall be set down for speedy hearing, but a default and order shall first be entered against all persons who have not appeared and answered, in the manner provided in section twenty-eight E. Such hearing shall be conducted in accordance with the usual course of proceedings in equity including all rights of exception and

appeal. At such hearing the court may receive the testimony of experts and may receive evidence as to the literary, cultural or educational character of said book and as to the manner and form of its publication, advertisement, and distribution. Upon such hearing, the court may make an adjudication in the manner provided in said section twenty-eight E.

SECTION 28G. An information or petition in equity under the provisions of section twenty-eight C shall not be open to objection on the ground that a mere judgment, order or decree is sought thereby and that no relief is or could be claimed thereunder on the issue of the defendant's knowledge as to the obscenity, indecency or impurity of the book.

SECTION 28H. In any trial under section twenty-eight B on an indictment found or a complaint made for any offence committed after the filing of a proceeding under section twenty-eight C, the fact of such filing and the action of the court or jury thereon, if any, shall be admissible in evidence. If prior to the said offence a final decree had been entered against the book, the defendant, if the book be obscene, indecent or impure, shall be conclusively presumed to have known said book to be obscene, indecent or impure, or if said decree had been in favor of the book he shall be conclusively presumed not to have known said book to be obscene, indecent or impure, or if no final decree had been entered but a proceeding had been filed prior to said offence, the defendant shall be conclusively presumed to have had knowledge of the contents of said book.

MR. JUSTICE DOUGLAS, concurring in the judgment.

Memoirs of a Woman of Pleasure, or, as it is often titled, *Fanny Hill,* concededly is an erotic novel. It was first published in about 1749 and has endured to this

date, despite periodic efforts to suppress it.[1] The book relates the adventures of a young girl who becomes a prostitute in London. At the end, she abandons that life and marries her first lover, observing:

> "Thus, at length, I got snug into port, where, in the bosom of virtue, I gather'd the only uncorrupt sweets: where, looking back on the course of vice I had run, and comparing its infamous blandishments with the infinitely superior joys of innocence, I could not help pitying, even in point of taste, those who, immers'd in gross sensuality, are insensible to the so delicate charms of VIRTUE, than which even PLEASURE has not a greater friend, nor than VICE a greater enemy. Thus temperance makes men lords over those pleasures that intemperance enslaves them to: the one, parent of health, vigour, fertility, cheerfulness, and every other desirable good of life; the other, of diseases, debility, barrenness, self-loathing, with only every evil incident to human nature.
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> ". . . The paths of Vice are sometimes strew'd with roses, but then they are for ever infamous for many a thorn, for many a cankerworm: those of Virtue are strew'd with roses purely, and those eternally unfading ones." [2]

In 1963, an American publishing house undertook the publication of *Memoirs*. The record indicates that an unusually large number of orders were placed by universities and libraries; the Library of Congress requested the

[1] *Memoirs* was the subject of what is generally regarded as the first recorded suppression of a literary work in this country on grounds of obscenity. See *Commonwealth* v. *Holmes*, 17 Mass. 336 (1821). The edition there condemned differed from the present volume in that it contained apparently erotic illustrations.

[2] *Memoirs*, at 213–214 (Putnam ed. 1963).

right to translate the book into Braille. But the Commonwealth of Massachusetts instituted the suit that ultimately found its way here, praying that the book be declared obscene so that the citizens of Massachusetts might be spared the necessity of determining for themselves whether or not to read it.

The courts of Massachusetts found the book "obscene" and upheld its suppression. This Court reverses, the prevailing opinion having seized upon language in the opinion of the Massachusetts Supreme Judicial Court in which it is candidly admitted that *Fanny Hill* has at least "some minimal literary value." I do not believe that the Court should decide this case on so disingenuous a basis as this. I base my vote to reverse on my view that the First Amendment does not permit the censorship of expression not brigaded with illegal action. But even applying the prevailing view of the *Roth* test, reversal is compelled by this record which makes clear that *Fanny Hill* is not "obscene." The prosecution made virtually no effort to prove that this book is "utterly without redeeming social importance." The defense, on the other hand, introduced considerable and impressive testimony to the effect that this was a work of literary, historical, and social importance.[3]

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[3] The defense drew its witnesses from the various colleges located within the Commonwealth of Massachusetts. These included: Fred Holly Stocking, Professor of English and Chairman of the English Department, Williams College; John M. Bullitt, Professor of English and Master of Quincy House, Harvard College; Robert H. Sproat, Associate Professor of English Literature, Boston University; Norman N. Holland, Associate Professor of English, Massachusetts Institute of Technology; and Ira Konigsberg, Assistant Professor of English and American Literature, Brandeis University.

In addition, the defense introduced into evidence reviews of impartial literary critics. These are, in my opinion, of particular significance since their publication indicates that the book is of sufficient significance as to warrant serious critical comment. The

We are judges, not literary experts or historians or philosophers. We are not competent to render an independent judgment as to the worth of this or any other book, except in our capacity as private citizens. I would pair my Brother CLARK on *Fanny Hill* with the Universalist minister I quote in the Appendix. If there is to be censorship, the wisdom of experts on such matters as literary merit and historical significance must be evaluated. On this record, the Court has no choice but to reverse the judgment of the Massachusetts Supreme Judicial Court, irrespective of whether we would include *Fanny Hill* in our own libraries.

Four of the seven Justices of the Massachusetts Supreme Judicial Court conclude that *Fanny Hill* is obscene. 349 Mass. 69, 206 N. E. 2d 403. Four of the seven judges of the New York Court of Appeals conclude that it is not obscene. *Larkin* v. *Putnam's Sons*, 14 N. Y. 2d 399, 200 N. E. 2d 760. To outlaw the book on such a voting record would be to let majorities rule where minorities were thought to be supreme. The Constitution forbids abridgment of "freedom of speech, or of the press." Censorship is the most notorious form of abridgment. It substitutes majority rule where minority tastes or viewpoints were to be tolerated.

It is to me inexplicable how a book that concededly has social worth can nonetheless be banned because of the manner in which it is advertised and sold. However florid its cover, whatever the pitch of its advertisements, the contents remain the same.

Every time an obscenity case is to be argued here, my office is flooded with letters and postal cards urging me

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reviews were by V. S. Pritchett, New York Review of Books, p. 1 (Oct. 31, 1963); Brigid Brophy, New Statesman, p. 710 (Nov. 15, 1963); and J. Donald Adams, New York Times Book Review, p. 2 (July 28, 1963). And the Appendix to this opinion contains another contemporary view.

to protect the community or the Nation by striking down the publication. The messages are often identical even down to commas and semicolons. The inference is irresistible that they were all copied from a school or church blackboard. Dozens of postal cards often are mailed from the same precinct. The drives are incessant and the pressures are great. Happily we do not bow to them. I mention them only to emphasize the lack of popular understanding of our constitutional system. Publications and utterances were made immune from majoritarian control by the First Amendment, applicable to the States by reason of the Fourteenth. No exceptions were made, not even for obscenity. The Court's contrary conclusion in *Roth,* where obscenity was found to be "outside" the First Amendment, is without justification.

The extent to which the publication of "obscenity" was a crime at common law is unclear. It is generally agreed that the first reported case involving obscene conduct is *The King* v. *Sir Charles Sedley.*[4] Publication of obscene literature, at first thought to be the exclusive concern of the ecclesiastical courts,[5] was not held to constitute an indictable offense until 1727.[6] A later case involved the publication of an "obscene and

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[4] There are two reports of the case. The first is captioned *Le Roy* v. *Sr. Charles Sidney,* 1 Sid. 168, pl. 29 (K. B. 1663); the second is titled *Sir Charles Sydlyes Case,* 1 Keble 620 (K. B. 1663). Sir Charles had made a public appearance on a London balcony while nude, intoxicated, and talkative. He delivered a lengthy speech to the assembled crowd, uttered profanity, and hurled bottles containing what was later described as an "offensive liquor" upon the crowd. The proximate source of the "offensive liquor" appears to have been Sir Charles. Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40–43 (1938).

[5] *The Queen* v. *Read,* 11 Mod. 142 (Q. B. 1707).

[6] *Dominus Rex* v. *Curl,* 2 Strange 789 (K. B. 1727). See Straus, The Unspeakable Curll (1927).

impious libel" (a bawdy parody of Pope's "Essay on Man") by a member of the House of Commons.[7] On the basis of these few cases, one cannot say that the common-law doctrines with regard to publication of obscenity were anything but uncertain. "There is no definition of the term. There is no basis of identification. There is no unity in describing what is obscene literature, or in prosecuting it. There is little more than the ability to smell it." Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40, 47 (1938).

But even if the common law had been more fully developed at the time of the adoption of the First Amendment, we would not be justified in assuming that the Amendment left the common law unscathed. In *Bridges* v. *California,* 314 U. S. 252, 264, we said:

> "[T]o assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.' Schofield, *Freedom of the Press in the United States,* 9 Publications Amer. Sociol. Soc., 67, 76.
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> "More specifically, it is to forget the environment in which the First Amendment was ratified. In presenting the proposals which were later embodied in the Bill of Rights, James Madison, the leader in the preparation of the First Amendment, said: 'Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body [Parliament],

[7] *Rex* v. *Wilkes,* 4 Burr. 2527 (K. B. 1770). The prosecution of Wilkes was a highly political action, for Wilkes was an outspoken critic of the government. See R. W. Postgate, That Devil Wilkes (1929). It has been suggested that the prosecution in this case was a convenient substitute for the less attractive charge of seditious libel. See Alpert, *supra,* at 45.

> the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution.' "

And see *Grosjean* v. *American Press Co.*, 297 U. S. 233, 248–249.

It is true, as the Court observed in *Roth,* that obscenity laws appeared on the books of a handful of States at the time the First Amendment was adopted.[8] But the First Amendment was, until the adoption of the Fourteenth, a restraint only upon federal power. Moreover, there is an absence of any *federal* cases or laws relative to obscenity in the period immediately after the adoption of the First Amendment. Congress passed no legislation relating to obscenity until the middle of the nineteenth century.[9] Neither reason nor history warrants exclusion of any particular class of expression from the protection of the First Amendment on nothing more than a judgment that it is utterly without merit. We faced the difficult questions the First Amendment poses with regard to libel in *New York Times* v. *Sullivan,*

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[8] See 354 U. S., at 483 and n. 13. For the most part, however, the early legislation was aimed at blasphemy and profanity. See 354 U. S., at 482–483 and n. 12. The first reported decision involving the publication of obscene literature does not come until 1821. See *Commonwealth* v. *Holmes,* 17 Mass. 336. It was not until after the Civil War that state prosecutions of this sort became commonplace. See Lockhart & McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295, 324–325 (1954).

[9] Tariff Act of 1842, c. 270, § 28, 5 Stat. 566 (prohibiting importation of obscene "prints"). Other federal legislation followed; the development of federal law is traced in Cairns, Paul, & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009, 1010 n. 2 (1962).

376 U. S. 254, 269, where we recognized that "libel can claim no talismanic immunity from constitutional limitations." We ought not to permit fictionalized assertions of constitutional history to obscure those questions here. Were the Court to undertake that inquiry, it would be unable, in my opinion, to escape the conclusion that no interest of society with regard to suppression of "obscene" literature could override the First Amendment to justify censorship.

The censor is always quick to justify his function in terms that are protective of society. But the First Amendment, written in terms that are absolute, deprives the States of any power to pass on the value, the propriety, or the morality of a particular expression. Cf. *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S. 684, 688–689; *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495. Perhaps the most frequently assigned justification for censorship is the belief that erotica produce antisocial sexual conduct. But that relationship has yet to be proven.[10] Indeed, if one were to make judgments on the

[10] See Cairns, Paul & Wishner, *supra,* 1034–1041; Lockhart & McClure, *supra,* at 382–387. And see the summary of Dr. Jahoda's studies prepared by her for Judge Frank, reprinted in *United States* v. *Roth,* 237 F. 2d 796, 815–816 (concurring opinion). Those who are concerned about children and erotic literature would do well to consider the counsel of Judge Bok:

"It will be asked whether one would care to have one's young daughter read these books. I suppose that by the time she is old enough to wish to read them she will have learned the biologic facts of life and the words that go with them. There is something seriously wrong at home if those facts have not been met and faced and sorted by then; it is not children so much as parents that should receive our concern about this. I should prefer that my own three daughters meet the facts of life and the literature of the world in my library than behind a neighbor's barn, for I can face the adversary there directly. If the young ladies are appalled by what they read, they can close the book at the bottom of page one; if they read further, they will learn what is in the world and in its

basis of speculation, one might guess that literature of the most pornographic sort would, in many cases, provide a substitute—not a stimulus—for antisocial sexual conduct. See Murphy, The Value of Pornography, 10 Wayne L. Rev. 655, 661 and n. 19 (1964). As I read the First Amendment, judges cannot gear the literary diet of an entire nation to whatever tepid stuff is incapable of triggering the most demented mind. The First Amendment demands more than a horrible example or two of the perpetrator of a crime of sexual violence, in whose pocket is found a pornographic book, before it allows the Nation to be saddled with a regime of censorship.[11]

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people, and no parents who have been discerning with their children need fear the outcome. Nor can they hold it back, for life is a series of little battles and minor issues, and the burden of choice is on us all, every day, young and old." *Commonwealth* v. *Gordon*, 66 Pa. D. & C. 101, 110.

[11] It would be a futile effort even for a censor to attempt to remove all that might possibly stimulate antisocial sexual conduct:

"The majority [of individuals], needless to say, are somewhere between the over-scrupulous extremes of excitement and frigidity . . . . Within this variety, it is impossible to define 'hard-core' pornography, as if there were some singly lewd concept from which all profane ideas passed by imperceptible degrees into that sexuality called holy. But there is no 'hard-core.' Everything, every idea, is capable of being obscene if the personality perceiving it so apprehends it.

"It is for this reason that books, pictures, charades, ritual, the spoken word, *can* and *do* lead directly to conduct harmful to the self indulging in it and to others. Heinrich Pommerenke, who was a rapist, abuser, and mass slayer of women in Germany, was prompted to his series of ghastly deeds by Cecil B. DeMille's *The Ten Commandments*. During the scene of the Jewish women dancing about the Golden Calf, all the doubts of his life came clear: Women were the source of the world's trouble and it was his mission to both punish them for this and to execute them. Leaving the theater, he slew his first victim in a park nearby. John George Haigh, the British vampire who sucked his victims' blood through soda straws and dissolved

Whatever may be the reach of the power to regulate *conduct,* I stand by my view in *Roth* v. *United States, supra,* that the First Amendment leaves no power in government over *expression of ideas.*

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS, CONCURRING.

DR. PEALE AND FANNY HILL.

An Address by

Rev. John R. Graham, First Universalist Church of Denver.

December 1965.

. . . . . .

At the present point in the twentieth century, it seems to me that there are two books which symbolize the human quest for what is moral. *Sin, Sex and Self-Control* by Dr. Norman Vincent Peale, the well-known clergyman of New York City, portrays the struggle of contemporary middle-class society to arrive at a means of stabilizing behavior patterns. At the same time, there is a disturbing book being sold in the same stores with Dr. Peale's volume. It is a seventeenth century English novel by John Cleland and it is known as *Fanny Hill: The Memoirs of a Woman of Pleasure.*

Quickly, it must be admitted that it appears that the two books have very little in common. One was written in a day of scientific and technological sophistication, while the other is over two hundred years old. One is acclaimed in the pulpit, while the other is protested before the United States Supreme Court. *Sin, Sex and Self-Control* is authored by a Christian pastor, while

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their drained bodies in acid baths, first had his murder-inciting dreams and vampire-longings from watching the 'voluptuous' procedure of—an Anglican High Church Service!" Murphy, *supra,* at 668.

Fanny Hill represents thoughts and experiences of a common prostitute. As far as the general public seems to be concerned, one is moral and the other is hopelessly immoral. While Dr. Peale is attempting to redeem the society, most people believe that *Fanny Hill* can only serve as another instance in an overall trend toward an immoral social order. Most parents would be pleased to find their children reading a book by Dr. Peale, but I am afraid that the same parents would be sorely distressed to discover a copy of *Fanny Hill* among the school books of their offspring.

Although one would not expect to find very many similarities between the thoughts of a pastor and those of a prostitute, the subject matter of the two books is, in many ways, strangely similar. While the contents are radically different, the concerns are the same. Both authors deal with human experience. They are concerned with people and what happens to them in the world in which they live each day. But most significantly of all, both books deal with the age-old question of "What is moral?" I readily admit that this concern with the moral is more obvious in Dr. Peale's book than it is in the one by John Cleland. The search for the moral in *Fanny Hill* is clothed in erotic passages which seem to equate morality with debauchery as far as the general public is concerned. At the same time, Dr. Peale's book is punctuated with such noble terms as "truth," "love," and "honesty."

These two books are not very important in themselves. They may or may not be great literature. Whether they will survive through the centuries to come is a question, although John Cleland has an historical edge on Norman Vincent Peale! However, in a symbolic way they do represent the struggle of the moral quest and for this reason they are important.

Dr. Peale begins his book with an analysis of contemporary society in terms of the moral disorder which is more than obvious today. He readily admits that the traditional Judeo-Christian standards of conduct and behavior no longer serve as strong and forceful guides. He writes:

> "For more than forty years, ever since my ordination, I had been preaching that if a person would surrender to Jesus Christ and adopt strong affirmative attitudes toward life he would be able to live abundantly and triumphantly. I was still absolutely convinced that this was true. But I was also bleakly aware that the whole trend in the seventh decade of the twentieth century seemed to be away from the principles and practices of religion—not toward them." (Page 1.)

Dr. Peale then reflects on the various changes that have taken place in our day and suggests that although he is less than enthusiastic about the loss of allegiance to religion, he is, nevertheless, willing to recognize that one cannot live by illusion.

After much struggle, Dr. Peale then says that he was able to develop a new perspective on the current moral dilemma of our times. What first appeared to be disaster was really opportunity. Such an idea, coming from him, should not be very surprising, since he is more or less devoted to the concept of "positive thinking!" He concludes that our society should welcome the fact that the old external authorities have fallen. He does not believe that individuals should ever be coerced into certain patterns of behavior.

According to Dr. Peale, we live in a day of challenge. Our society has longed for a time when individuals would be disciplined by self-control, rather than being motivated by external compunction. Bravely and forth-

rightly, he announces that the time has now come when self-control can and must replace external authority. He is quick to add that the values contained in the Judeo-Christian tradition and "the American way of life" must never be abandoned for they emanate from the wellsprings of "Truth." What has previously been only an external force must now be internalized by individuals.

In many ways, Dr. Peale's analysis of the social situation and the solution he offers for assisting the individual to stand against the pressures of the times, come very close to the views of Sigmund Freud. He felt that society could and would corrupt the individual and, as a result, the only sure defense was a strong super-ego or conscience. This is precisely what Dr. Peale recommends.

Interestingly enough John Cleland, in *Fanny Hill,* is concerned with the same issues. Although the question of moral behavior is presented more subtly in his book, the problem with which he deals is identical. There are those who contend that the book is wholly without redeeming social importance. They feel that it appeals only to prurient interests.

I firmly believe that *Fanny Hill* is a moral, rather than an immoral, piece of literature. In fact, I will go as far as to suggest that it represents a more significant view of morality than is represented by Dr. Peale's book *Sin, Sex and Self-Control.* As is Dr. Peale, Cleland is concerned with the nature of the society and the relationship of the individual to it. *Fanny Hill* appears to me to be an allegory. In the story, the immoral becomes the moral and the unethical emerges as the ethical. Nothing is more distressing than to discover that what is commonly considered to be evil may, in reality, demonstrate characteristics of love and concern.

There is real irony in the fact that Fanny Hill, a rather naive young girl who becomes a prostitute, finds warmth,

understanding and the meaning of love and faithfulness amid surroundings and situations which the society, as a whole, condemns as debased and depraved. The world outside the brothel affirms its faith in the dignity of man, but people are often treated as worthless and unimportant creatures. However, within the world of prostitution, Fanny Hill finds friendship, understanding, respect and is treated as a person of value. When her absent lover returns, she is not a lost girl of the gutter. One perceives that she is a whole and healthy person who has discovered the ability to love and be loved in a brothel.

I think Cleland is suggesting that one must be cautious about what is condemned and what is held in honor. From Dr. Peale's viewpoint, the story of Fanny Hill is a tragedy because she did not demonstrate self-control. She refused to internalize the values inherent in the Judeo-Christian tradition and the catalog of sexual scenes in the book, fifty-two in all, are a symbol of the debased individual and the society in which he lives.

Dr. Peale and others, would be correct in saying that Fanny Hill did not demonstrate self-control. She did, however, come to appreciate the value of self-expression. At no time were her "clients" looked upon as a means to an end. She tried and did understand them and she was concerned about them as persons. When her lover, Charles, returned she was not filled with guilt and remorse. She accepted herself as she was and was able to offer him her love and devotion.

I have a feeling that many people fear the book *Fanny Hill,* not because of its sexual scenes, but because the author raises serious question with the issue of what is moral and what is immoral. He takes exception to the idea that repression and restraint create moral individuals. He develops the thought that self-expression is more human than self-control. And he dares to suggest that, in a situation which society calls immoral and

debased, a genuine love and respect for life and for people, as human beings, can develop. Far from glorifying vice, John Cleland points an accusing finger at the individual who is so certain as to what it means to be a moral man.

There are those who will quickly say that this "message" will be missed by the average person who reads *Fanny Hill.* But this is precisely the point. We become so accustomed to pre-judging what is ethical and what is immoral that we are unable to recognize that what we accept as good may be nothing less than evil because it harms people.

I know of no book which more beautifully describes meaningful relationships between a man and a woman than does *Fanny Hill.* In many marriages, men use a woman for sexual gratification and otherwise, as well as vice versa. But this is not the case in the story of Fanny Hill. The point is simply that there are many, many ways in which we hurt, injure and degrade people that are far worse than either being or visiting a prostitute. We do this all in the name of morality.

At the same time that Dr. Peale is concerned with sick people, John Cleland attempts to describe healthy ones. *Fanny Hill* is a more modern and certainly more valuable book than *Sin, Sex and Self-Control* because the author does not tell us how to behave, but attempts to help us understand ourselves and the nature of love and understanding in being related to other persons. Dr. Peale's writing emphasizes the most useful commodities available to man—self-centeredness and self-control. John Cleland suggests that self-understanding and self-expression may not be as popular, but they are more humane.

The "Peale approach" to life breeds contentment, for it suggests that each one of us can be certain as to what is good and true. Standards for thinking and behavior are available and all we need to do is appropriate them

for our use. In a day when life is marked by chaos and confusion, this viewpoint offers much in the way of comfort and satisfaction. There is only one trouble with it, however, and that is that it results in conformity, rigid behavior and a lack of understanding. It results in personality configurations that are marked with an intense interest in propositions about Truth and Right but, at the same time, build a wall against people. Such an attitude creates certainty, but there is little warmth. The idea develops that there are "my kind of people" and they are "right." It forces us to degrade, dismiss and ultimately attempt to destroy anyone who does not agree with us.

To be alive and sensitive to life means that we have to choose what we want. There is no possible way for a person to be a slave and free at the same time. Self-control and self-expression are at opposite ends of the continuum. As much as some persons would like to have both, it is necessary to make a choice, since restraint and openness are contradictory qualities. To internalize external values denies the possibility of self-expression. We must decide what we want, when it comes to conformity and creativity. If we want people to behave in a structured and predictable manner, then the ideal of creativity cannot have meaning.

. . . . .

Long ago Plato said, "What is honored in a country will be cultivated there." More and more, we reward people for thinking alike and as a result, we become frightened, beyond belief, of those who take exception to the current consensus. If our society collapses, it will not be because people read a book such as *Fanny Hill*. It will fall, because we will have refused to understand it. Decadence, in a nation or an individual, arises not because there is a lack of ability to distingush between morality and immorality, but because the opportunity

for self-expression has been so controlled or strangled that the society or the person becomes a robot.

The issue which a Dr. Peale will never understand, because he is a victim of it himself and which John Cleland describes with brilliant clarity and sensitive persuasion is that until we learn to respect ourselves enough that we leave each other alone, we cannot discover the meaning of morality.

Dr. Peale and Fanny Hill offer the two basic choices open to man. Man is free to choose an autocentric existence which is marked by freedom from ambiguity and responsibility. Autocentricity presupposes a "closed world" where life is predetermined and animal-like. In contrast to this view, there is the allocentric outlook which is marked by an "open encounter of the total person with the world." Growth, spontaneity and expression are the goals of such an existence.

Dr. Peale epitomizes the autocentric approach. He offers "warm blankets" and comfortable "cocoons" for those who want to lose their humanity. On the other hand, *Fanny Hill* represents the allocentric viewpoint which posits the possibility for man to raise his sights, stretch his imagination, cultivate his sensitiveness as well as deepen and broaden his perspectives. In discussing the autocentric idea, Floyd W. Matson writes,

> "Human beings conditioned to apathy and affluence may well prefer this regressive path of least resistance, with its promise of escape from freedom and an end to striving. But we know at least that it is open to them to choose otherwise: in a word, to *choose themselves.*" (*The Broken Image,* page 193.)

In a day when people are overly sensitive in drawing lines between the good and the bad, the right and the wrong, as well as the true and the false, it seems to me

that there is great irony in the availability of a book such as *Fanny Hill.* Prostitution may be the oldest profession in the world, but we are ever faced with a question which is becoming more and more disturbing: "What does a prostitute look like?"

MR. JUSTICE CLARK, dissenting.

It is with regret that I write this dissenting opinion. However, the public should know of the continuous flow of pornographic material reaching this Court and the increasing problem States have in controlling it. *Memoirs of a Woman of Pleasure,* the book involved here, is typical. I have "stomached" past cases for almost 10 years without much outcry. Though I am not known to be a purist—or a shrinking violet—this book is too much even for me. It is important that the Court has refused to declare it obscene and thus affords it further circulation. In order to give my remarks the proper setting I have been obliged to portray the book's contents, which causes me embarrassment. However, quotations from typical episodes would so debase our Reports that I will not follow that course.

I.

Let me first pinpoint the effect of today's holding in the obscenity field. While there is no majority opinion in this case, there are three Justices who import a new test into that laid down in *Roth* v. *United States,* 354 U. S. 476 (1957), namely, that "[a] book cannot be proscribed unless it is found to be *utterly* without redeeming social value." I agree with my Brother WHITE that such a condition rejects the basic holding of *Roth* and gives the smut artist free rein to carry on his dirty business. My vote in that case—which was the deciding one for the majority opinion—was cast solely because the Court declared the test of obscenity to be: "whether to

the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." I understood that test to include only two constitutional requirements: (1) the book must be judged as a whole, not by its parts; and (2) it must be judged in terms of its appeal to the prurient interest of the average person, applying contemporary community standards.[1] Indeed, obscenity was denoted in *Roth* as having *"such slight social value as a step to truth that any benefit that may be derived . . . is clearly outweighed by the social interest in order and morality. . . ."* At 485 (quoting *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572 (1942)). Moreover, in no subsequent decision of this Court has any "utterly without redeeming social value" test been suggested, much less expounded. My Brother HARLAN in *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478 (1962), made no reference whatever to such a requirement in *Roth.* Rather he interpreted *Roth* as including a test of "patent offensiveness" besides "prurient appeal." Nor did my Brother BRENNAN in his concurring opinion in *Manual Enterprises* mention any "utterly without redeeming social value" test. The first reference to such a test was made by my Brother BRENNAN in *Jacobellis* v. *Ohio,* 378 U. S. 184, 191 (1964), seven years after *Roth.* In an opinion joined only by Justice Goldberg, he there wrote: "Recognizing that the test for obscenity enunciated [in *Roth*] . . . is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard." Nevertheless, he proceeded to add:

> "We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social importance,' . . . ."

[1] See Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 53–55 (1960).

This language was then repeated in the converse to announce this *non sequitur:*

> "It follows that material dealing with sex in a manner that advocates ideas . . . or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection." At 191.

Significantly no opinion in *Jacobellis,* other than that of my Brother BRENNAN, mentioned the "utterly without redeeming social importance" test which he there introduced into our many and varied previous opinions in obscenity cases. Indeed, rather than recognizing the "utterly without social importance" test, THE CHIEF JUSTICE in his dissent in *Jacobellis,* which I joined, specifically stated:

> "In light of the foregoing, I would reiterate my acceptance of the rule of the *Roth* case: *Material is obscene and not constitutionally protected against regulation and proscription* if 'to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' " (Emphasis added.) At 202.

THE CHIEF JUSTICE and I further asserted that the enforcement of this rule should be committed to the state and federal courts whose judgments made pursuant to the *Roth* rule we would accept, limiting our review to a consideration of whether there is "sufficient evidence" in the record to support a finding of obscenity. At 202.

II.

Three members of the majority hold that reversal here is necessary solely because their novel "utterly without redeeming social value" test was not properly interpreted or applied by the Supreme Judicial Court of Massachu-

setts. Massachusetts now has to retry the case although the "Findings of Fact, Rulings of Law and Order for Final Decree" of the trial court specifically held that "this book is 'utterly without redeeming social importance' in the fields of art, literature, science, news or ideas of any social importance and that it is obscene, indecent and impure." I quote portions of the findings:

> "Opinions of experts are admitted in evidence to aid the Court in its understanding and comprehension of the facts, but, of course, an expert cannot usurp the function of the Court. Highly artificial, stylistic writing and an abundance of metaphorical descriptions are contained in the book but the conclusions of some experts were pretty well strained in attempting to justify its claimed literary value: such as the book preached a moral that sex with love is better than sex without love, when Fanny's description of her sexual acts, particularly with the young boy she seduced, in Fanny's judgment at least, was to the contrary. *Careful review of all the expert testimony has been made,* but, the best evidence of all, is the book itself and it plainly has no value because of ideas, news or artistic, literary or scientific attributes. . . . Nor does it have any other merit. 'This Court will not adopt a rule of law which states obscenity is suppressible but well written obscenity is not.' Mr. Justice Scileppi in *People* v. *Fritch,* 13 N. Y. 2d 119." (Emphasis added.) Finding 20.

None of these findings of the trial court were overturned on appeal, although the Supreme Judicial Court of Massachusetts observed in addition that "the fact that the testimony may indicate this book has some minimal literary value does not mean it is of any social importance. We do not interpret the 'social importance' test as re-

quiring that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene." My Brother BRENNAN reverses on the basis of this casual statement, despite the specific findings of the trial court. Why, if the statement is erroneous, Brother BRENNAN does not affirm the holding of the trial court which beyond question is correct, one cannot tell. This course has often been followed in other cases.

In my view evidence of social importance is relevant to the determination of the ultimate question of obscenity. But social importance does not constitute a separate and distinct constitutional test. Such evidence must be considered together with evidence that the material in question appeals to prurient interest and is patently offensive. Accordingly, we must first turn to the book here under attack. I repeat that I regret having to depict the sordid episodes of this book.

III.

Memoirs is nothing more than a series of minutely and vividly described sexual episodes. The book starts with Fanny Hill, a young 15-year-old girl, arriving in London to seek household work. She goes to an employment office where through happenstance she meets the mistress of a bawdy house. This takes 10 pages. The remaining 200 pages of the book detail her initiation into various sexual experiences, from a lesbian encounter with a sister prostitute to all sorts and types of sexual debauchery in bawdy houses and as the mistress of a variety of men. This is presented to the reader through an uninterrupted succession of descriptions by Fanny, either as an observer or participant, of sexual adventures so vile that one of the male expert witnesses in the case was hesitant to repeat any one of them in the courtroom.

These scenes run the gamut of possible sexual experience such as lesbianism, female masturbation, homosexuality between young boys, the destruction of a maidenhead with consequent gory descriptions, the seduction of a young virgin boy, the flagellation of male by female, and vice versa, followed by fervid sexual engagement, and other abhorrent acts, including over two dozen separate bizarre descriptions of different sexual intercourses between male and female characters. In one sequence four girls in a bawdy house are required in the presence of one another to relate the lurid details of their loss of virginity and their glorification of it. This is followed the same evening by "publick trials" in which each of the four girls engages in sexual intercourse with a different man while the others witness, with Fanny giving a detailed description of the movement and reaction of each couple.

In each of the sexual scenes the exposed bodies of the participants are described in minute and individual detail. The pubic hair is often used for a background to the most vivid and precise descriptions of the response, condition, size, shape, and color of the sexual organs before, during and after orgasms. There are some short transitory passages between the various sexual episodes, but for the most part they only set the scene and identify the participants for the next orgy, or make smutty reference and comparison to past episodes.

There can be no doubt that the whole purpose of the book is to arouse the prurient interest. Likewise the repetition of sexual episode after episode and the candor with which they are described renders the book "patently offensive." These facts weigh heavily in any appraisal of the book's claims to "redeeming social importance."

Let us now turn to evidence of the book's alleged social value. While unfortunately the State offered little tes-

timony,[2] the defense called several experts to attest that the book has literary merit and historical value. A careful reading of testimony, however, reveals that it has no substance. For example, the first witness testified:

> "I think it is a work of art . . . it asks for and receives a literary response . . . presented in an orderly and organized fashion, with a fictional central character, and with a literary style . . . . I think the central character is . . . what I call an intellectual . . . someone who is extremely curious about life and who seeks . . . to record with accuracy the details of the external world, physical sensations, psychological responses . . . an empiricist . . . . I find that this tells me things . . . about the 18th century that I might not otherwise know."

If a book of art is one that asks for and receives a literary response, *Memoirs* is no work of art. The sole response evoked by the book is sensual. Nor does the orderly presentation of *Memoirs* make a difference; it presents nothing but lascivious scenes organized solely to arouse prurient interest and produce sustained erotic tension.[3] Certainly the book's baroque style cannot vitiate the determination of obscenity. From a legal standpoint, we must remember that obscenity is no less obscene though it be expressed in "elaborate language." Indeed, the more meticulous its presentation, the more it appeals to the prurient interest. To say that Fanny is an "intellectual" is an insult to those who travel under that tag.

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[2] In a preface to the paperbook edition, "A Note on the American History of *Memoirs of a Woman of Pleasure*," the publisher itself mentions several critics who denied the book had any literary merit and found it totally undistinguished. These critics included Ralph Thompson and Clifton Fadiman. P. xviii.

[3] As one review stated: "Yet all these pangs of defloration are in the service of erotic pleasure—Fanny's and the reader's. Postponing the culmination of Fanny's deflowering is equivalent to postponing the point where the reader has a mental orgasm."

She was nothing but a harlot—a sensualist—exploiting her sexual attractions which she sold for fun, for money, for lodging and keep, for an inheritance, and finally for a husband. If she was curious about life, her curiosity extended only to the pursuit of sexual delight wherever she found it. The book describes nothing in the "external world" except bawdy houses and debaucheries. As an empiricist, Fanny confines her observations and "experiments" to sex, with primary attention to depraved, lewd, and deviant practices.

Other experts produced by the defense testified that the book emphasizes the profound "idea that a sensual passion is only truly experienced when it is associated with the emotion of love" and that the sexual relationship "can be a wholesome, healthy, experience itself," whereas in certain modern novels "the relationship between the sexes is seen as another manifestation of modern decadence, insterility or perversion." In my view this proves nothing as to social value. The state court properly gave such testimony no probative weight. A review offered by the defense noted that "where 'pornography' does not brutalize, it idealizes. The book is, in this sense, an erotic fantasy—and a male fantasy, at that, put into the mind of a woman. The male organ is phenomenal to the point of absurdity." Finally, it saw the book as "a minor fantasy, deluding as a guide to conduct, but respectful of our delight in the body . . . an interesting footnote in the history of the English novel." These unrelated assertions reveal to me nothing whatever of literary, historical, or social value. Another review called the book "a great novel . . . one which turns its convention upside down . . . ." Admittedly Cleland did not attempt "high art" because he was writing "an erotic novel. He can skip the elevation and get on with the erections." Fanny's "downfall" is seen as "one long delightful swoon into the depths of pleasurable sensa-

tion." Rather than indicating social value in the book, this evidence reveals just the contrary. Another item offered by the defense described *Memoirs* as being "widely accredited as the first deliberately dirty novel in English." However, the reviewer found Fanny to be "no common harlot. Her 'Memoirs' combine literary grace with a disarming enthusiasm for an activity which is, after all, only human. What is more, she never uses a dirty word." The short answer to such "expertise" is that none of these so-called attributes have any value to society. On the contrary, they accentuate the prurient appeal.

Another expert described the book as having "detectable literary merit" since it reflects "an effort to interpret a rather complex character . . . going through a number of very different adventures." To illustrate his assertion that the "writing is very skillfully done" this expert pointed to the description of a whore, "Phoebe, who is 'red-faced, fat and in her early 50's, who waddles into a room.' She doesn't walk in, she waddles in." Given this standard for "skillful writing," it is not suprising that he found the book to have merit.

The remaining experts testified in the same manner, claiming the book to be a "record of the historical, psychological, [and] social events of the period." One has but to read the history of the 18th century to disprove this assertion. The story depicts nothing besides the brothels that are present in metropolitan cities in every period of history. One expert noticed "in this book a tendency away from nakedness during the sexual act which I find an interesting sort of sociological observation" on tastes different from contemporary ones. As additional proof, he marvels that Fanny "refers constantly to the male sexual organ as an engine . . . which is pulling you away from the way these events would be described in the 19th or 20th century." How this adds social value to the book

is beyond my comprehension. It only indicates the lengths to which these experts go in their effort to give the book some semblance of value. For example, the ubiquitous descriptions of sexual acts are excused as being necessary in tracing the "moral progress" of the heroine, and the giving of a silver watch to a servant is found to be "an odd and interesting custom that I would like to know more about." This only points up the bankruptcy of *Memoirs* in both purpose and content, adequately justifying the trial court's finding that it had absolutely no social value.

It is, of course, the duty of the judge or the jury to determine the question of obscenity, viewing the book by contemporary community standards. It can accept the appraisal of experts or discount their testimony in the light of the material itself or other relevant testimony. So-called "literary obscenity," *i. e.*, the use of erotic fantasies of the hard-core type clothed in an engaging literary style has no constitutional protection. If a book deals solely with erotic material in a manner calculated to appeal to the prurient interest, it matters not that it may be expressed in beautiful prose. There are obviously dynamic connections between art and sex—the emotional, intellectual, and physical—but where the former is used solely to promote prurient appeal, it cannot claim constitutional immunity. Cleland uses this technique to promote the prurient appeal of *Memoirs*. It is true that Fanny's perverse experiences finally bring from her the observation that "the heights of [sexual] enjoyment cannot be achieved until true affection prepares the bed of passion." But this merely emphasizes that sex, wherever and however found, remains the sole theme of *Memoirs*. In my view, the book's repeated and unrelieved appeals to the prurient interest of the average person leave it utterly without redeeming social importance.

IV.

In his separate concurrence, my Brother DOUGLAS asserts there is no proof that obscenity produces anti-social conduct. I had thought that this question was foreclosed by the determination in *Roth* that obscenity was not protected by the First Amendment. I find it necessary to comment upon Brother DOUGLAS' views, however, because of the new requirement engrafted upon *Roth* by Brother BRENNAN, *i. e.*, that material which "appeals to a prurient interest" and which is "patently offensive" may still not be suppressed unless it is "utterly without redeeming social value." The question of anti-social effect thus becomes relevant to the more limited question of social value. Brother BRENNAN indicates that the social importance criterion encompasses only such things as the artistic, literary, and historical qualities of the material. But the phrasing of the "utterly without redeeming social value" test suggests that other evidence must be considered. To say that social value may "redeem" implies that courts must balance alleged esthetic merit against the harmful consequences that may flow from pornography. Whatever the scope of the social value criterion—which need not be defined with precision here—it at least anticipates that the trier of fact will weigh evidence of the material's influence in causing deviant or criminal conduct, particularly sex crimes, as well as its effect upon the mental, moral, and physical health of the average person. Brother DOUGLAS' view as to the lack of proof in this area is not so firmly held among behavioral scientists as he would lead us to believe. For this reason, I should mention that there is a division of thought on the correlation between obscenity and socially deleterious behavior.

Psychological and physiological studies clearly indicate that many persons become sexually aroused from reading

obscene material.[4] While erotic stimulation caused by pornography may be legally insignificant in itself, there are medical experts who believe that such stimulation frequently manifests itself in criminal sexual behavior or other antisocial conduct.[5] For example, Dr. George W. Henry of Cornell University has expressed the opinion that obscenity, with its exaggerated and morbid emphasis on sex, particularly abnormal and perverted practices, and its unrealistic presentation of sexual behavior and attitudes, may induce antisocial conduct by the average person.[6] A number of sociologists think that this material may have adverse effects upon individual mental health, with potentially disruptive consequences for the community.[7]

In addition, there is persuasive evidence from criminologists and police officials. Inspector Herbert Case of the Detroit Police Department contends that sex murder cases are invariably tied to some form of obscene literature.[8] And the Director of the Federal Bureau of Investigation, J. Edgar Hoover, has repeatedly emphasized that pornography is associated with an overwhelmingly large number of sex crimes. Again, while the correlation between possession of obscenity and deviant be-

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[4] For a summary of experiments with various sexual stimuli see Cairns, Paul & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962). The authors cite research by Kinsey disclosing that obscene literature stimulated a definite sexual response in a majority of the male and female subjects tested.

[5] *E. g.*, Wertham, Seduction of the Innocent (1954), p. 164.

[6] Testimony before the Subcommittee of the Judiciary Committee to Investigate Juvenile Delinquency, S. Rep. No. 2381, 84th Cong., 2d Sess., pp. 8–12 (1956).

[7] Sorokin, The American Sex Revolution (1956).

[8] Testimony before the House Select Committee on Current Pornographic Materials, H. R. Rep. No. 2510, 82d Cong., 2d Sess., p. 62 (1952).

havior has not been conclusively established, the files of our law enforcement agencies contain many reports of persons who patterned their criminal conduct after behavior depicted in obscene material.[9]

The clergy are also outspoken in their belief that pornography encourages violence, degeneracy and sexual misconduct. In a speech reported by the New York Journal-American August 7, 1964, Cardinal Spellman particularly stressed the direct influence obscenity has on immature persons. These and related views have been confirmed by practical experience. After years of service with the West London Mission, Rev. Donald Soper found that pornography was a primary cause of prostitution. Rolph, Does Pornography Matter? (1961), pp. 47–48.[10]

Congress and the legislatures of every State have enacted measures to restrict the distribution of erotic and pornographic material,[11] justifying these controls by reference to evidence that antisocial behavior may result in part from reading obscenity.[12] Likewise, upon another trial, the parties may offer this sort of evidence along with other "social value" characteristics that they attribute to the book.

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[9] See, *e. g.*, Hoover, Combating Merchants of Filth: The Role of the FBI, 25 U. Pitt. L. Rev. 469 (1964); Hoover, The Fight Against Filth, The American Legion Magazine (May 1961).

[10] For a general discussion see Murphy, Censorship: Government and Obscenity (1963), pp. 131–151.

[11] The statutes are compiled in S. Rep. No. 2381, 84th Cong., 2d Sess., pp. 17–23 (1956). While New Mexico itself does not prohibit the distribution of obscenity, it has a statute giving municipalities the right to suppress "obscene" publications. N. M. Stat. § 14–17–14 (1965 Supp.).

[12] See Report of the New York State Joint Legislative Committee Studying the Publication and Dissemination of Offensive and Obscene Material (1958), pp. 141–166.

But this is not all that Massachusetts courts might consider. I believe it can be established that the book "was commercially exploited for the sake of prurient appeal, to the exclusion of all other values" and should therefore be declared obscene under the test of commercial exploitation announced today in *Ginzburg* and *Mishkin*.

As I have stated, my study of *Memoirs* leads me to think that it has no conceivable "social importance." The author's obsession with sex, his minute descriptions of phalli, and his repetitious accounts of bawdy sexual experiences and deviant sexual behavior indicate the book was designed solely to appeal to prurient interests. In addition, the record before the Court contains extrinsic evidence tending to show that the publisher was fully aware that the book attracted readers desirous of vicarious sexual pleasure, and sought to profit solely from its prurient appeal. The publisher's "Introduction" recites that Cleland, a "never-do-well bohemian," wrote the book in 1749 to make a quick 20 guineas. Thereafter, various publications of the book, often "embellished with fresh inflammatory details" and "highly exaggerated illustrations," appeared in "surreptitious circulation." Indeed, the cover of *Memoirs* tempts the reader with the announcement that the sale of the book has finally been permitted "after 214 years of suppression." Although written in a sophisticated tone, the "Introduction" repeatedly informs the reader that he may expect graphic descriptions of genitals and sexual exploits. For instance, it states:

> "Here and there, Cleland's descriptions of lovemaking are marred by what perhaps could be best described as his adherence to the 'longitudinal fallacy'—the formidable bodily equipment of his most

> accomplished lovers is apt to be described with quite unnecessary relish . . . ."

Many other passages in the "Introduction" similarly reflect the publisher's "own evaluation" of the book's nature. The excerpt printed on the jacket of the hardcover edition is typical:

> "*Memoirs of a Woman of Pleasure* is the product of a luxurious and licentious, but not a commercially degraded, era. . . . For all its abounding improprieties, his priapic novel is not a vulgar book. It treats of pleasure as the aim and end of existence, and of sexual satisfaction as the epitome of pleasure, but does so in a style that, despite its inflammatory subject, never stoops to a gross or unbecoming word."

Cleland apparently wrote only one other book, a sequel called *Memoirs of a Coxcomb,* published by Lancer Books, Inc. The "Introduction" to that book labels *Memoirs of a Woman of Pleasure* as "the most sensational piece of erotica in English literature." I daresay that this fact alone explains why G. P. Putnam's Sons published this obscenity—preying upon prurient and carnal proclivities for its own pecuniary advantage. I would affirm the judgment.

MR. JUSTICE HARLAN, dissenting.

The central development that emerges from the aftermath of *Roth* v. *United States,* 354 U. S. 476, is that no stable approach to the obscenity problem has yet been devised by this Court. Two Justices believe that the First and Fourteenth Amendments absolutely protect obscene and nonobscene material alike. Another Justice believes that neither the States nor the Federal Government may suppress any material save for "hard-core pornography." *Roth* in 1957 stressed prurience and

utter lack of redeeming social importance;[1] as *Roth* has been expounded in this case, in *Ginzburg* v. *United States, post,* p. 463, and in *Mishkin* v. *New York, post,* p. 502, it has undergone significant transformation. The concept of "pandering," emphasized by the separate opinion of THE CHIEF JUSTICE in *Roth,* now emerges as an uncertain gloss or interpretive aid, and the further requisite of "patent offensiveness" has been made explicit as a result of intervening decisions. Given this tangled state of affairs, I feel free to adhere to the principles first set forth in my separate opinion in *Roth,* 354 U. S., at 496, which I continue to believe represent the soundest constitutional solution to this intractable problem.

My premise is that in the area of obscenity the Constitution does not bind the States and the Federal Government in precisely the same fashion. This approach is plainly consistent with the language of the First and Fourteenth Amendments and, in my opinion, more responsive to the proper functioning of a federal system of government in this area. See my opinion in *Roth,* 354 U. S., at 505–506. I believe it is also consistent with past decisions of this Court. Although some 40 years have passed since the Court first indicated that the Fourteenth Amendment protects "free speech," see *Gitlow* v. *New York,* 268 U. S. 652; *Fiske* v. *Kansas,* 274 U. S. 380, the decisions have never declared that every utterance the Federal Government may not reach or every regulatory scheme it may not enact is also beyond the power of the State. The very criteria used in opinions to delimit the protection of free speech—the gravity of the evil being regulated, see *Schneider* v. *State,* 308 U. S. 147; how "clear and present" is the danger, *Schenck* v.

[1] Given my view of the applicable constitutional standards, I find no occasion to consider the place of "redeeming social importance" in the majority opinion in *Roth,* an issue which further divides the present Court.

United States, 249 U. S. 47, 52 (Holmes, J.); the magnitude of "such invasion of free speech as is necessary to avoid the danger," *United States* v. *Dennis,* 183 F. 2d 201, 212 (L. Hand, J.)—may and do depend on the particular context in which power is exercised. When, for example, the Court in *Beauharnais* v. *Illinois,* 343 U. S. 250, upheld a criminal group-libel law because of the "social interest in order and morality," 343 U. S., at 257, it was acknowledging the responsibility and capacity of the States in such public-welfare matters and not committing itself to uphold any similar federal statute applying to such communications as Congress might otherwise regulate under the commerce power. See also *Kovacs* v. *Cooper,* 336 U. S. 77.

Federal suppression of allegedly obscene matter should, in my view, be constitutionally limited to that often described as "hard-core pornography." To be sure, that rubric is not a self-executing standard, but it does describe something that most judges and others will "know . . . when [they] see it" (STEWART, J., in *Jacobellis* v. *Ohio,* 378 U. S. 184, 197) and that leaves the smallest room for disagreement between those of varying tastes. To me it is plain, for instance, that *Fanny Hill* does not fall within this class and could not be barred from the federal mails. If further articulation is meaningful, I would characterize as "hard-core" that prurient material that is patently offensive or whose indecency is self-demonstrating and I would describe it substantially as does MR. JUSTICE STEWART'S opinion in *Ginzburg, post,* p. 499. The Federal Government may be conceded a limited interest in excluding from the mails such gross pornography, almost universally condemned in this country.[2] But I believe the dangers of national

[2] This interest may be viewed from different angles. Compelling the Post Office to aid actively in disseminating this most obnoxious material may simply appear too offensive in itself. Or,

censorship and the existence of primary responsibility at the state level amply justify drawing the line at this point.

State obscenity laws present problems of quite a different order. The varying conditions across the country, the range of views on the need and reasons for curbing obscenity, and the traditions of local self-government in matters of public welfare all favor a far more flexible attitude in defining the bounds for the States. From my standpoint, the Fourteenth Amendment requires of a State only that it apply criteria rationally related to the accepted notion of obscenity and that it reach results not wholly out of step with current American standards. As to criteria, it should be adequate if the court or jury considers such elements as offensiveness, pruriency, social value, and the like. The latitude which I believe the States deserve cautions against any federally imposed formula listing the exclusive ingredients of obscenity and fixing their proportions. This approach concededly lacks precision, but imprecision is characteristic of mediating constitutional standards; [3] voluntariness of a confession, clear and present danger, and probable cause are only the most ready illustrations. In time and with more litigated examples, predictability increases, but there is no shortcut to satisfactory solutions in this field, and there is no advantage in supposing otherwise.

I believe the tests set out in the prevailing opinion, judged by their application in this case, offer only an

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more concretely, use of the mails may facilitate or insulate distribution so greatly that federal inaction amounts to thwarting state regulation.

[3] The deterrent effect of vagueness for that critical class of books near the law's borderline could in the past be ameliorated by devices like the Massachusetts *in rem* procedure used in this case. Of course, the Court's newly adopted "panderer" test, turning as it does on the motives and actions of the particular defendant, seriously undercuts the effort to give any seller a yes or no answer on a book in advance of his own criminal prosecution.

illusion of certainty and risk confusion and prejudice. The opinion declares that a book cannot be banned unless it is "utterly without redeeming social value" (*ante,* p. 418). To establish social value in the present case, a number of acknowledged experts in the field of literature testified that *Fanny Hill* held a respectable place in serious writing, and unless such largely uncontradicted testimony is accepted as decisive it is very hard to see that the "utterly without redeeming social value" test has any meaning at all. Yet the prevailing opinion, while denying that social value may be "weighed against" or "canceled by" prurience or offensiveness (*ante,* p. 419), terminates this case unwilling to give a conclusive decision on the status of *Fanny Hill* under the Constitution.[4] Apparently, the Court believes that the social value of the book may be negated if proof of pandering is present. Using this inherently vague "pandering" notion to offset "social value" wipes out any certainty the latter term might be given by reliance on experts, and admits into the case highly prejudicial evidence without appropriate restrictions. See my dissenting opinion in *Ginzburg, post,* p. 493. I think it more satisfactory to acknowledge that on this record the book has been shown to have some quantum of social value, that it may at the same time be deemed offensive and salacious, and that the State's decision to weigh these elements and to ban this particular work does not exceed constitutional limits.

A final aspect of the obscenity problem is the role this Court is to play in administering its standards, a matter

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[4] As I understand the prevailing opinion, its rationale is that the state court may not condemn *Fanny Hill* as obscene after finding the book to have a modicum of social value; the opinion does note that proof of pandering "might justify the conclusion" that the book wholly lacks social value (*ante,* p. 420). Given its premise for reversal, the opinion has "no occasion to assess" for itself the pruriency, offensiveness, or lack of social value of the book (*ante,* p. 420).

that engendered justified concern at the oral argument of the cases now decided. Short of saying that no material relating to sex may be banned, or that all of it may be, I do not see how this Court can escape the task of reviewing obscenity decisions on a case-by-case basis. The views of literary or other experts could be made controlling, but those experts had their say in *Fanny Hill* and apparently the majority is no more willing than I to say that Massachusetts must abide by their verdict. Yet I venture to say that the Court's burden of decision would be ameliorated under the constitutional principles that I have advocated. "Hard-core pornography" for judging federal cases is one of the more tangible concepts in the field. As to the States, the due latitude my approach would leave them ensures that only the unusual case would require plenary review and correction by this Court.

There is plenty of room, I know, for disagreement in this area of constitutional law. Some will think that what I propose may encourage States to go too far in this field. Others will consider that the Court's present course unduly restricts state experimentation with the still elusive problem of obscenity. For myself, I believe it is the part of wisdom for those of us who happen currently to possess the "final word" to leave room for such experimentation, which indeed is the underlying genius of our federal system.

On the premises set forth in this opinion, supplementing what I have earlier said in my opinions in *Roth, supra, Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, and *Jacobellis* v. *Ohio,* 378 U. S., at 203, I would affirm the judgment of the Massachusetts Supreme Judicial Court.

MR. JUSTICE WHITE, dissenting.

In *Roth* v. *United States,* 354 U. S. 476, the Court held a publication to be obscene if its predominant theme

appeals to the prurient interest in a manner exceeding customary limits of candor. Material of this kind, the Court said, is "utterly without redeeming social importance" and is therefore unprotected by the First Amendment.

To say that material within the *Roth* definition of obscenity is nevertheless not obscene if it has some redeeming social value is to reject one of the basic propositions of the *Roth* case—that such material is not protected *because* it is inherently and utterly without social value.

If "social importance" is to be used as the prevailing opinion uses it today, obscene material, however far beyond customary limits of candor, is immune if it has any literary style, if it contains any historical references or language characteristic of a bygone day, or even if it is printed or bound in an interesting way. Well written, especially effective obscenity is protected; the poorly written is vulnerable. And why shouldn't the fact that some people buy and read such material prove its "social value"?

A fortiori, if the predominant theme of the book appeals to the prurient interest as stated in *Roth* but the book nevertheless contains here and there a passage descriptive of character, geography or architecture, the book would not be "obscene" under the social importance test. I had thought that *Roth* counseled the contrary: that the character of the book is fixed by its predominant theme and is not altered by the presence of minor themes of a different nature. The *Roth* Court's emphatic reliance on the quotation from *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, means nothing less:

> "'. . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include*

the lewd and obscene . . . . It has been well observed that such utterances 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. . . .' (Emphasis added.)" 354 U. S., at 485.

In my view, "social importance" is not an independent test of obscenity but is relevant only to determining the predominant prurient interest of the material, a determination which the court or the jury will make based on the material itself and all the evidence in the case, expert or otherwise.

Application of the *Roth* test, as I understand it, necessarily involves the exercise of judgment by legislatures, courts and juries. But this does not mean that there are no limits to what may be done in the name of *Roth*. Cf. *Jacobellis* v. *Ohio,* 378 U. S. 184. *Roth* does not mean that a legislature is free to ban books simply because they deal with sex or because they appeal to the prurient interest. Nor does it mean that if books like *Fanny Hill* are unprotected, their nonprurient appeal is necessarily lost to the world. Literary style, history, teachings about sex, character description (even of a prostitute) or moral lessons need not come wrapped in such packages. The fact that they do impeaches their claims to immunity from legislative censure.

Finally, it should be remembered that if the publication and sale of *Fanny Hill* and like books are proscribed, it is not the Constitution that imposes the ban. Censure stems from a legislative act, and legislatures are constitutionally free to embrace such books whenever they wish to do so. But if a State insists on treating *Fanny Hill* as obscene and forbidding its sale, the First Amendment does not prevent it from doing so.

I would affirm the judgment below.

GINZBURG ET AL. *v.* UNITED STATES.

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

No. 42. Argued December 7, 1965.—Decided March 21, 1966.

Petitioner Ginzburg and three corporations which he controlled were convicted of violating the federal obscenity statute, 18 U. S. C. § 1461, by mailing three publications: an expensive hard-cover magazine dealing with sex, a sexual newsletter, and a short book purporting to be a sexual autobiography. The prosecution charged that these publications were obscene in the context of their production, sale, and attendant publicity. Besides testimony as to the merit of the material, abundant evidence was introduced that each of the publications was originated or sold as stock in trade of the business of pandering, *i. e.*, the purveying of publications openly advertised to appeal to the customers' erotic interest. Mailing privileges were sought from places with salaciously suggestive names; circulars for the magazine and newsletter stressed unrestricted expression of sex; and advertising of the book which purported to be of medical and psychiatric interest, but whose distribution was not confined to a professional audience, dwelt on the book's sexual imagery. In finding petitioners guilty, the trial judge applied the obscenity standards first enunciated in *Roth* v. *United States*, 354 U. S. 476, and the Court of Appeals affirmed. *Held:* Evidence that the petitioners deliberately represented the accused publications as erotically arousing and commercially exploited them as erotica solely for the sake of prurient appeal amply supported the trial court's determination that the material was obscene under the standards of the *Roth* case, *supra*. The mere fact of profit from the sale of the publication is not considered; but in a close case a showing of exploitation of interests in titillation by pornography with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters supports a determination that the material is obscene. Pp. 470–476.

338 F. 2d 12, affirmed.

Sidney Dickstein argued the cause for petitioners. With him on the briefs was *George Kaufmann*.

Paul Bender argued the cause for the United States, *pro hac vice*, by special leave of Court. With him on the brief were *Solicitor General Marshall* and *Assistant Attorney General Vinson*.

Briefs of *amici curiae*, urging reversal, were filed by *Irwin Karp* for the Authors League of America, Inc.; by *Bernard A. Berkman* and *Melvin L. Wulf* for the American Civil Liberties Union et al.; and by *Horace S. Manges* and *Marshall C. Berger* for American Book Publishers Council, Inc.

Briefs of *amici curiae*, urging affirmance, were filed by *Charles H. Keating, Jr.*, and *James J. Clancy* for Citizens for Decent Literature, Inc., et al.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A judge sitting without a jury in the District Court for the Eastern District of Pennsylvania [1] convicted petitioner Ginzburg and three corporations controlled by him upon all 28 counts of an indictment charging violation of the federal obscenity statute, 18 U. S. C. § 1461 (1964 ed.).[2] 224 F. Supp. 129. Each count alleged that a resident of the Eastern District received mailed matter, either one of three publications challenged as obscene, or advertising telling how and where the publications might

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[1] No challenge was or is made to venue under 18 U. S. C. § 3237 (1964 ed.).

[2] The federal obscenity statute, 18 U. S. C. § 1461, provides in pertinent part:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

. . . . . .

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or

be obtained. The Court of Appeals for the Third Circuit affirmed, 338 F. 2d 12. We granted certiorari, 380 U. S. 961. We affirm. Since petitioners do not argue that the trial judge misconceived or failed to apply the standards we first enunciated in *Roth* v. *United States,* 354 U. S. 476,[3] the only serious question is whether those standards were correctly applied.[4]

In the cases in which this Court has decided obscenity questions since *Roth,* it has regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene. We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the ques-

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indirectly, where, or how, or from whom, or by what means any of such mentioned matters . . . may be obtained . . . .

. . . . . .

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense . . . ."

[3] We are not, however, to be understood as approving all aspects of the trial judge's exegesis of *Roth,* for example his remarks that "the community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community." 224 F. Supp., at 137. Compare *Butler* v. *Michigan,* 352 U. S. 380.

[4] The Government stipulated at trial that the circulars advertising the publications were not themselves obscene; therefore the convictions on the counts for mailing the advertising stand only if the mailing of the publications offended the statute.

tion of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise. As in *Mishkin* v. *New York, post,* p. 502, and as did the courts below, 224 F. Supp., at 134, 338 F. 2d, at 14–15, we view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal.[5] The record in that regard amply supports the decision of the trial judge that the mailing of all three publications offended the statute.[6]

The three publications were EROS, a hard-cover magazine of expensive format; Liaison, a bi-weekly newsletter; and *The Housewife's Handbook on Selective Promiscuity* (hereinafter the *Handbook*), a short book. The issue of EROS specified in the indictment, Vol. 1, No. 4, contains 15 articles and photo-essays on the subject of love, sex, and sexual relations. The specified issue of Liaison, Vol. 1, No. 1, contains a prefatory "Letter from the Editors" announcing its dedication to "keeping sex an art and preventing it from becoming a science." The remainder of the issue consists of digests of two

[5] Our affirmance of the convictions for mailing EROS and Liaison is based upon their characteristics as a whole, including their editorial formats, and not upon particular articles contained, digested, or excerpted in them. Thus we do not decide whether particular articles, for example, in EROS, although identified by the trial judge as offensive, should be condemned as obscene whatever their setting. Similarly, we accept the Government's concession, note 13, *infra,* that the prosecution rested upon the manner in which the petitioners sold the *Handbook;* thus our affirmance implies no agreement with the trial judge's characterizations of the book outside that setting.

[6] It is suggested in dissent that petitioners were unaware that the record being established could be used in support of such an approach, and that petitioners should be afforded the opportunity of a new trial. However, the trial transcript clearly reveals that at several points the Government announced its theory that made the mode of distribution relevant to the determination of obscenity, and the trial court admitted evidence, otherwise irrelevant, toward that end.

articles concerning sex and sexual relations which had earlier appeared in professional journals and a report of an interview with a psychotherapist who favors the broadest license in sexual relationships. As the trial judge noted, "[w]hile the treatment is largely superficial, it is presented entirely without restraint of any kind. According to defendants' own expert, it is entirely without literary merit." 224 F. Supp., at 134. The *Handbook* purports to be a sexual autobiography detailing with complete candor the author's sexual experiences from age 3 to age 36. The text includes, and prefatory and concluding sections of the book elaborate, her views on such subjects as sex education of children, laws regulating private consensual adult sexual practices, and the equality of women in sexual relationships. It was claimed at trial that women would find the book valuable, for example as a marriage manual or as an aid to the sex education of their children.

Besides testimony as to the merit of the material, there was abundant evidence to show that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering—"the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." [7] EROS early sought mailing privileges from the postmasters of Intercourse and Blue Ball, Pennsylvania. The trial court found the obvious, that these hamlets were chosen only for the value their names would have in furthering petitioners' efforts to sell their publications on the basis of salacious appeal; [8] the facilities of the

[7] *Roth* v. *United States*, *supra*, 354 U. S., at 495–496 (WARREN, C. J., concurring).

[8] Evidence relating to petitioners' efforts to secure mailing privileges from these post offices was, contrary to the suggestion of MR. JUSTICE HARLAN in dissent, introduced for the purpose of supporting such a finding. Scienter had been stipulated prior to trial. The

post offices were inadequate to handle the anticipated volume of mail, and the privileges were denied. Mailing privileges were then obtained from the postmaster of Middlesex, New Jersey. EROS and Liaison thereafter mailed several million circulars soliciting subscriptions from that post office; over 5,500 copies of the *Handbook* were mailed.

The "leer of the sensualist" also permeates the advertising for the three publications. The circulars sent for EROS and Liaison stressed the sexual candor of the respective publications, and openly boasted that the publishers would take full advantage of what they regarded as an unrestricted license allowed by law in the expression of sex and sexual matters.[9] The advertising for the

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Government's position was revealed in the following colloquy, which occurred when it sought to introduce a letter to the postmaster of Blue Ball, Pennsylvania:

"The COURT. Who signed the letter?

"Mr. CREAMER. It is signed by Frank R. Brady, Associate Publisher of Mr. Ginzburg. It is on Eros Magazine, Incorporated's stationery.

"The COURT. And your objection is——

"Mr. SHAPIRO. It is in no way relevant to the particular issue or publication upon which the defendant has been indicted and in my view, even if there was an identification with respect to a particular issue, it would be of doubtful relevance in that event.

"The COURT. Anything else to say?

"Mr. CREAMER. If Your Honor pleases, there is a statement in this letter indicating that it would be advantageous to this publication to have it disseminated through Blue Ball, Pennsylvania, post office. I think this clearly goes to intent, as to what the purpose of publishing these magazines was. At least, it clearly establishes one of the reasons why they were disseminating this material.

"The COURT. Admitted."

[9] Thus, one EROS advertisement claimed:

"Eros is a child of its times. . . . [It] is the result of recent court decisions that have realistically interpreted America's obscenity laws and that have given to this country a new breadth of freedom

Handbook, apparently mailed from New York, consisted almost entirely of a reproduction of the introduction of the book, written by one Dr. Albert Ellis. Although he alludes to the book's informational value and its putative therapeutic usefulness, his remarks are preoccupied with the book's sexual imagery. The solicitation was indiscriminate, not limited to those, such as physicians or psychiatrists, who might independently discern the book's

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of expression. . . . EROS takes full advantage of this new freedom of expression. It is *the* magazine of sexual candor."

In another, more lavish spread:

"EROS is a new quarterly devoted to the subjects of Love and Sex. In the few short weeks since its birth, EROS has established itself as the rave of the American intellectual community—and the rage of prudes everywhere! And it's no wonder: EROS handles the subjects of Love and Sex with complete candor. The publication of this magazine—which is frankly and avowedly concerned with erotica—has been enabled by recent court decisions ruling that a literary piece or painting, though explicitly sexual in content, has a right to be published if it is a genuine work of art.

"EROS is a genuine work of art. . . ."

An undisclosed number of advertisements for Liaison were mailed. The outer envelopes of these ads ask, "Are you among the chosen few?" The first line of the advertisement eliminates the ambiguity: "Are you a member of the sexual elite?" It continues:

"That is, are you among the few happy and enlightened individuals who believe that a man and woman can make love without feeling pangs of conscience? Can you read about love and sex and discuss them without blushing and stammering?

"If so, you ought to know about an important new periodical called *Liaison*.

. . . . . .

"In short, *Liaison* is Cupid's Chronicle. . . .

"Though *Liaison* handles the subjects of love and sex with complete candor, I wish to make it clear that it is not a scandal sheet and it is not written for the man in the street. *Liaison* is aimed at intelligent, educated adults who can accept love and sex as part of life.

". . . I'll venture to say that after you've read your first bi-weekly issue, *Liaison* will be your most eagerly awaited piece of mail."

therapeutic worth.[10] Inserted in each advertisement was a slip labeled "GUARANTEE" and reading, "Documentary Books, Inc. unconditionally guarantees full refund of the price of THE HOUSEWIFE'S HANDBOOK ON SELECTIVE PROMISCUITY if the book fails to reach you because of U. S. Post Office censorship interference." Similar slips appeared in the advertising for EROS and Liaison; they highlighted the gloss petitioners put on the publications, eliminating any doubt what the purchaser was being asked to buy.[11]

This evidence, in our view, was relevant in determining the ultimate question of obscenity and, in the context of this record, serves to resolve all ambiguity and doubt. The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply sup-

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[10] Note 13, *infra*.

[11] There is much additional evidence supporting the conclusion of petitioners' pandering. One of petitioners' former writers for Liaison, for example, testified about the editorial goals and practices of that publication.

pression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the *Roth* test.

A proposition argued as to EROS, for example, is that the trial judge improperly found the magazine to be obscene as a whole, since he concluded that only four of the 15 articles predominantly appealed to prurient interest and substantially exceeded community standards of candor, while the other articles were admittedly nonoffensive. But the trial judge found that "[t]he deliberate and studied arrangement of EROS is editorialized for the purpose of appealing predominantly to prurient interest and to insulate through the inclusion of nonoffensive material." 224 F. Supp., at 131. However erroneous such a conclusion might be if unsupported by the evidence of pandering, the record here supports it. EROS was created, represented and sold solely as a claimed instrument of the sexual stimulation it would bring. Like the other publications, its pervasive treatment of sex and sexual matters rendered it available to exploitation by those who would make a business of pandering to "the widespread weakness for titillation by pornography." [12] Petitioners' own expert agreed, correctly we think, that "[i]f the object [of a work] is material gain for the creator through an appeal to the sexual curiosity and appetite," the work is pornographic. In other words, by animating sensual detail to give the publication a salacious cast, petitioners reinforced what is conceded by the Government to be an otherwise debatable conclusion.

A similar analysis applies to the judgment regarding the *Handbook*. The bulk of the proofs directed to social importance concerned this publication. Before selling publication rights to petitioners, its author had

[12] Schwartz, Morals Offenses and the Model Penal Code, 63 Col. L. Rev. 669, 677 (1963).

printed it privately; she sent circulars to persons whose names appeared on membership lists of medical and psychiatric associations, asserting its value as an adjunct to therapy. Over 12,000 sales resulted from this solicitation, and a number of witnesses testified that they found the work useful in their professional practice. The Government does not seriously contest the claim that the book has worth in such a controlled, or even neutral, environment. Petitioners, however, did not sell the book to such a limited audience, or focus their claims for it on its supposed therapeutic or educational value; rather, they deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed. They proclaimed its obscenity; and we cannot conclude that the court below erred in taking their own evaluation at its face value and declaring the book as a whole obscene despite the other evidence.[13]

The decision in *United States* v. *Rebhuhn,* 109 F. 2d 512, is persuasive authority for our conclusion.[14] That

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[13] The Government drew a distinction between the author's and petitioners' solicitation. At the sentencing proceeding the United States Attorney stated:

". . . [the author] was distributing . . . only to physicians; she never had widespread, indiscriminate distribution of the Handbook, and, consequently, the Post Office Department did not interfere . . . . If Mr. Ginzburg had distributed and sold and advertised these books solely to . . . physicians . . . we, of course, would not be here this morning with regard to The Housewife's Handbook . . . ."

[14] The Proposed Official Draft of the ALI Model Penal Code likewise recognizes the question of pandering as relevant to the obscenity issue, § 251.4 (4); Tentative Draft No. 6 (May 6, 1957), pp. 1–3, 13–17, 45–46, 53; Schwartz, *supra,* n. 12; see Craig, Suppressed Books, 195–206 (1963). Compare *Grove Press, Inc.* v. *Christenberry,* 175 F. Supp. 488, 496–497 (D. C. S. D. N. Y. 1959), aff'd 276 F. 2d 433 (C. A. 2d Cir. 1960); *United States* v. *One Book Entitled Ulysses,* 72 F. 2d 705, 707 (C. A. 2d Cir. 1934), affirming 5 F. Supp. 182 (D. C. S. D. N. Y. 1933). See also The Trial of Lady Chatterly—Regina v. Penguin Books, Ltd. (Rolph. ed. 1961).

was a prosecution under the predecessor to § 1461, brought in the context of pandering of publications assumed useful to scholars and members of learned professions. The books involved were written by authors proved in many instances to have been men of scientific standing, as anthropologists or psychiatrists. The Court of Appeals for the Second Circuit therefore assumed that many of the books were entitled to the protection of the First Amendment, and "could lawfully have passed through the mails, if directed to those who would be likely to use them for the purposes for which they were written . . . ." 109 F. 2d, at 514. But the evidence, as here, was that the defendants had not disseminated them for their "proper use, but . . . woefully misused them, and it was that misuse which constituted the gravamen of the crime." *Id.*, at 515. Speaking for the Court in affirming the conviction, Judge Learned Hand said:

> ". . . [T]he works themselves had a place, though a limited one, in anthropology and in psychotherapy. They might also have been lawfully sold to laymen who wished seriously to study the sexual practices of savage or barbarous peoples, or sexual aberrations; in other words, most of them were not obscene per se. In several decisions we have held that the statute does not in all circumstances forbid the dissemination of such publications . . . . However, in the case at bar, the prosecution succeeded . . . when it showed that the defendants had indiscriminately flooded the mails with advertisements, plainly designed merely to catch the prurient, though under the guise of distributing works of scientific or literary merit. We do not mean that the distributor of such works is charged with a duty to insure that they shall reach only proper hands, nor need we say what care he must use, for these defendants exceeded any possible limit; the circulars were no more than ap-

peals to the salaciously disposed, and no [fact finder] could have failed to pierce the fragile screen, set up to cover that purpose." 109 F. 2d, at 514–515.

We perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test.[15] No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themselves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.[16] Rather, the fact that each of these publications was created or exploited entirely on the basis of its appeal to prurient interests [17] strengthens the conclusion that the transac-

[15] Our conclusion is consistent with the statutory scheme. Although § 1461, in referring to "obscene . . . matter" may appear to deal with the qualities of material in the abstract, it is settled that the mode of distribution may be a significant part in the determination of the obscenity of the material involved. *United States* v. *Rebhuhn, supra.* Because the statute creates a criminal remedy, cf. *Manual Enterprises* v. *Day,* 370 U. S. 478, 495 (opinion of BRENNAN, J.), it readily admits such an interpretation, compare *United States* v. *31 Photographs, etc.,* 156 F. Supp. 350 (D. C. S. D. N. Y. 1957).

[16] See *New York Times* v. *Sullivan,* 376 U. S. 254, 265–266; *Smith* v. *California,* 361 U. S. 147, 150.

[17] See *Valentine* v. *Chrestensen,* 316 U. S. 52, where the Court viewed handbills purporting to contain protected expression as merely commercial advertising. Compare that decision with *Jamison* v. *Texas,* 318 U. S. 413, and *Murdock* v. *Pennsylvania,* 319 U. S. 105, where speech having the characteristics of advertising was held to be an integral part of religious discussions and hence protected. Material sold solely to produce sexual arousal, like commercial advertising, does not escape regulation because it has been dressed up as speech, or in other contexts might be recognized as speech.

tions here were sales of illicit merchandise, not sales of constitutionally protected matter.[18] A conviction for mailing obscene publications, but explained in part by the presence of this element, does not necessarily suppress the materials in question, nor chill their proper distribution for a proper use. Nor should it inhibit the enterprise of others seeking through serious endeavor to advance human knowledge or understanding in science, literature, or art. All that will have been determined is that questionable publications are obscene in a context which brands them as obscene as that term is defined in *Roth*—a use inconsistent with any claim to the shelter of the First Amendment.[19] "The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." *Roth* v. *United States*, 354 U. S., at 495 (WARREN, C. J., concurring).

It is important to stress that this analysis simply elaborates the test by which the obscenity vel non of the material must be judged. Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation

[18] Compare *Breard* v. *Alexandria*, 341 U. S. 622, with *Martin* v. *Struthers*, 319 U. S. 141. Cf. *Kovacs* v. *Cooper*, 336 U. S. 77; *Giboney* v. *Empire Storage Co.*, 336 U. S. 490; *Cox* v. *Louisiana*, 379 U. S. 536, 559.

[19] One who advertises and sells a work on the basis of its prurient appeal is not threatened by the perhaps inherent residual vagueness of the *Roth* test, cf. *Dombrowski* v. *Pfister*, 380 U. S. 479, 486–487, 491–492; such behavior is central to the objectives of criminal obscenity laws. ALI Model Penal Code, Tentative Draft No. 6 (May 6, 1957), pp. 1–3, 13–17; Comments to the Proposed Official Draft § 251.4, *supra;* Schwartz, Morals Offenses and the Model Penal Code, 63 Col. L. Rev. 669, 677–681 (1963); Paul & Schwartz, Federal Censorship—Obscenity in the Mail, 212–219 (1961); see *Mishkin* v. *New York*, *post*, p. 502, at 507, n. 5.

through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation.

Petitioners raise several procedural objections, principally directed to the findings which accompanied the trial court's memorandum opinion, Fed. Rules Crim. Proc. 23. Even on the assumption that petitioners' objections are well taken, we perceive no error affecting their substantial rights.

Affirmed.

MR. JUSTICE BLACK, dissenting.

Only one stark fact emerges with clarity out of the confusing welter of opinions and thousands of words written in this and two other cases today.[1] That fact is that Ginzburg, petitioner here, is now finally and authoritatively condemned to serve five years in prison for distributing printed matter about sex which neither Ginzburg nor anyone else could possibly have known to be criminal. Since, as I have said many times, I believe the Federal Government is without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind (as distinguished from conduct), I agree with Part II of the dissent of my Brother DOUGLAS in this case, and I would reverse Ginzburg's conviction on this ground alone. Even assuming, however, that the Court is correct in holding today that Congress does have power to clamp official censorship on some subjects selected by the Court, in some ways approved by it, I believe that the federal obscenity statute as enacted by Congress and as enforced by the Court against Ginzburg in this case should be held invalid on two other grounds.

[1] See No. 49, *Mishkin* v. *New York*, *post*, p. 502, and No. 368, *Memoirs* v. *Massachusetts*, *ante*, p. 413.

I.

Criminal punishment by government, although universally recognized as a necessity in limited areas of conduct, is an exercise of one of government's most awesome and dangerous powers. Consequently, wise and good governments make all possible efforts to hedge this dangerous power by restricting it within easily identifiable boundaries. Experience, and wisdom flowing out of that experience, long ago led to the belief that agents of government should not be vested with power and discretion to define and punish as criminal past conduct which had not been clearly defined as a crime in advance. To this end, at least in part, written laws came into being, marking the boundaries of conduct for which public agents could thereafter impose punishment upon people. In contrast, bad governments either wrote no general rules of conduct at all, leaving that highly important task to the unbridled discretion of government agents at the moment of trial, or sometimes, history tells us, wrote their laws in an unknown tongue so that people could not understand them or else placed their written laws at such inaccessible spots that people could not read them. It seems to me that these harsh expedients used by bad governments to punish people for conduct not previously clearly marked as criminal are being used here to put Mr. Ginzburg in prison for five years.

I agree with my Brother HARLAN that the Court has in effect rewritten the federal obscenity statute and thereby imposed on Ginzburg standards and criteria that Congress never thought about; or if it did think about them, certainly it did not adopt them. Consequently, Ginzburg is, as I see it, having his conviction and sentence affirmed upon the basis of a statute amended by this Court for violation of which amended statute he was not charged in the courts below. Such an affirmance we

have said violates due process. *Cole* v. *Arkansas*, 333 U. S. 196. Compare *Shuttlesworth* v. *Birmingham*, 382 U. S. 87. Quite apart from this vice in the affirmance, however, I think that the criteria declared by a majority of the Court today as guidelines for a court or jury to determine whether Ginzburg or anyone else can be punished as a common criminal for publishing or circulating obscene material are so vague and meaningless that they practically leave the fate of a person charged with violating censorship statutes to the unbridled discretion, whim and caprice of the judge or jury which tries him. I shall separately discuss the three elements which a majority of the Court seems to consider material in proving obscenity.[2]

(a) The first element considered necessary for determining obscenity is that the dominant theme of the material taken as a whole must appeal to the prurient interest in sex. It seems quite apparent to me that human beings, serving either as judges or jurors, could

[2] As I understand all of the opinions in this case and the two related cases decided today, three things must be proven to establish material as obscene. In brief these are (1) the material must appeal to the prurient interest, (2) it must be patently offensive, and (3) it must have no redeeming social value. MR. JUSTICE BRENNAN in his opinion in *Memoirs* v. *Massachusetts*, *ante*, p. 413, which is joined by THE CHIEF JUSTICE and MR. JUSTICE FORTAS, is of the opinion that all three of these elements must coalesce before material can be labeled obscene. MR. JUSTICE CLARK in a dissenting opinion in *Memoirs* indicates, however, that proof of the first two elements alone is enough to show obscenity and that proof of the third—the material must be utterly without redeeming social value—is only an aid in proving the first two. In his dissenting opinion in *Memoirs* MR. JUSTICE WHITE states that material is obscene "if its predominant theme appeals to the prurient interest in a manner exceeding customary limits of candor." In the same opinion MR. JUSTICE WHITE states that the social importance test "is relevant only to determining the predominant prurient interest of the material."

not be expected to give any sort of decision on this element which would even remotely promise any kind of uniformity in the enforcement of this law. What conclusion an individual, be he judge or juror, would reach about whether the material appeals to "prurient interest in sex" would depend largely in the long run not upon testimony of witnesses such as can be given in ordinary criminal cases where conduct is under scrutiny, but would depend to a large extent upon the judge's or juror's personality, habits, inclinations, attitudes and other individual characteristics. In one community or in one courthouse a matter would be condemned as obscene under this so-called criterion but in another community, maybe only a few miles away, or in another courthouse in the same community, the material could be given a clean bill of health. In the final analysis the submission of such an issue as this to a judge or jury amounts to practically nothing more than a request for the judge or juror to assert his own personal beliefs about whether the matter should be allowed to be legally distributed. Upon this subjective determination the law becomes certain for the first and last time.

(b) The second element for determining obscenity as it is described by my Brother BRENNAN is that the material must be "patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters . . . ." Nothing that I see in any position adopted by a majority of the Court today and nothing that has been said in previous opinions for the Court leaves me with any kind of certainty as to whether the "community standards" [3] referred to are world-wide, nation-wide, section-wide, state-wide,

[3] See the opinion of MR. JUSTICE BRENNAN, concurred in by Mr. Justice Goldberg in *Jacobellis* v. *Ohio*, 378 U. S. 184, but compare the dissent in that case of THE CHIEF JUSTICE, joined by MR. JUSTICE CLARK, at 199.

country-wide, precinct-wide or township-wide. But even if some definite areas were mentioned, who is capable of assessing "community standards" on such a subject? Could one expect the same application of standards by jurors in Mississippi as in New York City, in Vermont as in California? So here again the guilt or innocence of a defendant charged with obscenity must depend in the final analysis upon the personal judgment and attitudes of particular individuals and the place where the trial is held. And one must remember that the Federal Government has the power to try a man for mailing obscene matter in a court 3,000 miles from his home.

(c) A third element which three of my Brethren think is required to establish obscenity is that the material must be "utterly without redeeming social value." This element seems to me to be as uncertain, if not even more uncertain, than is the unknown substance of the Milky Way. If we are to have a free society as contemplated by the Bill of Rights, then I can find little defense for leaving the liberty of American individuals subject to the judgment of a judge or jury as to whether material that provokes thought or stimulates desire is "utterly without redeeming social value . . . ." Whether a particular treatment of a particular subject is with or without social value in this evolving, dynamic society of ours is a question upon which no uniform agreement could possibly be reached among politicians, statesmen, professors, philosophers, scientists, religious groups or any other type of group. A case-by-case assessment of social values by individual judges and jurors is, I think, a dangerous technique for government to utilize in determining whether a man stays in or out of the penitentiary.

My conclusion is that certainly after the fourteen separate opinions handed down in these three cases today no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate

decision in his particular case by this Court whether certain material comes within the area of "obscenity" as that term is confused by the Court today. For this reason even if, as appears from the result of the three cases today, this country is far along the way to a censorship of the subjects about which the people can talk or write, we need not commit further constitutional transgressions by leaving people in the dark as to what literature or what words or what symbols if distributed through the mails make a man a criminal. As bad and obnoxious as I believe governmental censorship is in a Nation that has accepted the First Amendment as its basic ideal for freedom, I am compelled to say that censorship that would stamp certain books and literature as illegal in advance of publication or conviction would in some ways be preferable to the unpredictable book-by-book censorship into which we have now drifted.

I close this part of my dissent by saying once again that I think the First Amendment forbids any kind or type or nature of governmental censorship over views as distinguished from conduct.

II.

It is obvious that the effect of the Court's decisions in the three obscenity cases handed down today is to make it exceedingly dangerous for people to discuss either orally or in writing anything about sex. Sex is a fact of life. Its pervasive influence is felt throughout the world and it cannot be ignored. Like all other facts of life it can lead to difficulty and trouble and sorrow and pain. But while it may lead to abuses, and has in many instances, no words need be spoken in order for people to know that the subject is one pleasantly interwoven in all human activities and involves the very substance of the creation of life itself. It is a subject which people are bound to consider and discuss whatever laws are passed

by any government to try to suppress it. Though I do not suggest any way to solve the problems that may arise from sex or discussions about sex, of one thing I am confident, and that is that federal censorship is not the answer to these problems. I find it difficult to see how talk about sex can be placed under the kind of censorship the Court here approves without subjecting our society to more dangers than we can anticipate at the moment. It was to avoid exactly such dangers that the First Amendment was written and adopted. For myself I would follow the course which I believe is required by the First Amendment, that is, recognize that sex at least as much as any other aspect of life is so much a part of our society that its discussion should not be made a crime.

I would reverse this case.

MR. JUSTICE DOUGLAS, dissenting.

Today's condemnation of the use of sex symbols to sell literature engrafts another exception on First Amendment rights that is as unwarranted as the judge-made exception concerning obscenity. This new exception condemns an advertising technique as old as history. The advertisements of our best magazines are chock-full of thighs, ankles, calves, bosoms, eyes, and hair, to draw the potential buyer's attention to lotions, tires, food, liquor, clothing, autos, and even insurance policies. The sexy advertisement neither adds to nor detracts from the quality of the merchandise being offered for sale. And I do not see how it adds to or detracts one whit from the legality of the book being distributed. A book should stand on its own, irrespective of the reasons why it was written or the wiles used in selling it. I cannot imagine any promotional effort that would make chapters 7 and 8 of the Song of Solomon any the less

or any more worthy of First Amendment protection than does their unostentatious inclusion in the average edition of the Bible.

I.

The Court has, in a variety of contexts, insisted that preservation of rights safeguarded by the First Amendment requires vigilance. We have recognized that a "criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms." *Dombrowski* v. *Pfister,* 380 U. S. 479, 486. Where uncertainty is the distinguishing characteristic of a legal principle—in this case the Court's "pandering" theory—"the free dissemination of ideas may be the loser." *Smith* v. *California,* 361 U. S. 147, 151. The Court today, however, takes the other course, despite the admonition in *Speiser* v. *Randall,* 357 U. S. 513, 525, that "[t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools." Before today, due regard for the frailties of free expression led us to reject insensitive procedures [1] and clumsy, vague, or overbroad substantive rules even in the realm of obscenity.[2] For as the Court emphasized in *Roth* v. *United States,* 354 U. S. 476, 488, "[t]he door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."

Certainly without the aura of sex in the promotion of these publications their contents cannot be said to be

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[1] *Marcus* v. *Search Warrant,* 367 U. S. 717; *A Quantity of Books* v. *Kansas,* 378 U. S. 205; *Freedman* v. *Maryland,* 380 U. S. 51.

[2] *Butler* v. *Michigan,* 352 U. S. 380; *Smith* v. *California,* 361 U. S. 147; *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478 (opinion of HARLAN, J.).

"utterly without redeeming social importance." *Roth* v. *United States, supra,* at 484.[3] One of the publications condemned today is the Housewife's Handbook on Selective Promiscuity, which a number of doctors and psychiatrists thought had clinical value. One clinical psychologist said: "I should like to recommend it, for example, to the people in my church to read, especially those who are having marital difficulties, in order to increase their tolerance and understanding for one another. Much of the book, I should think, would be very suitable reading for teen age people, especially teen age young women who could empathize strongly with the growing up period that Mrs. Rey [Anthony] relates, and could read on and be disabused of some of the unrealistic notions about marriage and sexual experiences. I should think this would make very good reading for the average man to help him gain a better appreciation of female sexuality."

The Rev. George Von Hilsheimer III, a Baptist minister,[4] testified that he has used the book "insistently in

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[3] The Court's premise is that Ginzburg represented that his publications would be sexually arousing. The Court, however, recognized in *Roth:* "[S]ex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to *prurient* interest . . . *i. e.,* a shameful or morbid interest in nudity, sex, or excretion . . . ." *Id.,* 487 and n. 20 (emphasis added). The advertisements for these publications, which the majority quotes (*ante,* at 468–469, n. 9), promised candor in the treatment of matters pertaining to sex, and at the same time proclaimed that they were artistic or otherwise socially valuable. In effect, then, these advertisements represented that the publications are *not* obscene.

[4] Rev. Von Hilsheimer obtained an A. B. at the University of Miami in 1951. He did graduate work in psychology and studied analysis and training therapy. Thereafter, he did graduate work as a theological student, and received a degree as a Doctor of Divinity from the University of Chicago in 1957. He had exten-

my pastoral counseling and in my formal psychological counseling":

> "The book is a history, a very unhappy history, of a series of sexual and psychological misadventures and the encounter of a quite typical and average American woman with quite typical and average American men. The fact that the book itself is the history of a woman who has had sexual adventures outside the normally accepted bounds of marriage which, of course for most Americans today, is a sort of serial polygamy, it does not teach or advocate this, but gives the women to whom I give the book at least a sense that their own experiences are not unusual, that their sexual failures are not unusual, and that they themselves should not be guilty because they are, what they say, sexual failures."

I would think the Baptist minister's evaluation would be enough to satisfy the Court's test, unless the censor's word is to be final or unless the experts are to be weighed in the censor's scales, in which event one Anthony Comstock would too often prove more weighty than a dozen more detached scholars, or unless we, the ultimate Board of Censors, are to lay down standards for review that give the censor the benefit of the "any evidence" rule or the "substantial evidence" rule as in the administrative law field. Cf. *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474. Or perhaps we mean to let the courts sift and choose among conflicting versions of the "redeeming social importance" of a particular book, making sure that they keep their findings clear of doubt lest we reverse, as

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sive experience as a group counselor, lecturer, and family counselor. He was a consultant to President Kennedy's Study Group on National Voluntary Services, and a member of the board of directors of Mobilization for Youth.

we do today in *Memoirs* v. *Massachusetts, ante,* p. 413, because the lower court in an effort to be fair showed how two-sided the argument was. Since the test is whether the publication is "utterly without redeeming social importance," then I think we should honor the opinion of the Baptist minister who testified as an expert in the field of counseling.

Then there is the newsletter *Liaison.* One of the defendants' own witnesses, critic Dwight Macdonald, testified that while, in his opinion, it did not go beyond the customary limits of candor tolerated by the community, it was "an extremely tasteless, vulgar and repulsive issue." This may, perhaps, overstate the case, but *Liaison* is admittedly little more than a collection of "dirty" jokes and poems, with the possible exception of an interview with Dr. Albert Ellis. As to this material, I find wisdom in the words of the late Judge Jerome Frank:

> "Those whose views most judges know best are other lawyers. Judges can and should take judicial notice that, at many gatherings of lawyers at Bar Association or of alumni of our leading law schools, tales are told fully as 'obscene' as many of those distributed by men . . . convicted for violation of the obscenity statute. . . . 'One thinks of the lyrics sung . . . by a certain respected and conservative member of the faculty of a great law-school which considers itself the most distinguished and which is the Alma Mater of many judges sitting on upper courts.' " [5]

Liaison's appeal is neither literary nor spiritual. But neither is its appeal to a "shameful or morbid interest in nudity, sex, or excretion." The appeal is to the ribald

[5] *United States* v. *Roth,* 237 F. 2d 796, 822 and n. 58 (concurring opinion).

sense of humor which is—for better or worse—a part of our culture. A mature society would not suppress this newsletter as obscene but would simply ignore it.

Then there is EROS. The Court affirms the judgment of the lower court, which found only four of the many articles and essays to be obscene. One of the four articles consisted of numerous ribald limericks, to which the views expressed as to *Liaison* would apply with equal force. Another was a photo essay entitled "Black and White in Color" which dealt with interracial love: a subject undoubtedly offensive to some members of our society. Critic Dwight Macdonald testified:

> "I suppose if you object to the idea of a Negro and a white person having sex together, then, of course, you would be horrified by it. I don't. From the artistic point of view I thought it was very good. In fact, I thought it was done with great taste, and I don't know how to say it—I never heard of him before, but he is obviously an extremely competent and accomplished photographer."

Another defense witness, Professor Horst W. Janson, presently the Chairman of the Fine Arts Department at New York University, testified:

> "I think they are outstandingly beautiful and artistic photographs. I can not imagine the theme being treated in a more lyrical and delicate manner than it has been done here.
>
> . . . . . .
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> "I might add here that of course photography in appropriate hands is an artistic instrument and this particular photographer has shown a very great awareness of compositional devices and patterns that have a long and well-established history in western art.
>
> . . . . . .

> "The very contrast in the color of the two bodies of course has presented him with certain opportunities that he would not have had with two models of the same color, and he has taken rather extraordinary and very delicate advantage of these contrasts."

The third article found specifically by the trial judge to be obscene was a discussion by Drs. Eberhard W. and Phyllis C. Kronhausen of erotic writing by women, with illustrative quotations.[6] The worth of the article was discussed by Dwight Macdonald, who stated:

> "I thought [this was] an extremely interesting and important study with some remarkable quotations from the woman who had put down her sense of love-making, of sexual intercourse . . . in an extremely eloquent way. I have never seen this from the woman's point of view. I thought the point they made, the difference between the man's and the woman's approach to sexual intercourse was very well made and very important."

Still another article found obscene was a short introduction to and a lengthy excerpt from My Life and Loves by Frank Harris, about which there is little in the record. Suffice it to say that this seems to be a book of some literary stature. At least I find it difficult on this record to say that it is "utterly without redeeming social importance." [7]

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[6] The Kronhausens wrote Pornography and the Law (1959).

[7] The extensive literary comment which the book's publication generated demonstrates that it is not "utterly without redeeming social importance." See, *e. g.*, New York Review of Books, p. 6 (Jan. 9, 1964); New Yorker, pp. 79–80 (Jan. 4, 1964); Library Journal, pp. 4743–4744 (Dec. 15, 1963); New York Times Book Review, p. 10 (Nov. 10, 1963); Time, pp. 102–104 (Nov. 8, 1963); Newsweek, pp. 98–100 (Oct. 28, 1963); New Republic, pp. 23–27 (Dec. 28, 1963).

Some of the tracts for which these publishers go to prison concern normal sex, some homosexuality, some the masochistic yearning that is probably present in everyone and dominant in some. Masochism is a desire to be punished or subdued. In the broad frame of reference the desire may be expressed in the longing to be whipped and lashed, bound and gagged, and cruelly treated.[8] Why is it unlawful to cater to the needs of this group? They are, to be sure, somewhat offbeat, nonconformist, and odd. But we are not in the realm of criminal conduct, only ideas and tastes. Some like Chopin, others like "rock and roll." Some are "normal," some are masochistic, some deviant in other respects, such as the homosexual. Another group also represented here translates mundane articles into sexual symbols. This group, like those embracing masochism, are anathema to the so-called stable majority. But why is freedom of the press and expression denied them? Are they to be barred from communicating in symbolisms important to them? When the Court today speaks of "social value," does it mean a "value" to the majority? Why is not a minority "value" cognizable? The masochistic group is one; the deviant group is another. Is it not important that members of those groups communicate with each other? Why is communication by the "written word" forbidden? If we were wise enough, we might know that communication may have greater therapeutical value than any sermon that those of the "normal" community can ever offer. But if the communication is of value to the masochistic community or to others of the deviant community, how can it be said to be "utterly

[8] See Krafft-Ebing, Psychopathia Sexualis, p. 89 *et seq.* (1893); Eisler, Man Into Wolf, p. 23 *et seq.* (1951); Stekel, Sadism and Masochism (1929) *passim;* Bergler, Principles of Self-Damage (1959) *passim;* Reik, Masochism in Modern Man (1941) *passim.*

without redeeming social importance"? "Redeeming" to whom? "Importance" to whom?

We took quite a different stance in *One, Inc.* v. *Olesen,* 355 U. S. 371, where we unanimously reversed the decision of the Court of Appeals in 241 F. 2d 772 without opinion. Our holding was accurately described by Lockhart and McClure, Obscenity Censorship: The Core Constitutional Issue—What Is Obscene? 7 Utah L. Rev. 289, 293 (1961):

> "[This] was a magazine for homosexuals entitled *One—The Homosexual Magazine,* which was definitely not a scientific or critical magazine, but appears to have been written to appeal to the tastes and interests of homosexuals." [9]

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[9] The Court of Appeals summarized the contents as follows:

"The article 'Sappho Remembered' is the story of a lesbian's influence on a young girl only twenty years of age but 'actually nearer sixteen in many essential ways of maturity,' in her struggle to choose between a life with the lesbian, or a normal married life with her childhood sweetheart. The lesbian's affair with her roommate while in college, resulting in the lesbian's expulsion from college, is recounted to bring in the jealousy angle. The climax is reached when the young girl gives up her chance for a normal married life to live with the lesbian. This article is nothing more than cheap pornography calculated to promote lesbianism. It falls far short of dealing with homosexuality from the scientific, historical and critical point of view.

"The poem 'Lord Samuel and Lord Montagu' is about the alleged homosexual activities of Lord Montagu and other British Peers and contains a warning to all males to avoid the public toilets while Lord Samuel is 'sniffing round the drains' of Piccadilly (London). . . .

. . . . . .

"The stories 'All This and Heaven Too,' and 'Not Til the End,' pages 32–36, are similar to the story 'Sappho Remembered,' except that they relate to the activities of the homosexuals rather than lesbians." 241 F. 2d 772, 777, 778.

There are other decisions of ours which also reversed judgments condemning publications catering to a wider range of literary tastes

Man was not made in a fixed mould. If a publication caters to the idiosyncrasies of a minority, why does it not have some "social importance"? Each of us is a very temporary transient with likes and dislikes that cover the spectrum. However plebian my tastes may be, who am I to say that others' tastes must be so limited and that other tastes have no "social importance"? How can we know enough to probe the mysteries of the subconscious of our people and say that this is good for them and that is not? Catering to the most eccentric taste may have "social importance" in giving that minority an opportunity to express itself rather than to repress its inner desires, as I suggest in my separate opinion in *Memoirs* v. *Massachusetts, ante,* at 431–432. How can we know that this expression may not *prevent* antisocial conduct?

I find it difficult to say that a publication has no "social importance" because it caters to the taste of the most unorthodox amongst us. We members of this Court should be among the last to say what should be orthodox in literature. An omniscience would be required which few in our whole society possess.

II.

This leads me to the conclusion, previously noted, that the First Amendment allows all ideas to be expressed—whether orthodox, popular, offbeat, or repulsive. I do not think it permissible to draw lines between

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than we seem to tolerate today. See, *e. g., Mounce* v. *United States,* 355 U. S. 180, vacating and remanding 247 F. 2d 148 (nudist magazines); *Sunshine Book Co.* v. *Summerfield,* 355 U. S. 372, reversing 101 U. S. App. D. C. 358, 249 F. 2d 114 (nudist magazine); *Tralins* v. *Gerstein,* 378 U. S. 576, reversing 151 So. 2d 19 (book titled "Pleasure Was My Business" depicting the happenings in a house of prostitution); *Grove Press* v. *Gerstein,* 378 U. S. 577, reversing 156 So. 2d 537 (book titled "Tropic of Cancer" by Henry Miller).

the "good" and the "bad" and be true to the constitutional mandate to let all ideas alone. If our Constitution permitted "reasonable" regulation of freedom of expression, as do the constitutions of some nations,[10] we would be in a field where the legislative and the judiciary would have much leeway. But under our charter all regulation or control of expression is barred. Government does not sit to reveal where the "truth" is. People are left to pick and choose between competing offerings. There is no compulsion to take and read what is repulsive any more than there is to spend one's time poring over government bulletins, political tracts, or theological treatises. The theory is that people are mature enough to pick and choose, to recognize trash when they see it, to be attracted to the literature that satisfies their deepest need, and, hopefully, to move from plateau to plateau and finally reach the world of enduring ideas.

I think this is the ideal of the Free Society written into our Constitution. We have no business acting as censors or endowing any group with censorship powers. It is shocking to me for us to send to prison anyone for publishing anything, especially tracts so distant from any incitement to action as the ones before us.

[This opinion applies also to *Mishkin* v. *New York*, *post*, p. 502.]

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[10] See, *e. g.*, Constitution of the Union of Burma, Art. 17 (i), reprinted in I Peaslee, Constitutions of Nations, p. 281 (2d ed. 1956); Constitution of India, Art. 19 (2), II Peaslee, *op. cit. supra*, p. 227; Constitution of Ireland, Art. 40 (6) (1) (i), II Peaslee, *op. cit. supra*, p. 458; Federal Constitution of the Swiss Confederation, Art. 55, III Peaslee, *op. cit. supra*, p. 344; Constitution of Libya, Art. 22, I Peaslee, Constitutions of Nations, p. 438 (3d ed. 1965); Constitution of Nigeria, Art. 25 (2), *id.*, p. 605; Constitution of Zambia, Art. 22 (2), *id.*, pp. 1040–1041.

MR. JUSTICE HARLAN, dissenting.

I would reverse the convictions of Ginzburg and his three corporate co-defendants. The federal obscenity statute under which they were convicted, 18 U. S. C. § 1461 (1964 ed.), is concerned with unlawful shipment of "nonmailable" matter. In my opinion announcing the judgment of the Court in *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, the background of the statute was assessed, and its focus was seen to be solely on the character of the material in question. That too has been the premise on which past cases in this Court arising under this statute, or its predecessors, have been decided. See, *e. g., Roth* v. *United States,* 354 U. S. 476. I believe that under this statute the Federal Government is constitutionally restricted to banning from the mails only "hard-core pornography," see my separate opinion in *Roth, supra,* at 507, and my dissenting opinion in *A Book Named "John Cleland's Memoirs"* v. *Attorney General of Massachusetts, ante,* p. 455. Because I do not think it can be maintained that the material in question here falls within that narrow class, I do not believe it can be excluded from the mails.

The Court recognizes the difficulty of justifying these convictions; the majority refuses to approve the trial judge's "exegesis of *Roth*" (note 3, *ante,* p. 465); it declines to approve the trial court's "characterizations" of the Handbook "outside" the "setting" which the majority for the first time announces to be crucial to this conviction (note 5, *ante,* p. 466). Moreover, the Court accepts the Government's concession that the Handbook has a certain "worth" when seen in something labeled a "controlled, or even neutral, environment" (*ante,* p. 472); the majority notes that these are "publications which we have assumed . . . cannot themselves be adjudged obscene in the abstract" (*ante,* p. 474). In fact, the Court in the last analysis sustains the convictions on the

express assumption that the items held to be obscene are not, viewing them strictly, obscene at all (*ante,* p. 466).

This curious result is reached through the elaboration of a theory of obscenity entirely unrelated to the language, purposes, or history of the federal statute now being applied, and certainly different from the test used by the trial court to convict the defendants. While the precise holding of the Court is obscure, I take it that the objective test of *Roth,* which ultimately focuses on the material in question, is to be supplemented by another test that goes to the question whether the mailer's aim is to "pander" to or "titillate" those to whom he mails questionable matter.

Although it is not clear whether the majority views the panderer test as a statutory gloss or as constitutional doctrine, I read the opinion to be in the latter category.[1] The First Amendment, in the obscenity area, no longer fully protects material on its face nonobscene, for such material must now also be examined in the light of the defendant's conduct, attitude, motives. This seems to me a mere euphemism for allowing punishment of a person who mails otherwise constitutionally protected material just because a jury or a judge may not find him or his business agreeable. Were a State to enact a "panderer" statute under its police power, I have little doubt that—subject to clear drafting to avoid attacks on vagueness and equal protection grounds—such a statute would be constitutional. Possibly the same might be true of the Federal Government acting under its postal or commerce powers. What I fear the Court has done today is in effect to write a new statute, but without the sharply focused definitions and standards necessary in such a sensitive area. Casting such a dubious gloss over a

[1] The prevailing opinion in *Memoirs* v. *Massachusetts, ante,* p. 413, makes clearer the constitutional ramifications of this new doctrine.

straightforward 101-year-old statute (see 13 Stat. 507) is for me an astonishing piece of judicial improvisation.

It seems perfectly clear that the theory on which these convictions are now sustained is quite different from the basis on which the case was tried and decided by the District Court and affirmed by the Court of Appeals.[2] The District Court found the Handbook "patently offensive on its face" and without "the slightest redeeming social, artistic or literary importance or value"; it held that there was "no credible evidence that The Handbook has the slightest valid scientific importance for treatment of individuals in clinical psychiatry, psychology, or any field of medicine." 224 F. Supp. 129, 131. The trial court made similar findings as to Eros and Liaison. The majority's opinion, as I read it, casts doubts upon these explicit findings. As to the Handbook, the Court interprets an offhand remark by the government prosecutor at the sentencing hearing as a "concession," which the majority accepts, that the prosecution rested upon the conduct of the petitioner, and the Court explicitly refuses to accept the trial judge's "characterizations" of the book, which I take to be an implied rejection of the findings of fact upon which the conviction was in fact based (note 5, *ante*, p. 466). Similarly as to Eros, the Court implies that the finding of obscenity might be "erroneous" were it not supported "by the evidence of pandering" (*ante*, p. 471). The Court further characterizes the Eros decision, aside from pandering, as "an otherwise debatable conclusion" (*ante*, p. 471).

If there is anything to this new pandering dimension to the mailing statute, the Court should return the case

[2] Although at one point in its opinion the Court of Appeals referred to "the shoddy business of pandering," 338 F. 2d 12, 15, a reading of the opinion as a whole plainly indicates that the Court of Appeals did not affirm these convictions on the basis on which this Court now sustains them.

for a new trial, for petitioners are at least entitled to a day in court on the question on which their guilt has ultimately come to depend. Compare the action of the Court in *Memoirs* v. *Massachusetts, ante,* p. 413, also decided today, where the Court affords the State an opportunity to prove in a subsequent prosecution that an accused purveyor of *Fanny Hill* in fact used pandering methods to secure distribution of the book.

If a new trial were given in the present case, as I read the Court's opinion, the burden would be on the Government to show that the motives of the defendants were to pander to "the widespread weakness for titillation by pornography" (*ante,* p. 471). I suppose that an analysis of the type of individuals receiving Eros and the Handbook would be relevant. If they were ordinary people, interested in purchasing Eros or the Handbook for one of a dozen personal reasons, this might be some evidence of pandering to the general public. On the other hand, as the Court suggests, the defendants could exonerate themselves by showing that they sent these works only or perhaps primarily (no standards are set) to psychiatrists and other serious-minded professional people. Also relevant would apparently be the nature of the mailer's advertisements or representations. Conceivably someone mailing to the public selective portions of a recognized classic with the avowed purpose of titillation would run the risk of conviction for mailing nonmailable matter. Presumably the Post Office under this theory might once again attempt to ban Lady Chatterley's Lover, which a lower court found not bannable in 1960 by an abstract application of *Roth. Grove Press, Inc.* v. *Christenberry,* 276 F. 2d 433. I would suppose that if the Government could show that Grove Press is pandering to people who are interested in the book's sexual passages and not in D. H. Lawrence's social theories or literary technique § 1461 could properly be

invoked. Even the well-known opinions of Judge A. N. Hand in *United States* v. *One Book Entitled Ulysses*, 72 F. 2d 705, and of Judge Woolsey in the District Court, 5 F. Supp. 182, might be rendered nugatory if a mailer of Ulysses is found to be titillating readers with its "coarse, blasphemous, and obscene" portions, 72 F. 2d, at 707, rather than piloting them through the intricacies of Joyce's stream of consciousness.

In the past, as in the trial of these petitioners, evidence as to a defendant's conduct was admissible only to show relevant intent.[3] Now evidence not only as to conduct, but also as to attitude and motive, is admissible on the primary question of whether the material mailed is obscene. I have difficulty seeing how these inquiries are logically related to the question whether a particular work is obscene. In addition, I think such a test for obscenity is impermissibly vague, and unwarranted by anything in the First Amendment or in 18 U. S. C. § 1461.

I would reverse the judgments below.

MR. JUSTICE STEWART, dissenting.

Ralph Ginzburg has been sentenced to five years in prison for sending through the mail copies of a magazine,

[3] To show pandering, the Court relies heavily on the fact that the defendants sought mailing privileges from the postmasters of Intercourse and Blue Ball, Pennsylvania, before settling upon Middlesex, New Jersey, as a mailing point (*ante*, pp. 467–468). This evidence was admitted, however, only to show required scienter, see 338 F. 2d 12, 16. On appeal to the Court of Appeals and to this Court, petitioner Ginzburg asserted that at most the evidence shows the intent of petitioner Eros Magazine, Inc., and was erroneously used against him. The Court of Appeals held the point *de minimis*, 338 F. 2d, at 16–17, on the ground that the parties had stipulated the necessary intent. The United States, in its brief in this Court, likewise viewed this evidence as relating solely to *scienter;* nowhere did the United States attempt to sustain these convictions on anything like a pandering theory.

a pamphlet, and a book. There was testimony at his trial that these publications possess artistic and social merit. Personally, I have a hard time discerning any. Most of the material strikes me as both vulgar and unedifying. But if the First Amendment means anything, it means that a man cannot be sent to prison merely for distributing publications which offend a judge's esthetic sensibilities, mine or any other's.

Censorship reflects a society's lack of confidence in itself. It is a hallmark of an authoritarian regime. Long ago those who wrote our First Amendment charted a different course. They believed a society can be truly strong only when it is truly free. In the realm of expression they put their faith, for better or for worse, in the enlightened choice of the people, free from the interference of a policeman's intrusive thumb or a judge's heavy hand. So it is that the Constitution protects coarse expression as well as refined, and vulgarity no less than elegance. A book worthless to me may convey something of value to my neighbor. In the free society to which our Constitution has committed us, it is for each to choose for himself.[1]

Because such is the mandate of our Constitution, there is room for only the most restricted view of this Court's decision in *Roth* v. *United States,* 354 U. S. 476. In that case the Court held that "obscenity is not within the area of constitutionally protected speech or press."

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[1] Different constitutional questions would arise in a case involving an assault upon individual privacy by publication in a manner so blatant or obtrusive as to make it difficult or impossible for an unwilling individual to avoid exposure to it. Cf. *e. g., Breard* v. *Alexandria,* 341 U. S. 622; *Public Utilities Commission of the District of Columbia* v. *Pollak,* 343 U. S. 451; *Griswold* v. *Connecticut,* 381 U. S. 479. Still other considerations might come into play with respect to laws limited in their effect to those deemed insufficiently adult to make an informed choice. No such issues were tendered in this case.

Id., at 485. The Court there characterized obscenity as that which is "utterly without redeeming social importance," *id.*, at 484, "deals with sex in a manner appealing to prurient interest," *id.*, at 487, and "goes substantially beyond customary limits of candor in description or representation of such matters." *Id.*, at 487, n. 20.[2] In *Manual Enterprises* v. *Day*, 370 U. S. 478, I joined MR. JUSTICE HARLAN'S opinion adding "patent indecency" as a further essential element of that which is not constitutionally protected.

There does exist a distinct and easily identifiable class of material in which all of these elements coalesce. It is that, and that alone, which I think government may constitutionally suppress, whether by criminal or civil sanctions. I have referred to such material before as hard-core pornography, without trying further to define it. *Jacobellis* v. *Ohio*, 378 U. S. 184, at 197 (concurring opinion). In order to prevent any possible misunderstanding, I have set out in the margin a description, borrowed from the Solicitor General's brief, of the kind of thing to which I have reference.[3] See also Lockhart and

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[2] It is not accurate to say that the *Roth* opinion "fashioned standards" for obscenity, because, as the Court explicitly stated, no issue was there presented as to the obscenity of the material involved. 354 U. S., at 481, n. 8. And in no subsequent case has a majority of the Court been able to agree on any such "standards."

[3] ". . . Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment. . . ."

McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 63–64.

Although arguments can be made to the contrary, I accept the proposition that the general dissemination of matter of this description may be suppressed under valid laws.[4] That has long been the almost universal judgment of our society. See *Roth* v. *United States,* 354 U. S., at 485. But material of this sort is wholly different from the publications mailed by Ginzburg in the present case, and different not in degree but in kind.

The Court today appears to concede that the materials Ginzburg mailed were themselves protected by the First Amendment. But, the Court says, Ginzburg can still be sentenced to five years in prison for mailing them. Why? Because, says the Court, he was guilty of "commercial exploitation," of "pandering," and of "titillation." But Ginzburg was not charged with "commercial exploitation"; he was not charged with "pandering"; he was not charged with "titillation." Therefore, to affirm his conviction now on any of those grounds, even if otherwise valid, is to deny him due process of law. *Cole* v. *Arkansas,* 333 U. S. 196. But those grounds are *not,* of course, otherwise valid. Neither the statute under which Ginzburg was convicted nor any other federal statute I know of makes "commercial exploitation" or "pandering" or "titillation" a criminal offense. And any criminal law that sought to do so in the terms so elusively defined by the Court would, of course, be unconstitutionally vague and therefore void. All of these matters are developed in the dissenting opinions of my Brethren, and I simply note here that I fully agree with them.

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[4] During oral argument we were advised by government counsel that the vast majority of prosecutions under this statute involve material of this nature. Such prosecutions usually result in guilty pleas and never come to this Court.

For me, however, there is another aspect of the Court's opinion in this case that is even more regrettable. Today the Court assumes the power to deny Ralph Ginzburg the protection of the First Amendment because it disapproves of his "sordid business." That is a power the Court does not possess. For the First Amendment protects us all with an even hand. It applies to Ralph Ginzburg with no less completeness and force than to G. P. Putnam's Sons.[5] In upholding and enforcing the Bill of Rights, this Court has no power to pick or to choose. When we lose sight of that fixed star of constitutional adjudication, we lose our way. For then we forsake a government of law and are left with government by Big Brother.

I dissent.

[5] See *Memoirs* v. *Massachusetts*, *ante*, p. 413.

MISHKIN *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 49. Argued December 7, 1965.—Decided March 21, 1966.

Appellant was convicted of violating § 1141 of the New York Penal Law for publishing, hiring others to prepare, and possessing with intent to sell obscene books. *Held:*

1. The statute is not impermissibly vague. *Roth* v. *United States,* 354 U. S. 476, 491–492. Pp. 506–507.

2. The books were properly found to be obscene. Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. P. 508.

3. There was ample evidence that appellant possessed the requisite scienter. Pp. 510–512.

4. The unrestricted notation of probable jurisdiction of the appeal may be regarded as a grant of the writ of certiorari as to appellant's claim that the books had been illegally seized and that their admission into evidence was therefore improper. However, such writ is dismissed as improvidently granted for lack of sufficient clarity in the record as to justify resolution of the issue. Pp. 512–514.

15 N. Y. 2d 671, 724, 204 N. E. 2d 209, 205 N. E. 2d 201, affirmed.

Emanuel Redfield argued the cause and filed a brief for appellant.

H. Richard Uviller argued the cause for appellee. With him on the brief were *Frank S. Hogan* and *Alan F. Leibowitz.*

Edward de Grazia filed a brief for Marshall Cohen et al., as *amici curiae,* urging reversal.

Briefs of *amici curiae,* urging affirmance, were filed by *Leo A. Larkin, Roger Arnebergh* and *Max P. Zall* for the City of New York et al.; and by *Charles H. Keating, Jr.,* and *James J. Clancy* for Citizens for Decent Literature, Inc., et al.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case, like *Ginzburg* v. *United States, ante,* p. 463, also decided today, involves convictions under a criminal obscenity statute. A panel of three judges of the Court of Special Sessions of the City of New York found appellant guilty of violating § 1141 of the New York Penal Law [1] by hiring others to prepare obscene books, publishing obscene books, and possessing obscene books with intent to sell them.[2] 26 Misc. 2d 152, 207 N. Y. S. 2d 390

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[1] Section 1141 of the Penal Law, in pertinent part, reads as follows:

"1. A person who . . . has in his possession with intent to sell, lend, distribute . . . any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book . . . or who . . . prints, utters, publishes, or in any manner manufactures, or prepares any such book . . . or who

"2. In any manner, hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them,

"Is guilty of a misdemeanor . . . .

. . . . . .

"4. The possession by any person of six or more identical or similar articles coming within the provisions of subdivision one of this section is presumptive evidence of a violation of this section.

"5. The publication for sale of any book, magazine or pamphlet designed, composed or illustrated as a whole to appeal to and commercially exploit prurient interest by combining covers, pictures, drawings, illustrations, caricatures, cartoons, words, stories and advertisements or any combination or combinations thereof devoted to the description, portrayal or deliberate suggestion of illicit sex, including adultery, prostitution, fornication, sexual crime and sexual perversion or to the exploitation of sex and nudity by the presentation of nude or partially nude female figures, posed, photographed or otherwise presented in a manner calculated to provoke or incite prurient interest, or any combination or combinations thereof, shall be a violation of this section."

[2] The information charged 159 counts of violating § 1141; in each instance a single count named a single book, although often the same book was the basis of three counts, each alleging one of the

(1960). He was sentenced to prison terms aggregating three years and ordered to pay $12,000 in fines for these crimes.[3] The Appellate Division, First Department, affirmed those convictions. 17 App. Div. 2d 243, 234 N. Y. S. 2d 342 (1962). The Court of Appeals affirmed without opinion. 15 N. Y. 2d 671, 204 N. E. 2d 209 (1964), remittitur amended, 15 N. Y. 2d 724, 205 N. E. 2d 201 (1965). We noted probable jurisdiction. 380 U. S. 960. We affirm.

Appellant was not prosecuted for anything he said or believed, but for what he did, for his dominant role in several enterprises engaged in producing and selling

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three types of § 1141 offenses. Of these, 11 counts were dismissed on motion of the prosecutor at the outset of the trial and verdicts of acquittal were entered on seven counts at the end of trial. The remaining § 1141 counts on which appellant was convicted are listed in the Appendix to this opinion.

Appellant was also convicted on 33 counts charging violations of § 330 of the General Business Law for failing to print the publisher's and printer's names and addresses on the books. The Appellate Division reversed the convictions under these counts, and the Court of Appeals affirmed. The State has not sought review of that decision in this Court.

[3] The trial court divided the counts into five groups for purposes of sentencing. One group consisted of the possession counts concerning books seized from a basement storeroom in a warehouse; a second group of possession counts concerned books seized from appellant's retail bookstore, Publishers' Outlet; the third consisted of the publishing counts; the fourth consisted of the counts charging him with hiring others to prepare the books, and the fifth consisted of the counts charging violations of the General Business Law. Sentences of one year and a $3,000 fine were imposed on one count of each of the first four groups; the prison sentences on the first three were made consecutive and that on the count in the fourth group was made concurrent with that in the third group. A $500 fine was imposed on one count in the fifth group. Sentence was suspended on the convictions on all other counts. The suspension of sentence does not render moot the claims as to invalidity of the convictions on those counts.

allegedly obscene books. Fifty books are involved in this case. They portray sexuality in many guises. Some depict relatively normal heterosexual relations, but more depict such deviations as sado-masochism, fetishism, and homosexuality. Many have covers with drawings of scantily clad women being whipped, beaten, tortured, or abused. Many, if not most, are photo-offsets of typewritten books written and illustrated by authors and artists according to detailed instructions given by the appellant. Typical of appellant's instructions was that related by one author who testified that appellant insisted that the books be "full of sex scenes and lesbian scenes . . . . [T]he sex had to be very strong, it had to be rough, it had to be clearly spelled out. . . . I had to write sex very bluntly, make the sex scenes very strong. . . . [T]he sex scenes had to be unusual sex scenes between men and women, and women and women, and men and men. . . . [H]e wanted scenes in which women were making love with women . . . . [H]e wanted sex scenes . . . in which there were lesbian scenes. He didn't call it lesbian, but he described women making love to women and men . . . making love to men, and there were spankings and scenes—sex in an abnormal and irregular fashion." Another author testified that appellant instructed him "to deal very graphically with . . . the darkening of the flesh under flagellation . . . ." Artists testified in similar vein as to appellant's instructions regarding illustrations and covers for the books.

All the books are cheaply prepared paperbound "pulps" with imprinted sales prices that are several thousand percent above costs. All but three were printed by a photo-offset printer who was paid 40¢ or 15¢ per copy, depending on whether it was a "thick" or "thin" book. The printer was instructed by appellant not to use appellant's name as publisher but to print some fic-

titious name on each book, to "make up any name and address." Appellant stored books on the printer's premises and paid part of the printer's rent for the storage space. The printer filled orders for the books, at appellant's direction, delivering them to appellant's retail store, Publishers' Outlet, and, on occasion, shipping books to other places. Appellant paid the authors, artists, and printer cash for their services, usually at his bookstore.

I.

Appellant attacks § 1141 as invalid on its face, contending that it exceeds First Amendment limitations by proscribing publications that are merely sadistic or masochistic, that the terms "sadistic" and "masochistic" are impermissibly vague, and that the term "obscene" is also impermissibly vague. We need not decide the merits of the first two contentions, for the New York courts held in this case that the terms "sadistic" and "masochistic," as well as the other adjectives used in § 1141 to describe proscribed books, are "synonymous with 'obscene.'" 26 Misc. 2d, at 154, 207 N. Y. S. 2d, at 393. The contention that the term "obscene" is also impermissibly vague fails under our holding in *Roth* v. *United States*, 354 U. S. 476, 491–492. Indeed, the definition of "obscene" adopted by the New York courts in interpreting § 1141 delimits a narrower class of conduct than that delimited under the *Roth* definition, *People* v. *Richmond County News, Inc.*, 9 N. Y. 2d 578, 586–587, 175 N. E. 2d 681, 685–686 (1961),[4] and thus § 1141, like the statutes in

[4] "It [obscene material covered by § 1141] focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable 'by the insult it offers, invariably, to sex, and to the human spirit' (D. H. Lawrence, Pornography and Obscenity [1930], p. 12), it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to

Roth, provides reasonably ascertainable standards of guilt.[5]

Appellant also objects that § 1141 is invalid as applied, *first*, because the books he was convicted of publishing, hiring others to prepare, and possessing for sale are not obscene, and *second*, because the proof of scienter is inadequate.

1. *The Nature of the Material.*—The First Amendment prohibits criminal prosecution for the publication and dissemination of allegedly obscene books that do not satisfy the *Roth* definition of obscenity. States are free to adopt other definitions of obscenity only to the extent that those adopted stay within the bounds set by the constitutional criteria of the *Roth* definition, which

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sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, 'a debauchery of the sexual faculty.' (Murray, Literature and Censorship, 14 Books on Trial 393, 394; see, also, Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 65.)" 9 N. Y. 2d, at 587, 175 N. E. 2d, at 686.

See also *People* v. *Fritch*, 13 N. Y. 2d 119, 123, 192 N. E. 2d 713, 716 (1963):

"In addition to the foregoing tests imposed by the decisions of the [United States] Supreme Court, this court interpreted section 1141 of the Penal Law in *People* v. *Richmond County News* . . . as applicable only to material which may properly be termed 'hard-core pornography.' "

[5] The stringent scienter requirement of § 1141, as interpreted in *People* v. *Finkelstein*, 9 N. Y. 2d 342, 345, 174 N. E. 2d 470, 472 (1961), also eviscerates much of appellant's vagueness claim. See, *infra*, pp. 510–512. See generally, *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 342; *American Communications Assn.* v. *Douds*, 339 U. S. 382, 412–413; *Screws* v. *United States*, 325 U. S. 91, 101–104 (opinion of Mr. Justice Douglas); *United States* v. *Ragen*, 314 U. S. 513, 524; *Gorin* v. *United States*, 312 U. S. 19, 27–28; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 501–503; *Omaechevarria* v. *Idaho*, 246 U. S. 343, 348.

restrict the regulation of the publication and sale of books to that traditionally and universally tolerated in our society.

The New York courts have interpreted obscenity in § 1141 to cover only so-called "hard-core pornography," see *People* v. *Richmond County News, Inc.*, 9 N. Y. 2d 578, 586–587, 175 N. E. 2d 681, 685–686 (1961), quoted in note 4, *supra*. Since that definition of obscenity is more stringent than the *Roth* definition, the judgment that the constitutional criteria are satisfied is implicit in the application of § 1141 below. Indeed, appellant's sole contention regarding the nature of the material is that some of the books involved in this prosecution,[6] those depicting various deviant sexual practices, such as flagellation, fetishism, and lesbianism, do not satisfy the prurient-appeal requirement because they do not appeal to a prurient interest of the "average person" in sex, that "instead of stimulating the erotic, they disgust and sicken." We reject this argument as being founded on an unrealistic interpretation of the prurient-appeal requirement.

Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the "average" or "normal" person in *Roth*, 354 U. S., at 489–490, does not foreclose this holding.[7] In regard to the prurient-appeal requirement, the

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[6] It could not be plausibly maintained that all of the appellant's books, including those dominated by descriptions of relatively normal heterosexual relationships, are devoid of the requisite prurient appeal.

[7] See *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 482 (opinion of HARLAN, J.); Lockhart and McClure, Censorship of Obscenity:

concept of the "average" or "normal" person was employed in *Roth* to serve the essentially negative purpose of expressing our rejection of that aspect of the *Hicklin* test, *Regina* v. *Hicklin,* [1868] L. R. 3 Q. B. 360, that made the impact on the most susceptible person determinative. We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons,[8] it also avoids the inadequacy of the most-susceptible-person facet of the *Hicklin* test.

No substantial claim is made that the books depicting sexually deviant practices are devoid of prurient appeal to sexually deviant groups. The evidence fully establishes that these books were specifically conceived and marketed for such groups. Appellant instructed his authors and artists to prepare the books expressly to induce their purchase by persons who would probably be sexually stimulated by them. It was for this reason that appellant "wanted an emphasis on beatings and fetishism and clothing—irregular clothing, and that sort of thing,

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The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 72–73 (1960).

It is true that some of the material in *Alberts* v. *California,* decided with *Roth,* resembled the deviant material involved here. But no issue involving the obscenity of the material was before us in either case. 354 U. S., at 481, n. 8. The basic question for decision there was whether the publication and sale of obscenity, however defined, could be criminally punished in light of First Amendment guarantees. Our discussion of definition was not intended to develop all the nuances of a definition required by the constitutional guarantees.

[8] See generally, 1 American Handbook of Psychiatry 593–604 (Arieti ed. 1959), for a description of the pertinent types of deviant sexual groups.

and again sex scenes between women; always sex scenes had to be very strong." And to be certain that authors fulfilled his purpose, appellant furnished them with such source materials as Caprio, Variations in Sexual Behavior, and Krafft-Ebing, Psychopathia Sexualis. Not only was there proof of the books' prurient appeal, compare *United States* v. *Klaw*, 350 F. 2d 155 (C. A. 2d Cir. 1965), but the proof was compelling; in addition appellant's own evaluation of his material confirms such a finding. See *Ginzburg* v. *United States*, *ante*, p. 463.

2. *Scienter.*—In *People* v. *Finkelstein*, 9 N. Y. 2d 342, 344–345, 174 N. E. 2d 470, 471 (1961), the New York Court of Appeals authoritatively interpreted § 1141 to require the "vital element of scienter," and it defined the required mental element in these terms:

> "A reading of the statute [§ 1141] as a whole clearly indicates that only those who are in some manner aware of the *character* of the material they attempt to distribute should be punished. It is not innocent but *calculated purveyance* of filth which is exorcised . . . ." [9] (Emphasis added.)

Appellant's challenge to the validity of § 1141 founded on *Smith* v. *California*, 361 U. S. 147, is thus foreclosed,[10]

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[9] For a similar scienter requirement see Model Penal Code § 251.4 (2); Commentary, Model Penal Code (Tentative Draft No. 6, 1957), 14, 49–51; cf. Schwartz, Morals Offenses and the Model Penal Code, 63 Col. L. Rev. 669, 677 (1963).

We do not read Judge Froessel's parenthetical reference to knowledge of the contents of the books in his opinion in *People* v. *Finkelstein*, 11 N. Y. 2d 300, 304, 183 N. E. 2d 661, 663 (1962), as a modification of this definition of scienter. Cf. *People* v. *Fritch*, 13 N. Y. 2d 119, 126, 192 N. E. 2d 713, 717–718 (1963).

[10] The scienter requirement set out in the text would seem to be, as a matter of state law, as applicable to publishers as it is to booksellers; both types of activities are encompassed within subdivision 1 of § 1141. Moreover, there is no need for us to speculate as to whether this scienter requirement is also present in subdivision 2 of

and this construction of § 1141 makes it unnecessary for us to define today "what sort of mental element is requisite to a constitutionally permissible prosecution." *Id.*, at 154. The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity. The New York definition of the scienter required by § 1141 amply serves those ends, and therefore fully meets the demands of the Constitution.[11] Cf. *Roth* v. *United States*, 354 U. S., at 495–496 (WARREN, C. J., concurring).

Appellant's principal argument is that there was insufficient proof of scienter. This argument is without merit. The evidence of scienter in this record consists, in part, of appellant's instructions to his artists and writers; his efforts to disguise his role in the enterprise that published and sold the books; the transparency of the character of the material in question, highlighted by the titles, covers, and illustrations; the massive number of obscene books appellant published, hired others to prepare, and possessed for sale; the repetitive quality of the sequences and formats of the books; and the exorbi-

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§ 1141 (making it a crime to hire others to prepare obscene books), for appellant's convictions for that offense involved books for the publication of which he was also convicted.

No constitutional claim was asserted below or in this Court as to the possible duplicative character of the hiring and publishing counts.

[11] The first appeal in *Finkelstein* defining the scienter required by § 1141 was decided after this case was tried, but before the Appellate Division and Court of Appeals affirmed these convictions. We therefore conclude that the state appellate courts were satisfied that the § 1141 scienter requirement was correctly applied at trial.

The § 1141 counts did not allege appellant's knowledge of the character of the books, but appellant has not argued, below or here, that this omission renders the information constitutionally inadequate.

tant prices marked on the books. This evidence amply shows that appellant was "aware of the character of the material" and that his activity was "not innocent but calculated purveyance of filth."

II.

Appellant claims that all but one of the books were improperly admitted in evidence because they were fruits of illegal searches and seizures. This claim is not capable in itself of being brought here by appeal, but only by a petition for a writ of certiorari under 28 U. S. C. § 1257 (3) (1964 ed.) as specifically setting up a federal constitutional right.[12] Nevertheless, since appellant challenged the constitutionality of § 1141 in this prosecution, and the New York courts sustained the statute, the case is properly here on appeal, and our unrestricted notation of probable jurisdiction justified appellant's briefing of the search and seizure issue. *Flournoy* v. *Weiner,* 321 U. S. 253, 263; *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530, 547. The nonappealable issue is treated, however, as if contained in a petition for a writ of certiorari, see 28 U. S. C. § 2103 (1964 ed.), and the unrestricted notation of probable jurisdiction of the appeal is to be understood as a grant of the writ on that issue. The issue thus remains within our certiorari jurisdiction, and we may, for good reason, even at this stage, decline to decide the merits of the issue, much as we would dismiss a writ of certiorari as improvidently granted. We think that this is a case for such an exercise of our discretion.

The far-reaching and important questions tendered by this claim are not presented by the record with sufficient

[12] Unlike the claim here, the challenges decided in the appeals in *Marcus* v. *Search Warrant,* 367 U. S. 717, and *A Quantity of Copies of Books* v. *Kansas,* 378 U. S. 205, implicated the constitutional validity of statutory schemes establishing procedures for seizing the books.

clarity to require or justify their decision. Appellant's standing to assert the claim in regard to all the seizures is not entirely clear; there is no finding on the extent or nature of his interest in two book stores, the Main Stem Book Shop and Midget Book Shop, in which some of the books were seized. The State seeks to justify the basement storeroom seizure, in part, on the basis of the consent of the printer-accomplice; but there were no findings as to the authority of the printer over the access to the storeroom, or as to the voluntariness of his alleged consent. It is also maintained that the seizure in the storeroom was made on the authority of a search warrant; yet neither the affidavit upon which the warrant issued nor the warrant itself is in the record. Finally, while the search and seizure issue has a First Amendment aspect because of the alleged massive quality of the seizures, see *A Quantity of Copies of Books* v. *Kansas,* 378 U. S. 205, 206 (opinion of BRENNAN, J.); *Marcus* v. *Search Warrant,* 367 U. S. 717, the record in this regard is inadequate. There is neither evidence nor findings as to how many of the total available copies of the books in the various bookstores were seized and it is impossible to determine whether the books seized in the basement storeroom were on the threshold of dissemination. Indeed, this First Amendment aspect apparently was not presented or considered by the state courts, nor was it raised in appellant's jurisdictional statement; it appeared for the first time in his brief on the merits.

In light of these circumstances, which were not fully apprehended at the time we took the case, we decline to reach the merits of the search and seizure claim; insofar as notation of probable jurisdiction may be regarded as a grant of the certiorari writ on the search and seizure issue, that writ is dismissed as improvidently granted. "Examination of a case on the merits . . . may bring into 'proper focus' a consideration which . . .

later indicates that the grant was improvident." *The Monrosa* v. *Carbon Black,* 359 U. S. 180, 184.

Affirmed.

[For dissenting opinion of MR. JUSTICE DOUGLAS, see *ante,* p. 482.]

APPENDIX TO OPINION OF THE COURT.

THE CONVICTIONS BEING REVIEWED.

Exhibit No.	Title of Book	§ 1141 Counts Naming the Book: Possession	Pub-lishing	Hiring Others
1	Chances Go Around	1	63	111
2	Impact	2	64	112
3	Female Sultan	3	65	113
4	Satin Satellite	4		
5	Her Highness	5	67	115
6	Mistress of Leather	6	68	116
7	Educating Edna	7	69	117
8	Strange Passions	8	70	118
9	The Whipping Chorus Girls	9	71	119
10	Order Of The Day and Bound Maritally	10	72	120
11	Dance With the Dominant Whip	11	73	121
12	Cult Of The Spankers	12	74	122
13	Confessions	13	75	123
14 & 46	The Hours Of Torture	14 & 40	76	124
15 & 47	Bound In Rubber	15 & 41	77	125
16 & 48	Arduous Figure Training at Bondhaven	16 & 42	78	126
17 & 49	Return Visit To Fetterland	17 & 43	79	127
18	Fearful Ordeal In Restraintland	18	80	128
19 & 50	Women In Distress	19 & 44	81	129
20 & 54	Pleasure Parade No. 1	20 & 48	82	130
21 & 57	Screaming Flesh	21 & 51	86	134
22 & 58	Fury	22 & 52		
23	So Firm So Fully Packed	23	87	135
24	I'll Try Anything Twice	24		
25 & 59	Masque	25 & 53		
26	Catanis	26		

Exhibit No.	Title of Book	§ 1141 Counts Naming the Book: Possession	Publishing	Hiring Others
27	The Violated Wrestler	27	89	137
28	Betrayal	28		
29	Swish Bottom	29	90	138
30	Raw Dames	30	91	139
31	The Strap Returns	31	92	140
32	Dangerous Years	32	93	141
43	Columns of Agony	37	95	144
44	The Tainted Pleasure	38	96	145
45	Intense Desire	39	97	146
51	Pleasure Parade No. 4	45	85	133
52	Pleasure Parade No. 3	46	84	132
53	Pleasure Parade No. 2	47	83	131
55	Sorority Girls Stringent Initiation	49	98	147
56	Terror At The Bizarre Museum	50	99	148
60	Temptation	57		
61	Peggy's Distress On Planet Venus	58	101	150
62	Ways of Discipline	59	102	151
63	Mrs. Tyrant's Finishing School	60	103	152
64	Perilous Assignment	61	104	153
68	Bondage Correspondence		107	156
69	Woman Impelled		106	155
70	Eye Witness		108	157
71	Stud Broad		109	158
72	Queen Bee		110	159

MR. JUSTICE HARLAN, concurring.

On the issue of obscenity I concur in the judgment of affirmance on premises stated in my dissenting opinion in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Massachusetts, ante,* p. 455. In all other respects I agree with and join the Court's opinion.

MR. JUSTICE BLACK, dissenting.

The Court here affirms convictions and prison sentences aggregating three years plus fines totaling $12,000 im-

posed on appellant Mishkin based on state charges that he hired others to prepare and publish obscene books and that Mishkin himself possessed such books. This Court has held in many cases that the Fourteenth Amendment makes the First applicable to the States. See for illustration cases collected in my concurring opinion in *Speiser* v. *Randall,* 357 U. S. 513, 530. Consequently upon the same grounds that I dissented from a five-year federal sentence imposed upon Ginzburg in No. 42, *ante,* p. 476, for sending "obscene" printed matter through the United States mails I dissent from affirmance of this three-year state sentence imposed on Mishkin. Neither in this case nor in *Ginzburg* have I read the alleged obscene matter. This is because I believe for reasons stated in my dissent in *Ginzburg* and in many other prior cases that this Court is without constitutional power to censor speech or press regardless of the particular subject discussed. I think the federal judiciary because it is appointed for life is the most appropriate tribunal that could be selected to interpret the Constitution and thereby mark the boundaries of what government agencies can and cannot do. But because of life tenure, as well as other reasons, the federal judiciary is the least appropriate branch of government to take over censorship responsibilities by deciding what pictures and writings people throughout the land can be permitted to see and read. When this Court makes particularized rules on what people can see and read, it determines which policies are reasonable and right, thereby performing the classical function of legislative bodies directly responsible to the people. Accordingly, I wish once more to express my objections to saddling this Court with the irksome and inevitably unpopular and unwholesome task of finally deciding by a case-by-case, sight-by-sight personal judgment of the members of this Court what pornography (whatever that means) is too hard core for people

to see or read. If censorship of views about sex or any other subject is constitutional then I am reluctantly compelled to say that I believe the tedious, time-consuming and unwelcome responsibility for finally deciding what particular discussions or opinions must be suppressed in this country, should, for the good of this Court and of the Nation, be vested in some governmental institution or institutions other than this Court.

I would reverse these convictions. The three-year sentence imposed on Mishkin and the five-year sentence imposed on Ginzburg for expressing views about sex are minor in comparison with those more lengthy sentences that are inexorably bound to follow in state and federal courts as pressures and prejudices increase and grow more powerful, which of course they will. Nor is it a sufficient answer to these assuredly ever-increasing punishments to rely on this Court's power to strike down "cruel and unusual punishments" under the Eighth Amendment. Distorting or stretching that Amendment by reading it as granting unreviewable power to this Court to perform the legislative function of fixing punishments for all state and national offenses offers a sadly inadequate solution to the multitudinous problems generated by what I consider to be the un-American policy of censoring the thoughts and opinions of people. The only practical answer to these concededly almost unanswerable problems is, I think, for this Court to decline to act as a national board of censors over speech and press but instead to stick to its clearly authorized constitutional duty to adjudicate cases over things and conduct. Halfway censorship methods, no matter how laudably motivated, cannot in my judgment protect our cherished First Amendment freedoms from the destructive aggressions of both state and national government. I would reverse this case and announce that the First and Fourteenth Amendments taken together command that neither Con-

gress nor the States shall pass laws which in any manner abridge freedom of speech and press—whatever the subjects discussed. I think the Founders of our Nation in adopting the First Amendment meant precisely that the Federal Government should pass "no law" regulating speech and press but should confine its legislation to the regulation of conduct. So too, that policy of the First Amendment made applicable to the States by the Fourteenth, leaves the States vast power to regulate conduct but no power at all, in my judgment, to make the expression of views a crime.

MR. JUSTICE STEWART, dissenting.

The appellant was sentenced to three years in prison for publishing numerous books. However tawdry those books may be, they are not hard-core pornography, and their publication is, therefore, protected by the First and Fourteenth Amendments. *Ginzburg* v. *United States, ante,* p. 497 (dissenting opinion). The judgment should be reversed.*

*See *Ginzburg* v. *United States, ante,* p. 497, at 499, note 3 (dissenting opinion). Moreover, there was no evidence at all that any of the books are the equivalent of hard-core pornography in the eyes of any particularized group of readers. Cf. *United States* v. *Klaw,* 350 F. 2d 155 (C. A. 2d Cir.).

Although the New York Court of Appeals has purported to interpret § 1141 to cover only what it calls "hard-core pornography," this case makes abundantly clear that that phrase has by no means been limited in New York to the clearly identifiable and distinct class of material I have described in *Ginzburg* v. *United States, ante,* p. 497, at 499, note 3 (dissenting opinion).

Syllabus.

BRENNER, COMMISSIONER OF PATENTS *v.* MANSON.

CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

No. 58. Argued November 17, 1965.—Decided March 21, 1966.

In December 1957 Ringold and Rosenkranz applied for a patent on an allegedly novel process for making certain steroids, claiming priority as of December 1956. A patent issued thereon in 1959. In January 1960 respondent filed an application to patent the same process, asserting that he had discovered it prior to December 1956, and requesting that an "interference" be declared to test the issue of priority. Respondent's application was denied by a Patent Office examiner, the Board of Appeals affirming, for failure "to disclose any utility for" the compound produced by the process. The Court of Customs and Patent Appeals (CCPA) reversed, holding that "where a claimed process produces a known product it is not necessary to show utility for the product" as long as it is not detrimental to the public interest. *Held:*

1. This Court has jurisdiction under 28 U. S. C. § 1256 to review upon petition of the Commissioner of Patents patent decisions of the CCPA. Pp. 523–528.

2. The Patent Office properly may refuse to declare an "interference" on the ground that the application therefor fails to disclose a prima facie case of patentability. P. 528, n. 12.

3. The practical utility of the compound produced by a chemical process is an essential element in establishing a prima facie case for the patentability of the process. Pp. 528–536.

(a) One may patent only that which is useful. Pp. 528–529, 535.

(b) Respondent has not provided any basis for overturning the determination of the Patent Office that the utility requirement was not satisfied in this case by reference to the alleged utility of an adjacent homologue. Pp. 531–532.

(c) The requirement that a chemical process be useful is not satisfied by a showing that the compound yielded belongs to a class of compounds which scientists are screening for possible uses. Pp. 532–536.

(d) Nor is the utility requirement for chemical processes satisfied by a showing that the process works, *i. e.*, yields the intended product. Pp. 532–536.

52 C. C. P. A. (Pat.) 739, 333 F. 2d 234, reversed.

Paul Bender argued the cause for petitioner, *pro hac vice*, by special leave of Court. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Douglas, Sherman L. Cohn* and *Edward Berlin.*

Dean Laurence argued the cause for respondent. With him on the brief were *Herbert I. Sherman* and *John L. White.*

W. Brown Morton, Jr., and *Ellsworth H. Mosher* filed a brief for the American Patent Law Association, as *amicus curiae*, urging affirmance.

MR. JUSTICE FORTAS delivered the opinion of the Court.

This case presents two questions of importance to the administration of the patent laws: First, whether this Court has certiorari jurisdiction, upon petition of the Commissioner of Patents, to review decisions of the Court of Customs and Patent Appeals; and second, whether the practical utility of the compound produced by a chemical process is an essential element in establishing a prima facie case for the patentability of the process. The facts are as follows:

In December 1957, Howard Ringold and George Rosenkranz applied for a patent on an allegedly novel process for making certain known steroids.[1] They claimed

[1] The applicants described the products of their process as "2-methyl dihydrotestosterone derivatives and esters thereof as well as 2-methyl dihydrotestosterone derivatives having a C–17 lower alkyl group. The products of the process of the present invention have a useful high anabolic-androgenic ratio and are especially valuable for treatment of those ailments where anabolic or antiestrogenic effect together with a lesser androgenic effect is desired."

priority as of December 17, 1956, the date on which they had filed for a Mexican patent. United States Patent No. 2,908,693 issued late in 1959.

In January 1960, respondent Manson, a chemist engaged in steroid research, filed an application to patent precisely the same process described by Ringold and Rosenkranz. He asserted that it was he who had discovered the process, and that he had done so before December 17, 1956. Accordingly, he requested that an "interference" be declared in order to try out the issue of priority between his claim and that of Ringold and Rosenkranz.[2]

A Patent Office examiner denied Manson's application, and the denial was affirmed by the Board of Appeals within the Patent Office. The ground for rejection was the failure "to disclose any utility for" the chemical compound produced by the process. Letter of Examiner, dated May 24, 1960. This omission was not

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[2] 35 U. S. C. § 135 (1964 ed.) provides: "Whenever an application is made for a patent which, in the opinion of the Commissioner, would interfere with any pending application, or with any unexpired patent, he shall give notice thereof . . . . The question of priority of invention shall be determined by a board of patent interferences . . . whose decision, if adverse to the claim of an applicant, shall constitute the final refusal by the Patent Office of the claims involved, and the Commissioner may issue a patent to the applicant who is adjudged the prior inventor. . . ."

Patent Office Rule 204 (b), 37 CFR § 1.204 (b), provides: "When the filing date or effective filing date of an applicant is subsequent to the filing date of a patentee, the applicant, before an interference will be declared, shall file an affidavit that he made the invention in controversy in this country, before the filing date of the patentee . . . and, when required, the applicant shall file an affidavit . . . setting forth facts which would prima facie entitle him to an award of priority relative to the filing date of the patentee."

Judge Thurman Arnold has provided an irreverent description of the way patent claims, including "interferences," are presented to the Patent Office. See *Monsanto Chemical Co.* v. *Coe,* 79 U. S. App. D. C. 155, 145 F. 2d 18.

cured, in the opinion of the Patent Office, by Manson's reference to an article in the November 1956 issue of the Journal of Organic Chemistry, 21 J. Org. Chem. 1333–1335, which revealed that steroids of a class which included the compound in question were undergoing screening for possible tumor-inhibiting effects in mice, and that a homologue [3] adjacent to Manson's steroid had proven effective in that role. Said the Board of Appeals, "It is our view that the statutory requirement of usefulness of a product cannot be presumed merely because it happens to be closely related to another compound which is known to be useful."

The Court of Customs and Patent Appeals (hereinafter CCPA) reversed, Chief Judge Worley dissenting. 52 C. C. P. A. (Pat.) 739, 745, 333 F. 2d 234, 237–238. The court held that Manson was entitled to a declaration of interference since "where a claimed process produces a known product it is not necessary to show utility for the product," so long as the product "is not alleged to be detrimental to the public interest." Certiorari was granted, 380 U. S. 971, to resolve this running dispute over what constitutes "utility" in chemical process claims,[4] as well as to answer the question concerning our certiorari jurisdiction.

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[3] "A homologous series is a family of chemically related compounds, the composition of which varies from member to member by CH_2 (one atom of carbon and two atoms of hydrogen). . . . Chemists knowing the properties of one member of a series would in general know what to expect in adjacent members." *Application of Henze*, 37 C. C. P. A. (Pat.) 1009, 1014, 181 F. 2d 196, 200–201. See also *In re Hass*, 31 C. C. P. A. (Pat.) 895, 901, 141 F. 2d 122, 125; *Application of Norris*, 37 C. C. P. A. (Pat.) 876, 179 F. 2d 970; *Application of Jones*, 32 C. C. P. A. (Pat.) 1020, 149 F. 2d 501. With respect to the inferior predictability of steroid homologues, see, *infra*, p. 532.

[4] In addition to the clear conflict between the Patent Office and the CCPA, there arguably exists one between the CCPA and the Court of Appeals for the District of Columbia. See *Petrocarbon*

I.

Section 1256 of Title 28 U. S. C. (1964 ed.), enacted in 1948, provides that "Cases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of certiorari." This unqualified language would seem to foreclose any challenge to our jurisdiction in the present case. Both the Government [5] and the respondent urge that we have certiorari jurisdiction over patent decisions of the CCPA, although the latter would confine our jurisdiction to those petitions filed by dissatisfied applicants and would deny the Commissioner of Patents the right to seek certiorari.[6] This concert of opinion does not settle the basic question because jurisdiction cannot be conferred by consent of the parties. The doubt that does exist stems from a decision of this

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Limited v. *Watson,* 101 U. S. App. D. C. 214, 247 F. 2d 800, cert. denied, 355 U. S. 955. But see *Application* of *Szwarc,* 50 C. C. P. A. (Pat.) 1571, 1576–1583, 319 F. 2d 277, 281–286.

[5] The present case is the first in which the Government has taken the position that § 1256 confers jurisdiction upon this Court to review patent decisions in the CCPA. Prior to *Glidden Co.* v. *Zdanok,* 370 U. S. 530, the Government was of the view that the Court lacked jurisdiction. See, *e. g.,* the Brief in Opposition in *Dalton* v. *Marzall,* No. 87, O. T. 1951, cert. denied, 342 U. S. 818. After the decision in *Glidden,* discussed *infra,* at 526, the Government conceded the issue was a close one. See, *e. g.,* Brief in Opposition in *In re Gruschwitz,* No. 579, O. T. 1963, cert. denied, 375 U. S. 967.

[6] We find no warrant for this curious limitation either in the statutory language or in the legislative history of § 1256. Nor do we find persuasive the circumstance that the Commissioner may not appeal adverse decisions of the Board of Appeals. 35 U. S. C. §§ 141, 142, and 145 (1964 ed.). As a member of the Board and the official responsible for selecting the membership of its panels, 35 U. S. C. § 7 (1964 ed.), the Commissioner may be appropriately considered as bound by Board determinations. No such consideration operates to prevent his seeking review of adverse decisions rendered by the CCPA.

Court, rendered in January 1927, in *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, which has been widely interpreted as precluding certiorari jurisdiction over patent and trademark decisions of the CCPA.

Postum, however, was based upon a statutory scheme materially different from the present one. *Postum* involved a proceeding in the Patent Office to cancel a trademark. The Commissioner of Patents rejected the application. An appeal was taken to the then Court of Appeals for the District of Columbia, which in 1927 exercised the jurisdiction later transferred to the CCPA. Under the statutory arrangement in effect at the time, the judgment of the Court of Appeals was not definitive because it was not an order to the Patent Office determinative of the controversy. A subsequent bill in equity could be brought in the District Court and it was possible that a conflicting adjudication could thus be obtained. On this basis, the Court held that it could not review the decision of the Court of Appeals. It held that the conclusion of the Court of Appeals was an "administrative decision" rather than a "judicial judgment": "merely an instruction to the Commissioner of Patents by a court which is made part of the machinery of the Patent Office for administrative purposes." 272 U. S., at 698–699. Therefore, this Court concluded, the proceeding in the Court of Appeals—essentially administrative in nature—was neither case nor controversy within the meaning of Article III of the Constitution. Congress might confer such "administrative" tasks upon the courts of the District of Columbia, wrote Chief Justice Taft, but it could not empower this Court to participate therein.

Congress soon amended the statutory scheme. In March of 1927 it provided that an action in the District Court was to be alternative and not cumulative to appellate review, that it could not be maintained to overcome

an adjudication in the Court of Appeals.[7] In 1929 Congress transferred appellate jurisdiction over the Commissioner's decisions from the Court of Appeals to what had been the Court of Customs Appeals and was now styled the Court of Customs and Patent Appeals.[8] Whereas the Court of Appeals had been empowered to take additional evidence and to substitute its judgment for that of the Commissioner, the CCPA was confined to the record made in the Patent Office.[9] Compare *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144–145. Despite these changes, however, *Postum* had acquired a life of its own. It continued to stand in the way of attempts to secure review here of CCPA decisions respecting the Commissioner of Patents. See, *e. g.*, *McBride* v. *Teeple*, 311 U. S. 649, denying certiorari for "want of jurisdiction" on the authority of *Postum*.[10]

This was the background against which Congress, in its 1948 codification of statutes pertaining to the judiciary, enacted § 1256, blandly providing in unqualified language for review on certiorari of "[c]ases in the Court of Customs and Patent Appeals." Nothing in the legislative materials relating to the statute, except its language, is of assistance to us in the resolution of the present problem: Did the statutory changes which followed

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[7] Act of March 2, 1927, c. 273, § 11, 44 Stat. 1335, 1336. See *Glidden Co.* v. *Zdanok*, *supra*, at 572–579; Kurland & Wolfson, Supreme Court Review of the Court of Customs and Patent Appeals, 18 Geo. Wash. L. Rev. 192 (1950). This remains the law. 35 U. S. C. §§ 141, 145.

[8] Act of March 2, 1929, c. 488, 45 Stat. 1475.

[9] See Kurland & Wolfson, *op. cit. supra*, n. 7, at 196.

[10] Apart from *Postum*, until enactment of § 1256 in 1948 there existed no statutory basis for jurisdiction in these cases. See Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, § 251 (Wolfson & Kurland ed. 1951).

Postum mean that a patent decision by the CCPA was a "judicial" determination reviewable by this Court under Article III? And, if so, was § 1256 intended to create such jurisdiction?

Assistance came with the 1958 revision of the Judicial Code. Congress there declared the CCPA "a court established under article III . . . ," that is, a constitutional court exercising judicial rather than administrative power. 28 U. S. C. § 211 (1964 ed.). In 1962 this Court addressed itself to the nature and status of the CCPA. *Glidden Co.* v. *Zdanok,* 370 U. S. 530, raised the question whether a judge of the CCPA was an Article III judge, capable of exercising federal judicial power. In answering that question in the affirmative, MR. JUSTICE HARLAN'S opinion, for three of the seven Justices participating, expressly left open the question whether § 1256 conferred certiorari jurisdiction over patent and trademark cases decided in the CCPA, 370 U. S., at 578 n. 49. It suggested, however, that *Postum* might be nothing more than a museum piece. The opinion noted that *Postum* "must be taken to be limited to the statutory scheme in existence before" 1929. 370 U. S., at 579. The concurring opinion of MR. JUSTICE CLARK, in which THE CHIEF JUSTICE joined, did not reflect any difference on this point.

Thus, the decision sought to be reviewed is that of an Article III court. It is "judicial" in character. It is not merely an instruction to the Commissioner or part of the "administrative machinery" of the Patent Office. It is final and binding in the usual sense.[11] In sum, *Postum*

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[11] This is not to say that a CCPA determination that an applicant is entitled to a patent precludes a contrary result in a subsequent infringement suit, any more than issuance of a patent by the Patent Office or the decision in an earlier infringement action against a different "infringer" has that effect. See, *e. g., Graham* v. *John Deere Co., ante,* p. 1, at 4. We review decisions of the Dis-

has no vitality in the present setting, and there remains no constitutional bar to our jurisdiction.

Having arrived at this conclusion, we have no difficulty in giving full force and effect to the generality of the language in § 1256. It would be entirely arbitrary for us to assume, despite the statutory language, that Congress in 1948 intended to enshrine *Postum*—dependent as it was upon a statutory scheme fundamentally altered in 1927 and 1929—as a hidden exception to the sweep of § 1256. The contrary is more plausible: that by using broad and unqualified language, Congress intended our certiorari jurisdiction over CCPA cases to be as broad as the Constitution permits.

This conclusion is reinforced by reference to the anomalous consequences which would result were we to adopt a contrary view of § 1256. Determinations of the Patent Office may be challenged either by appeal to the CCPA or by suit instituted in the United States District Court for the District of Columbia. 35 U. S. C. § 145, 28 U. S. C. § 1542 (1964 ed.). Where the latter route is elected, the decision obtained may be reviewed in the Court of Appeals for the District of Columbia Circuit, and ultimately in this Court upon writ of certiorari. *Hoover Co.* v. *Coe*, 325 U. S. 79. It would be strange indeed if corresponding certiorari jurisdiction did not exist where the alternative route was elected. Were that so, in the event of conflict between the CCPA and the courts of the District of Columbia, resolution by this Court would be achievable only if the litigants chose to proceed through the latter. Obviously, the orderly administration both of our certiorari jurisdiction and of the patent laws requires that ultimate review be available in this Court, regardless of the route chosen by the litigants.

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trict Court under 35 U. S. C. § 145 although these are subject to the same measure of readjudication in infringement suits. See *Hoover Co.* v. *Coe*, 325 U. S. 79.

We therefore conclude that § 1256 authorizes the grant of certiorari in the present case. We now turn to the merits.[12]

II.

Our starting point is the proposition, neither disputed nor disputable, that one may patent only that which is

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[12] Respondent and the *amicus curiae* take a different view than does the Government of precisely what the issue on the merits is. They argue that the issue of "patentability" is not properly before us, that the issue actually presented is whether the Primary Examiner in the Patent Office has authority under Rule 204 (b) himself to evaluate the sufficiency of affidavits submitted under that Rule.

Both the Board of Appeals and the CCPA rejected this view and focused instead on the question of what averments satisfy the statutory requirement that a claimed chemical process be "useful." We agree. First, the issue of "patentability" cannot be foreclosed by the circumstance that the Patent Office—which, according to counsel for respondent, processes some 1,800 claims and issues 700 patents each week—has already issued a patent to Ringold and Rosenkranz who asserted in their claim that their process yielded useful products. See note 1, *supra*. Second, there is no basis for the proposition that even where an applicant for an interference presents a claim which on its face is unpatentable, a complicated and frequently lengthy factual inquiry into priority of invention must inexorably take place. On the contrary, Rule 201 (a), 37 CFR § 1.201 (a), defines an interference proceeding as one involving "two or more parties claiming substantially the same *patentable* invention and may be instituted as soon as it is determined that common *patentable* subject matter is claimed . . . ." (Emphasis supplied.) See *Application of Rogoff*, 46 C. C. P. A. (Pat.) 733, 739, 261 F. 2d 601, 606: "The question as to patentability of claims to an applicant must be determined before any question of interference arises and claims otherwise unpatentable to an applicant cannot be allowed merely in order to set up an interference." See also *Wirkler* v. *Perkins*, 44 C. C. P. A. (Pat.) 1005, 1008, 245 F. 2d 502, 504. Cf. *Glass* v. *De Roo*, 44 C. C. P. A. (Pat.) 723, 239 F. 2d 402.

The current version of Rule 203 (a), 37 CFR § 1.203 (a), makes it explicit that the examiner, "[b]efore the declaration of interference," must determine the patentability of the claim as to each party. See also Rule 237, 37 CFR § 1.237.

"useful." In *Graham* v. *John Deere Co., ante,* p. 1, at 5–10, we have reviewed the history of the requisites of patentability, and it need not be repeated here. Suffice it to say that the concept of utility has maintained a central place in all of our patent legislation, beginning with the first patent law in 1790 [13] and culminating in the present law's provision that

> "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." [14]

As is so often the case, however, a simple, everyday word can be pregnant with ambiguity when applied to the facts of life. That this is so is demonstrated by the present conflict between the Patent Office and the CCPA over how the test is to be applied to a chemical process which yields an already known product whose utility—other than as a possible object of scientific inquiry—has not yet been evidenced. It was not long ago that agency and court seemed of one mind on the question. In *Application of Bremner,* 37 C. C. P. A. (Pat.) 1032, 1034, 182 F. 2d 216, 217, the court affirmed rejection by the Patent Office of both process and product claims. It noted that "no use for the products claimed to be developed by the processes had been shown in the specification." It held that "It was never intended that a patent be granted upon a product, or a process producing a product, unless such product be useful." Nor was this new doctrine in the court. See *Thomas* v. *Michael,* 35 C. C. P. A. (Pat.) 1036, 1038–1039, 166 F. 2d 944, 946–947.

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[13] See Act of April 10, 1790, c. 7, 1 Stat. 109; Act of Feb. 21, 1793, c. 11, 1 Stat. 318; Act of July 4, 1836, c. 357, 5 Stat. 117; Act of July 8, 1870, c. 230, 16 Stat. 198; Rev. Stat. § 4886 (1874).

[14] 35 U. S. C. § 101 (1964 ed.).

The Patent Office has remained steadfast in this view. The CCPA, however, has moved sharply away from *Bremner*. The trend began in *Application of Nelson*, 47 C. C. P. A. (Pat.) 1031, 280 F. 2d 172. There, the court reversed the Patent Office's rejection of a claim on a process yielding chemical intermediates "useful to chemists doing research on steroids," despite the absence of evidence that any of the steroids thus ultimately produced were themselves "useful." The trend has accelerated,[15] culminating in the present case where the court held it sufficient that a process produces the result intended and is not "detrimental to the public interest." 52 C. C. P. A. (Pat.), at 745, 333 F. 2d, at 238.

It is not remarkable that differences arise as to how the test of usefulness is to be applied to chemical processes. Even if we knew precisely what Congress meant in 1790 when it devised the "new and useful" phraseology and in subsequent re-enactments of the test, we should have difficulty in applying it in the context of contemporary chemistry where research is as comprehensive as man's grasp and where little or nothing is wholly beyond the pale of "utility"—if that word is given its broadest reach.

Respondent does not—at least in the first instance—rest upon the extreme proposition, advanced by the court below, that a novel chemical process is patentable so long

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[15] Thus, in *Application of Wilke*, 50 C. C. P. A. (Pat.) 964, 314 F. 2d 558, the court reversed a Patent Office denial of a process claim, holding that 35 U. S. C. § 112 (1964 ed.) was satisfied even though the specification recited only the manner in which the process was to be used and not any use for the products thereby yielded. See also *Application of Adams*, 50 C. C. P. A. (Pat.) 1185, 316 F. 2d 476.

In *Application of Szwarc*, 50 C. C. P. A. (Pat.) 1571, 319 F. 2d 277, the court acknowledged that its view of the law respecting utility of chemical processes had changed since *Bremner*. See generally, Note, The Utility Requirement in the Patent Law, 53 Geo. L. J. 154, 175–181 (1964).

as it yields the intended product [16] and so long as the product is not itself "detrimental." Nor does he commit the outcome of his claim to the slightly more conventional proposition that any process is "useful" within the meaning of § 101 if it produces a compound whose potential usefulness is under investigation by serious scientific researchers, although he urges this position, too, as an alternative basis for affirming the decision of the CCPA. Rather, he begins with the much more orthodox argument that his process has a specific utility which would entitle him to a declaration of interference even under the Patent Office's reading of § 101. The claim is that the supporting affidavits filed pursuant to Rule 204 (b), by reference to Ringold's 1956 article, reveal that an adjacent homologue of the steroid yielded by his process has been demonstrated to have tumor-inhibiting effects in mice, and that this discloses the requisite utility. We do not accept any of these theories as an adequate basis for overriding the determination of the Patent Office that the "utility" requirement has not been met.

Even on the assumption that the process would be patentable were respondent to show that the steroid produced had a tumor-inhibiting effect in mice,[17] we would

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[16] Respondent couches the issue in terms of whether the process yields a "known" product. We fail to see the relevance of the fact that the product is "known," save to the extent that references to a compound in scientific literature suggest that it might be a subject of interest and possible investigation.

[17] In light of our disposition of the case, we express no view as to the patentability of a process whose sole demonstrated utility is to yield a product shown to inhibit the growth of tumors in laboratory animals. See *Application of Hitchings,* 52 C. C. P. A. (Pat.) 1141, 342 F. 2d 80; *Application of Bergel,* 48 C. C. P. A. (Pat.) 1102, 292 F. 2d 955; cf. *Application of Dodson,* 48 C. C. P. A. (Pat.) 1125, 292 F. 2d 943; *Application of Krimmel,* 48 C. C. P. A. (Pat.) 1116, 292 F. 2d 948. For a Patent Office view, see Marcus, The Patent Office and Pharmaceutical Invention, 47 J. Pat. Off. Soc. 669, 673–676 (1965).

not overrule the Patent Office finding that respondent has not made such a showing. The Patent Office held that, despite the reference to the adjacent homologue, respondent's papers did not disclose a sufficient likelihood that the steroid yielded by his process would have similar tumor-inhibiting characteristics. Indeed, respondent himself recognized that the presumption that adjacent homologues have the same utility [18] has been challenged in the steroid field because of "a greater known unpredictability of compounds in that field." [19] In these circumstances and in this technical area, we would not overturn the finding of the Primary Examiner, affirmed by the Board of Appeals and not challenged by the CCPA.

The second and third points of respondent's argument present issues of much importance. Is a chemical process "useful" within the meaning of § 101 either (1) because it works—*i. e.*, produces the intended product? or (2) because the compound yielded belongs to a class of compounds now the subject of serious scientific investigation? These contentions present the basic problem for our adjudication. Since we find no specific assistance in the legislative materials underlying § 101, we are remitted to an analysis of the problem in light of the general intent of Congress, the purposes of the patent system, and the implications of a decision one way or the other.

In support of his plea that we attenuate the requirement of "utility," respondent relies upon Justice Story's

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[18] See n. 3, *supra*.

[19] See respondent's letter requesting amendment, dated July 21, 1960, Record, pp. 20–23. See also *Application of Adams*, 50 C. C. P. A. (Pat.) 1185, 1190, 316 F. 2d 476, 479–480 (concurring-dissenting opinion). In the present case, the Board of Appeals found support in the Ringold article itself for the view that "minor changes in the structure of a steroid may produce profound changes in its biological activity." Record, p. 52.

well-known statement that a "useful" invention is one "which may be applied to a beneficial use in society, in contradistinction to an invention injurious to the morals, health, or good order of society, or frivolous and insignificant" [20]—and upon the assertion that to do so would encourage inventors of new processes to publicize the event for the benefit of the entire scientific community, thus widening the search for uses and increasing the fund of scientific knowledge. Justice Story's language sheds little light on our subject. Narrowly read, it does no more than compel us to decide whether the invention in question is "frivolous and insignificant"—a query no easier of application than the one built into the statute. Read more broadly, so as to allow the patenting of any invention not positively harmful to society, it places such a special meaning on the word "useful" that we cannot accept it in the absence of evidence that Congress so intended. There are, after all, many things in this world which may not be considered "useful" but which, nevertheless, are totally without a capacity for harm.

It is true, of course, that one of the purposes of the patent system is to encourage dissemination of information concerning discoveries and inventions.[21] And it may be that inability to patent a process to some extent discourages disclosure and leads to greater secrecy than would otherwise be the case. The inventor of the process, or the corporate organization by which he is employed, has some incentive to keep the invention

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[20] Note on the Patent Laws, 3 Wheat. App. 13, 24. See also Justice Story's decisions on circuit in *Lowell* v. *Lewis*, 15 Fed. Cas. 1018 (No. 8568) (C. C. D. Mass.), and *Bedford* v. *Hunt*, 3 Fed. Cas. 37 (No. 1217) (C. C. D. Mass.).

[21] "As a reward for inventions and to encourage their disclosure, the United States offers a seventeen-year monopoly to an inventor who refrains from keeping his invention a trade secret." *Universal Oil Prods. Co.* v. *Globe Oil & Ref. Co.*, 322 U. S. 471, 484.

secret while uses for the product are searched out. However, in light of the highly developed art of drafting patent claims so that they disclose as little useful information as possible—while broadening the scope of the claim as widely as possible—the argument based upon the virtue of disclosure must be warily evaluated. Moreover, the pressure for secrecy is easily exaggerated, for if the inventor of a process cannot himself ascertain a "use" for that which his process yields, he has every incentive to make his invention known to those able to do so. Finally, how likely is disclosure of a patented process to spur research by others into the uses to which the product may be put? To the extent that the patentee has power to enforce his patent, there is little incentive for others to undertake a search for uses.

Whatever weight is attached to the value of encouraging disclosure and of inhibiting secrecy, we believe a more compelling consideration is that a process patent in the chemical field, which has not been developed and pointed to the degree of specific utility, creates a monopoly of knowledge which should be granted only if clearly commanded by the statute. Until the process claim has been reduced to production of a product shown to be useful, the metes and bounds of that monopoly are not capable of precise delineation. It may engross a vast, unknown, and perhaps unknowable area. Such a patent may confer power to block off whole areas of scientific development,[22] without compensating benefit to the public. The basic *quid pro quo* contemplated by the Constitution and the Congress for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility. Unless and until a process is refined and developed to this point—where specific bene-

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[22] See *Monsanto Chemical Co.* v. *Coe*, 79 U. S. App. D. C. 155, 158–161, 145 F. 2d 18, 21–24.

fit exists in currently available form—there is insufficient justification for permitting an applicant to engross what may prove to be a broad field.

These arguments for and against the patentability of a process which either has no known use or is useful only in the sense that it may be an object of scientific research would apply equally to the patenting of the product produced by the process. Respondent appears to concede that with respect to a product, as opposed to a process, Congress has struck the balance on the side of nonpatentability unless "utility" is shown. Indeed, the decisions of the CCPA are in accord with the view that a product may not be patented absent a showing of utility greater than any adduced in the present case.[23] We find absolutely no warrant for the proposition that although Congress intended that no patent be granted on a chemical compound whose sole "utility" consists of its potential role as an object of use-testing, a different set of rules was meant to apply to the process which yielded the unpatentable product.[24] That proposition seems to us little more than an attempt to evade the impact of the rules which concededly govern patentability of the product itself.

This is not to say that we mean to disparage the importance of contributions to the fund of scientific infor-

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[23] See, *e. g.*, the decision below, 52 C. C. P. A. (Pat.), at 744, 333 F. 2d, at 237. See also *Application of Bergel,* 48 C. C. P. A. (Pat.), at 1105, 292 F. 2d, at 958. Cf. *Application of Nelson,* 47 C. C. P. A. (Pat.), at 1043–1044, 280 F. 2d, at 180–181; *Application of Folkers,* 52 C. C. P. A. (Pat.) 1269, 344 F. 2d 970.

[24] The committee reports which preceded enactment of the 1952 revision of the patent laws disclose no intention to create such a dichotomy, and in fact provide some evidence that the contrary was assumed. Sen. Rep. No. 1979, Committee on the Judiciary, 82d Cong., 2d Sess., 5, 17; H. R. Rep. No. 1923, Committee on the Judiciary, 82d Cong., 2d Sess., 6, 17. Cf. Hoxie, A Patent Attorney's View, 47 J. Pat. Off. Soc. 630, 636 (1965).

mation short of the invention of something "useful," or that we are blind to the prospect that what now seems without "use" may tomorrow command the grateful attention of the public. But a patent is not a hunting license. It is not a reward for the search, but compensation for its successful conclusion. "[A] patent system must be related to the world of commerce rather than to the realm of philosophy. . . ." [25]

The judgment of the CCPA is *Reversed.*

MR. JUSTICE DOUGLAS, while acquiescing in Part I of the Court's opinion, dissents on the merits of the controversy for substantially the reasons stated by MR. JUSTICE HARLAN.

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

While I join the Court's opinion on the issue of certiorari jurisdiction, I cannot agree with its resolution of the important question of patentability.

Respondent has contended that a workable chemical process, which is both new and sufficiently nonobvious to satisfy the patent statute, is by its existence alone a contribution to chemistry and "useful" as the statute employs that term.[1] Certainly this reading of "useful" in the statute is within the scope of the constitutional grant, which states only that "[t]o promote the Progress of Science and useful Arts," the exclusive right to "Writings and Discoveries" may be secured for limited times to those who produce them. Art. I, § 8. Yet the patent statute is somewhat differently worded and is on

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[25] *Application of Ruschig*, 52 C. C. P. A. (Pat.) 1238, 1245, 343 F. 2d 965, 970 (Rich, J.). See also, *Katz* v. *Horni Signal Mfg. Corp.*, 145 F. 2d 961 (C. A. 2d Cir.).

[1] The statute in pertinent part is set out in the Court's opinion, p. 529, *ante*.

its face open both to respondent's construction and to the contrary reading given it by the Court. In the absence of legislative history on this issue, we are thrown back on policy and practice. Because I believe that the Court's policy arguments are not convincing and that past practice favors the respondent, I would reject the narrow definition of "useful" and uphold the judgment of the Court of Customs and Patent Appeals (hereafter CCPA).

The Court's opinion sets out about half a dozen reasons in support of its interpretation. Several of these arguments seem to me to have almost no force. For instance, it is suggested that "[u]ntil the process claim has been reduced to production of a product shown to be useful, the metes and bounds of that monopoly are not capable of precise delineation" (p. 534, *ante*) and "[i]t may engross a vast, unknown, and perhaps unknowable area" (p. 534, *ante*). I fail to see the relevance of these assertions; process claims are not disallowed because the products they produce may be of "vast" importance nor, in any event, does advance knowledge of a specific product use provide much safeguard on this score or fix "metes and bounds" precisely since a hundred more uses may be found after a patent is granted and greatly enhance its value.

The further argument that an established product use is part of "[t]he basic *quid pro quo*" (p. 534, *ante*) for the patent or is the requisite "successful conclusion" (p. 536, *ante*) of the inventor's search appears to beg the very question whether the process is "useful" simply because it facilitates further research into possible product uses. The same infirmity seems to inhere in the Court's argument that chemical products lacking immediate utility cannot be distinguished for present purposes from the processes which create them, that respondent appears to concede and the CCPA holds that

the products are nonpatentable, and that therefore the processes are nonpatentable. Assuming that the two classes cannot be distinguished, a point not adequately considered in the briefs, and assuming further that the CCPA has firmly held such products nonpatentable,[2] this permits us to conclude only that the CCPA is wrong either as to the products or as to the processes and affords no basis for deciding whether both or neither should be patentable absent a specific product use.

More to the point, I think, are the Court's remaining, prudential arguments against patentability: namely, that disclosure induced by allowing a patent is partly undercut by patent-application drafting techniques, that disclosure may occur without granting a patent, and that a patent will discourage others from inventing uses for the product. How far opaque drafting may lessen the public benefits resulting from the issuance of a patent is not shown by any evidence in this case but, more important, the argument operates against all patents and gives no reason for singling out the class involved here. The thought that these inventions may be more likely than most to be disclosed even if patents are not allowed may have more force; but while empirical study of the industry might reveal that chemical researchers would behave in this fashion, the abstractly logical choice for them seems to me to maintain secrecy until a product use can be discovered. As to discouraging the search by

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[2] Any concession by respondent would hardly be controlling on an issue of this general importance, but I am less clear than the Court that such a concession exists. See, *e. g.*, Brief for Respondent, p. 53. As to the CCPA, it is quite true that that court purports in the very case under review and in others to distinguish product patents, although its actual practice may be somewhat less firm. See *Application of Adams*, 50 C. C. P. A. (Pat.) 1185, 316 F. 2d 476, *Application of Nelson*, 47 C. C. P. A. (Pat.) 1031, 280 F. 2d 172.

others for product uses, there is no doubt this risk exists but the price paid for any patent is that research on other uses or improvements may be hampered because the original patentee will reap much of the reward. From the standpoint of the public interest the Constitution seems to have resolved that choice in favor of patentability.

What I find most troubling about the result reached by the Court is the impact it may have on chemical research. Chemistry is a highly interrelated field and a tangible benefit for society may be the outcome of a number of different discoveries, one discovery building upon the next. To encourage one chemist or research facility to invent and disseminate new processes and products may be vital to progress, although the product or process be without "utility" as the Court defines the term, because that discovery permits someone else to take a further but perhaps less difficult step leading to a commercially useful item. In my view, our awareness in this age of the importance of achieving and publicizing basic research should lead this Court to resolve uncertainties in its favor and uphold the respondent's position in this case.

This position is strengthened, I think, by what appears to have been the practice of the Patent Office during most of this century. While available proof is not conclusive, the commentators seem to be in agreement that until *Application of Bremner,* 37 C. C. P. A. (Pat.) 1032, 182 F. 2d 216, in 1950, chemical patent applications were commonly granted although no resulting end use was stated or the statement was in extremely broad terms.[3] Taking this to be true, *Bremner* represented

[3] See, *e. g.,* the statement of a Patent Office Examiner-in-Chief: "Until recently it was also rather common to get patents on chemical compounds in cases where no use was indicated for the claimed compounds or in which a very broad indication or suggestion as

a deviation from established practice which the CCPA has now sought to remedy in part only to find that the Patent Office does not want to return to the beaten track. If usefulness was typically regarded as inherent during a long and prolific period of chemical research and development in this country, surely this is added reason why the Court's result should not be adopted until Congress expressly mandates it, presumably on the basis of empirical data which this Court does not possess.

Fully recognizing that there is ample room for disagreement on this problem when, as here, it is reviewed in the abstract, I believe the decision below should be affirmed.

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to use was included in the application. [*Bremner* and another later ruling] . . . have put an end to this practice." Wolffe, Adequacy of Disclosure as Regards Specific Embodiment and Use of Invention, 41 J. Pat. Off. Soc. 61, 66 (1959). The Government's brief in this case is in accord: "[I]t was apparently assumed by the Patent Office [prior to 1950] . . . that chemical compounds were necessarily useful . . . and that specific inquiry beyond the success of the process was therefore unnecessary . . . ." Brief for the Commissioner, p. 25. See also Cohen & Schwartz, Do Chemical Intermediates Have Patentable Utility? 29 Geo. Wash. L. Rev. 87, 91 (1960); Note, 53 Geo. L. J. 154, 183 (1964); 14 Am. U. L. Rev. 78 (1964).

KENT *v.* UNITED STATES.

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

No. 104. Argued January 19, 1966.—Decided March 21, 1966.

Petitioner was arrested at the age of 16 in connection with charges of housebreaking, robbery and rape. As a juvenile, he was subject to the exclusive jurisdiction of the District of Columbia Juvenile Court unless that court, after "full investigation," should waive jurisdiction over him and remit him for trial to the United States District Court for the District of Columbia. Petitioner's counsel filed a motion in the Juvenile Court for a hearing on the question of waiver, and for access to the Juvenile Court's Social Service file which had been accumulated on petitioner during his probation for a prior offense. The Juvenile Court did not rule on these motions. It entered an order waiving jurisdiction, with the recitation that this was done after the required "full investigation." Petitioner was indicted in the District Court. He moved to dismiss the indictment on the ground that the Juvenile Court's waiver was invalid. The District Court overruled the motion, and petitioner was tried. He was convicted on six counts of housebreaking and robbery, but acquitted on two rape counts by reason of insanity. On appeal petitioner raised among other things the validity of the Juvenile Court's waiver of jurisdiction; the United States Court of Appeals for the District of Columbia Circuit affirmed, finding the procedure leading to waiver and the waiver order itself valid. *Held:* The Juvenile Court order waiving jurisdiction and remitting petitioner for trial in the District Court was invalid. Pp. 552–564.

(a) The Juvenile Court's latitude in determining whether to waive jurisdiction is not complete. It "assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation.'" Pp. 552–554.

(b) The *parens patriae* philosophy of the Juvenile Court "is not an invitation to procedural arbitrariness." Pp. 554–556.

(c) As the Court of Appeals for the District of Columbia Circuit has held, "the waiver of jurisdiction is a 'critically important'

action determining vitally important statutory rights of the juvenile." Pp. 556–557.

(d) The Juvenile Court Act requires "full investigation" and makes the Juvenile Court records available to persons having a "legitimate interest in the protection . . . of the child . . . ." These provisions, "read in the context of constitutional principles relating to due process and the assistance of counsel," entitle a juvenile to a hearing, to access by his counsel to social records and probation or similar reports which presumably are considered by the Juvenile Court, and to a statement of the reasons for the Juvenile Court's decision sufficient to enable meaningful appellate review thereof. Pp. 557–563.

(e) Since petitioner is now 21 and beyond the jurisdiction of the Juvenile Court, the order of the Court of Appeals and the judgment of the District Court are vacated and the case is remanded to the District Court for a hearing *de novo,* consistent with this opinion, on whether waiver was appropriate when ordered by the Juvenile Court. "If that court finds that waiver was inappropriate, petitioner's conviction must be vacated. If, however, it finds that the waiver order was proper when originally made, the District Court may proceed, after consideration of such motions as counsel may make and such further proceedings, if any, as may be warranted, to enter an appropriate judgment." Pp. 564–565.

119 U. S. App. D. C. 378, 343 F. 2d 247, reversed and remanded.

Myron G. Ehrlich and *Richard Arens* argued the cause for petitioner. With them on the briefs were *Monroe H. Freedman* and *David Carliner.*

Theodore George Gilinsky argued the cause for the United States. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Vinson, Nathan Lewin* and *Beatrice Rosenberg.*

Nicholas N. Kittrie filed a brief for Thurman Arnold et al., as *amici curiae.*

Mr. Justice Fortas delivered the opinion of the Court.

This case is here on certiorari to the United States Court of Appeals for the District of Columbia Circuit. The facts and the contentions of counsel raise a number

of disturbing questions concerning the administration by the police and the Juvenile Court authorities of the District of Columbia laws relating to juveniles. Apart from raising questions as to the adequacy of custodial and treatment facilities and policies, some of which are not within judicial competence, the case presents important challenges to the procedure of the police and Juvenile Court officials upon apprehension of a juvenile suspected of serious offenses. Because we conclude that the Juvenile Court's order waiving jurisdiction of petitioner was entered without compliance with required procedures, we remand the case to the trial court.

Morris A. Kent, Jr., first came under the authority of the Juvenile Court of the District of Columbia in 1959. He was then aged 14. He was apprehended as a result of several housebreakings and an attempted purse snatching. He was placed on probation, in the custody of his mother who had been separated from her husband since Kent was two years old. Juvenile Court officials interviewed Kent from time to time during the probation period and accumulated a "Social Service" file.

On September 2, 1961, an intruder entered the apartment of a woman in the District of Columbia. He took her wallet. He raped her. The police found in the apartment latent fingerprints. They were developed and processed. They matched the fingerprints of Morris Kent, taken when he was 14 years old and under the jurisdiction of the Juvenile Court. At about 3 p. m. on September 5, 1961, Kent was taken into custody by the police. Kent was then 16 and therefore subject to the "exclusive jurisdiction" of the Juvenile Court. D. C. Code § 11–907 (1961), now § 11–1551 (Supp. IV, 1965). He was still on probation to that court as a result of the 1959 proceedings.

Upon being apprehended, Kent was taken to police headquarters where he was interrogated by police officers.

It appears that he admitted his involvement in the offense which led to his apprehension and volunteered information as to similar offenses involving housebreaking, robbery, and rape. His interrogation proceeded from about 3 p. m. to 10 p. m. the same evening.[1]

Some time after 10 p. m. petitioner was taken to the Receiving Home for Children. The next morning he was released to the police for further interrogation at police headquarters, which lasted until 5 p. m.[2]

The record does not show when his mother became aware that the boy was in custody, but shortly after 2 p. m. on September 6, 1961, the day following petitioner's apprehension, she retained counsel.

Counsel, together with petitioner's mother, promptly conferred with the Social Service Director of the Juvenile Court. In a brief interview, they discussed the possibility that the Juvenile Court might waive jurisdiction under D. C. Code § 11–914 (1961), now § 11–1553 (Supp. IV, 1965) and remit Kent to trial by the District Court. Counsel made known his intention to oppose waiver.

Petitioner was detained at the Receiving Home for almost a week. There was no arraignment during this

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[1] There is no indication in the file that the police complied with the requirement of the District Code that a child taken into custody, unless released to his parent, guardian or custodian, "shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to a place of detention provided by the Board of Public Welfare, and the officer taking him shall immediately notify the court and shall file a petition when directed to do so by the court." D. C. Code § 11–912 (1961), now § 16–2306 (Supp. IV, 1965).

[2] The elicited statements were not used in the subsequent trial before the United States District Court. Since the statements were made while petitioner was subject to the jurisdiction of the Juvenile Court, they were inadmissible in a subsequent criminal prosecution under the rule of *Harling* v. *United States*, 111 U. S. App. D. C. 174, 295 F. 2d 161 (1961).

time, no determination by a judicial officer of probable cause for petitioner's apprehension.[3]

During this period of detention and interrogation, petitioner's counsel arranged for examination of petitioner by two psychiatrists and a psychologist. He thereafter filed with the Juvenile Court a motion for a hearing on the question of waiver of Juvenile Court jurisdiction, together with an affidavit of a psychiatrist certifying that petitioner "is a victim of severe psychopathology" and recommending hospitalization for psychiatric observation. Petitioner's counsel, in support of his motion to the effect that the Juvenile Court should retain jurisdiction of petitioner, offered to prove that if petitioner were given adequate treatment in a hospital under the aegis of the Juvenile Court, he would be a suitable subject for rehabilitation.

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[3] In the case of adults, arraignment before a magistrate for determination of probable cause and advice to the arrested person as to his rights, etc., are provided by law and are regarded as fundamental. Cf. Fed. Rules Crim. Proc. 5 (a), (b); *Mallory* v. *United States*, 354 U. S. 449. In *Harling* v. *United States, supra*, the Court of Appeals for the District of Columbia has stated the basis for this distinction between juveniles and adults as follows:

"It is, of course, because children are, generally speaking, exempt from criminal penalties that safeguards of the criminal law, such as Rule 5 and the exclusionary Mallory rule, have no general application in juvenile proceedings." 111 U. S. App. D. C., at 176, 295 F. 2d, at 163.

In *Edwards* v. *United States*, 117 U. S. App. D. C. 383, 384, 330 F. 2d 849, 850 (1964), it was said that: ". . . special practices . . . follow the apprehension of a juvenile. He may be held in custody by the juvenile authorities—and is available to investigating officers—for five days before any formal action need be taken. There is no duty to take him before a magistrate, and no responsibility to inform him of his rights. He is not booked. The statutory intent is to establish a non-punitive, non-criminal atmosphere."

We indicate no view as to the legality of these practices. Cf. *Harling* v. *United States, supra*, 111 U. S. App. D. C., at 176, 295 F. 2d, at 163, n. 12.

At the same time, petitioner's counsel moved that the Juvenile Court should give him access to the Social Service file relating to petitioner which had been accumulated by the staff of the Juvenile Court during petitioner's probation period, and which would be available to the Juvenile Court judge in considering the question whether it should retain or waive jurisdiction. Petitioner's counsel represented that access to this file was essential to his providing petitioner with effective assistance of counsel.

The Juvenile Court judge did not rule on these motions. He held no hearing. He did not confer with petitioner or petitioner's parents or petitioner's counsel. He entered an order reciting that after "full investigation, I do hereby waive" jurisdiction of petitioner and directing that he be "held for trial for [the alleged] offenses under the regular procedure of the U. S. District Court for the District of Columbia." He made no findings. He did not recite any reason for the waiver.[4] He made no reference to the motions filed by petitioner's counsel. We must assume that he denied, *sub silentio*, the motions for a hearing, the recommendation for hospitalization for psychiatric observation, the request for access to the Social Service file, and the offer to prove that petitioner was a fit subject for rehabilitation under the Juvenile Court's jurisdiction.[5]

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[4] At the time of these events, there was in effect Policy Memorandum No. 7 of November 30, 1959, promulgated by the judge of the Juvenile Court to set forth the criteria to govern disposition of waiver requests. It is set forth in the Appendix. This Memorandum has since been rescinded. See *United States* v. *Caviness*, 239 F. Supp. 545, 550 (D. C. D. C. 1965).

[5] It should be noted that at this time the statute provided for only one Juvenile Court judge. Congressional hearings and reports attest the impossibility of the burden which he was supposed to carry. See Amending the Juvenile Court Act of the District of Columbia, Hearings before Subcommittee No. 3 of the House Com-

Presumably, prior to entry of his order, the Juvenile Court judge received and considered recommendations of the Juvenile Court staff, the Social Service file relating to petitioner, and a report dated September 8, 1961 (three days following petitioner's apprehension), submitted to him by the Juvenile Probation Section. The Social Service file and the September 8 report were later sent to the District Court and it appears that both of them referred to petitioner's mental condition. The September 8 report spoke of "a rapid deterioration of [petitioner's] personality structure and the possibility of mental illness." As stated, neither this report nor the Social Service file was made available to petitioner's counsel.

The provision of the Juvenile Court Act governing waiver expressly provides only for "full investigation." It states the circumstances in which jurisdiction may be waived and the child held for trial under adult procedures, but it does not state standards to govern the Juvenile Court's decision as to waiver. The provision reads as follows:

> "If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order

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mittee on the District of Columbia, 87th Cong., 1st Sess. (1961); Juvenile Delinquency, Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 86th Cong., 1st Sess. (1959–1960); Additional Judges for Juvenile Court, Hearing before the House Committee on the District of Columbia, 86th Cong., 1st Sess. (1959); H. R. Rep. No. 1041, 87th Cong., 1st Sess. (1961); S. Rep. No. 841, 87th Cong., 1st Sess. (1961); S. Rep. No. 116, 86th Cong., 1st Sess. (1959). The statute was amended in 1962 to provide for three judges for the court. 76 Stat. 21; D. C. Code § 11–1502 (Supp. IV, 1965).

such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this subchapter in conducting and disposing of such cases." [6]

Petitioner appealed from the Juvenile Court's waiver order to the Municipal Court of Appeals, which affirmed, and also applied to the United States District Court for a writ of habeas corpus, which was denied. On appeal from these judgments, the United States Court of Appeals held on January 22, 1963, that neither appeal to the Municipal Court of Appeals nor habeas corpus was available. In the Court of Appeals' view, the exclusive method of reviewing the Juvenile Court's waiver order was a motion to dismiss the indictment in the District Court. *Kent* v. *Reid,* 114 U. S. App. D. C. 330, 316 F. 2d 331 (1963).

Meanwhile, on September 25, 1961, shortly after the Juvenile Court order waiving its jurisdiction, petitioner was indicted by a grand jury of the United States District Court for the District of Columbia. The indictment contained eight counts alleging two instances of housebreaking, robbery, and rape, and one of housebreaking and robbery. On November 16, 1961, petitioner moved the District Court to dismiss the indictment on the grounds that the waiver was invalid. He also moved the District Court to constitute itself a Juvenile Court as authorized by D. C. Code § 11–914 (1961), now § 11–1553 (Supp. IV, 1965). After substantial delay occasioned by petitioner's appeal and habeas corpus proceedings, the District Court addressed itself to the motion to dismiss on February 8, 1963.[7]

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[6] D. C. Code § 11–914 (1961), now § 11–1553 (Supp. IV, 1965).

[7] On February 5, 1963, the motion to the District Court to constitute itself a Juvenile Court was denied. The motion was renewed

The District Court denied the motion to dismiss the indictment. The District Court ruled that it would not "go behind" the Juvenile Court judge's recital that his order was entered "after full investigation." It held that "The only matter before me is as to whether or not the statutory provisions were complied with and the Courts have held . . . with reference to full investigation, that that does not mean a quasi judicial or judicial hearing. No hearing is required."

On March 7, 1963, the District Court held a hearing on petitioner's motion to determine his competency to stand trial. The court determined that petitioner was competent.[8]

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orally and denied on February 8, 1963, after the District Court's decision that the indictment should not be dismissed.

[8] The District Court had before it extensive information as to petitioner's mental condition, bearing upon both competence to stand trial and the defense of insanity. The court had obtained the "Social Service" file from the Juvenile Court and had made it available to petitioner's counsel. On October 13, 1961, the District Court had granted petitioner's motion of October 6 for commitment to the Psychiatric Division of the General Hospital for 60 days. On December 20, 1961, the hospital reported that "It is the concensus [*sic*] of the staff that Morris is emotionally ill and severely so . . . we feel that he is incompetent to stand trial and to participate in a mature way in his own defense. His illness has interfered with his judgment and reasoning ability . . . ." The prosecutor opposed a finding of incompetence to stand trial, and at the prosecutor's request, the District Court referred petitioner to St. Elizabeths Hospital for psychiatric observation. According to a letter from the Superintendent of St. Elizabeths of April 5, 1962, the hospital's staff found that petitioner was "suffering from mental disease at the present time, Schizophrenic Reaction, Chronic Undifferentiated Type," that he had been suffering from this disease at the time of the charged offenses, and that "if committed by him [those criminal acts] were the product of this disease." They stated, however, that petitioner was "mentally competent to understand the nature of the proceedings against him and to consult properly with counsel in his own defense."

At trial, petitioner's defense was wholly directed toward proving that he was not criminally responsible because "his unlawful act was the product of mental disease or mental defect." *Durham* v. *United States,* 94 U. S. App. D. C. 228, 241, 214 F. 2d 862, 875 (1954). Extensive evidence, including expert testimony, was presented to support this defense. The jury found as to the counts alleging rape that petitioner was "not guilty by reason of insanity." Under District of Columbia law, this made it mandatory that petitioner be transferred to St. Elizabeths Hospital, a mental institution, until his sanity is restored.[9] On the six counts of housebreaking and robbery, the jury found that petitioner was guilty.[10]

Kent was sentenced to serve five to 15 years on each count as to which he was found guilty, or a total of 30 to 90 years in prison. The District Court ordered that the time to be spent at St. Elizabeths on the mandatory commitment after the insanity acquittal be counted as part of the 30- to 90-year sentence. Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. That court affirmed. 119 U. S. App. D. C. 378, 343 F. 2d 247 (1964).[11]

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[9] D. C. Code § 24–301 (1961).

[10] The basis for this distinction—that petitioner was "sane" for purposes of the housebreaking and robbery but "insane" for the purposes of the rape—apparently was the hypothesis, for which there is some support in the record, that the jury might find that the robberies had anteceded the rapes, and in that event, it might conclude that the housebreakings and robberies were not the products of his mental disease or defect, while the rapes were produced thereby.

[11] Petitioner filed a petition for rehearing *en banc,* but subsequently moved to withdraw the petition in order to prosecute his petition for certiorari to this Court. The Court of Appeals permitted withdrawal. Chief Judge Bazelon filed a dissenting opinion in which Circuit Judge Wright joined. 119 U. S. App. D. C., at 395, 343 F. 2d, at 264 (1964).

Before the Court of Appeals and in this Court, petitioner's counsel has urged a number of grounds for reversal. He argues that petitioner's detention and interrogation, described above, were unlawful. He contends that the police failed to follow the procedure prescribed by the Juvenile Court Act in that they failed to notify the parents of the child and the Juvenile Court itself, note 1, *supra;* that petitioner was deprived of his liberty for about a week without a determination of probable cause which would have been required in the case of an adult, see note 3, *supra;* that he was interrogated by the police in the absence of counsel or a parent, cf. *Harling* v. *United States,* 111 U. S. App. D. C. 174, 176, 295 F. 2d 161, 163, n. 12 (1961), without warning of his right to remain silent or advice as to his right to counsel, in asserted violation of the Juvenile Court Act and in violation of rights that he would have if he were an adult; and that petitioner was fingerprinted in violation of the asserted intent of the Juvenile Court Act and while unlawfully detained and that the fingerprints were unlawfully used in the District Court proceeding.[12]

These contentions raise problems of substantial concern as to the construction of and compliance with the Juvenile Court Act. They also suggest basic issues as to the justifiability of affording a juvenile less protection than is accorded to adults suspected of criminal offenses, particularly where, as here, there is an absence of any indication that the denial of rights available to adults was offset, mitigated or explained by action of the Government, as *parens patriae,* evidencing the special

[12] Cf. *Harling* v. *United States,* 111 U. S. App. D. C. 174, 295 F. 2d 161 (1961); *Bynum* v. *United States,* 104 U. S. App. D. C. 368, 262 F. 2d 465 (1958). It is not clear from the record whether the fingerprints used were taken during the detention period or were those taken while petitioner was in custody in 1959, nor is it clear that petitioner's counsel objected to the use of the fingerprints.

solicitude for juveniles commanded by the Juvenile Court Act. However, because we remand the case on account of the procedural error with respect to waiver of jurisdiction, we do not pass upon these questions.[13]

It is to petitioner's arguments as to the infirmity of the proceedings by which the Juvenile Court waived its otherwise exclusive jurisdiction that we address our attention. Petitioner attacks the waiver of jurisdiction on a number of statutory and constitutional grounds. He contends that the waiver is defective because no hearing was held; because no findings were made by the Juvenile Court; because the Juvenile Court stated no reasons for waiver; and because counsel was denied access to the Social Service file which presumably was considered by the Juvenile Court in determining to waive jurisdiction.

We agree that the order of the Juvenile Court waiving its jurisdiction and transferring petitioner for trial in the United States District Court for the District of Columbia was invalid. There is no question that the order is reviewable on motion to dismiss the indictment in the District Court, as specified by the Court of Appeals in this case. *Kent* v. *Reid, supra.* The issue is the standards to be applied upon such review.

We agree with the Court of Appeals that the statute contemplates that the Juvenile Court should have con-

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[13] Petitioner also urges that the District Court erred in the following respects:

(1) It gave the jury a version of the "Allen" charge. See *Allen* v. *United States,* 164 U. S. 492.

(2) It failed to give an adequate and fair competency hearing.

(3) It denied the motion to constitute itself a juvenile court pursuant to D. C. Code § 11–914 (1961), now § 11–1553. (Supp. IV, 1965.)

(4) It should have granted petitioner's motion for acquittal on all counts, *n. o. v.*, on the grounds of insanity.

We decide none of these claims.

siderable latitude within which to determine whether it should retain jurisdiction over a child or—subject to the statutory delimitation [14]—should waive jurisdiction. But this latitude is not complete. At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a "full investigation." *Green* v. *United States,* 113 U. S. App. D. C. 348, 308 F. 2d 303 (1962).[15] The statute gives the Juvenile Court a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the conclusion to be reached. It does not confer upon the Juvenile Court a license for arbitrary procedure. The statute does not permit the Juvenile Court to determine in isolation and without the participation or any representation of the child the "critically important" question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act.[16] It does not authorize the Juvenile Court, in total disregard of a motion for hearing filed by counsel, and without any hearing or statement or reasons, to decide—as in this case—that the child will be taken from the Receiving Home for Children

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[14] The statute is set out at pp. 547–548, *supra.*

[15] "What is required before a waiver is, as we have said, 'full investigation.' . . . It prevents the waiver of jurisdiction as a matter of routine for the purpose of easing the docket. It prevents routine waiver in certain classes of alleged crimes. It requires a judgment in each case based on 'an inquiry not only into the facts of the alleged offense but also into the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case.' *Pee* v. *United States,* 107 U. S. App. D. C. 47, 50; 274 F. 2d 556, 559 (1959)." *Green* v. *United States, supra,* at 350, 308 F. 2d, at 305.

[16] See *Watkins* v. *United States,* 119 U. S. App. D. C. 409, 413, 343 F. 2d 278, 282 (1964); *Black* v. *United States,* 122 U. S. App. D. C. 393, 355 F. 2d 104 (1965).

and transferred to jail along with adults, and that he will be exposed to the possibility of a death sentence [17] instead of treatment for a maximum, in Kent's case, of five years, until he is 21.[18]

We do not consider whether, on the merits, Kent should have been transferred; but there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure. We hold that it does not.

1. The theory of the District's Juvenile Court Act, like that of other jurisdictions,[19] is rooted in social welfare philosophy rather than in the *corpus juris*. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens*

[17] D. C. Code § 22–2801 (1961) fixes the punishment for rape at 30 years, or death if the jury so provides in its verdict. The maximum punishment for housebreaking is 15 years, D. C. Code § 22–1801 (1961); for robbery it is also 15 years, D. C. Code § 22–2901 (1961).

[18] The jurisdiction of the Juvenile Court over a child ceases when he becomes 21. D. C. Code § 11–907 (1961), now § 11–1551 (Supp. IV, 1965).

[19] All States have juvenile court systems. A study of the actual operation of these systems is contained in Note, Juvenile Delinquents: The Police, State Courts, and Individualized Justice, 79 Harv. L. Rev. 775 (1966).

patriae rather than prosecuting attorney and judge.[20] But the admonition to function in a "parental" relationship is not an invitation to procedural arbitrariness.

2. Because the State is supposed to proceed in respect of the child as *parens patriae* and not as adversary, courts have relied on the premise that the proceedings are "civil" in nature and not criminal, and have asserted that the child cannot complain of the deprivation of important rights available in criminal cases. It has been asserted that he can claim only the fundamental due process right to fair treatment.[21] For example, it has been held that he is not entitled to bail; to indictment by grand jury; to a speedy and public trial; to trial by jury; to immunity against self-incrimination; to confrontation of his accusers; and in some jurisdictions (but not in the District of Columbia, see *Shioutakon* v. *District of Columbia*, 98 U. S. App. D. C. 371, 236 F. 2d 666 (1956), and *Black* v. *United States, supra*) that he is not entitled to counsel.[22]

While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults.[23] There is much evidence that some juvenile courts, including that of the District of Columbia, lack

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[20] See Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis. L. Rev. 7.

[21] *Pee* v. *United States*, 107 U. S. App. D. C. 47, 274 F. 2d 556 (1959).

[22] See *Pee* v. *United States, supra*, at 54, 274 F. 2d, at 563; Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547 (1957).

[23] Cf. *Harling* v. *United States*, 111 U. S. App. D. C. 174, 177, 295 F. 2d 161, 164 (1961).

the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[24]

This concern, however, does not induce us in this case to accept the invitation [25] to rule that constitutional guaranties which would be applicable to adults charged with the serious offenses for which Kent was tried must be applied in juvenile court proceedings concerned with allegations of law violation. The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia Circuit provide an adequate basis for decision of this case, and we go no further.

3. It is clear beyond dispute that the waiver of jurisdiction is a "critically important" action determining vitally important statutory rights of the juvenile. The Court of Appeals for the District of Columbia Circuit has so held. See *Black v. United States, supra; Watkins* v. *United States,* 119 U. S. App. D. C. 409, 343 F. 2d 278 (1964). The statutory scheme makes this plain. The Juvenile Court is vested with "original and exclusive jurisdiction" of the child. This jurisdiction confers special rights and immunities. He is, as specified by the statute, shielded from publicity. He may be confined, but with rare exceptions he may not be jailed along with adults. He may be detained, but only until he is 21 years of age. The court is admonished by the statute to give preference to retaining the child in the custody of his parents "unless his welfare and the safety and protec-

[24] See Handler, *op. cit. supra,* note 20; Note, *supra,* note 19; materials cited in note 5, *supra.*

[25] See brief of *amicus curiae.*

tion of the public can not be adequately safeguarded without . . . removal." The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment. D. C. Code §§ 11–907, 11–915, 11–927, 11–929 (1961).[26]

The net, therefore, is that petitioner—then a boy of 16—was by statute entitled to certain procedures and benefits as a consequence of his statutory right to the "exclusive" jurisdiction of the Juvenile Court. In these circumstances, considering particularly that decision as to waiver of jurisdiction and transfer of the matter to the District Court was potentially as important to petitioner as the difference between five years' confinement and a death sentence, we conclude that, as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision. We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel.[27]

The Court of Appeals in this case relied upon *Wilhite* v. *United States,* 108 U. S. App. D. C. 279, 281 F. 2d 642 (1960). In that case, the Court of Appeals held, for purposes of a determination as to waiver of jurisdiction,

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[26] These are now, without substantial changes, §§ 11–1551, 16–2307, 16–2308, 16–2313, 11–1586 (Supp. IV, 1965).

[27] While we "will not ordinarily review decisions of the United States Court of Appeals [for the District of Columbia Circuit] which are based upon statutes . . . limited [to the District] . . . ," *Del Vecchio* v. *Bowers,* 296 U. S. 280, 285, the position of that court, as we discuss *infra,* is self-contradictory. Nor have we deferred to decisions on local law where to do so would require adjudication of difficult constitutional questions. See *District of Columbia* v. *Little,* 339 U. S. 1.

that no formal hearing is required and that the "full investigation" required of the Juvenile Court need only be such "as is needed to satisfy *that* court . . . on the question of waiver." [28] (Emphasis supplied.) The authority of *Wilhite,* however, is substantially undermined by other, more recent, decisions of the Court of Appeals.

In *Black* v. *United States,* decided by the Court of Appeals on December 8, 1965, the court [29] held that assistance of counsel in the "critically important" determination of waiver is essential to the proper administration of juvenile proceedings. Because the juvenile was not advised of his right to retained or appointed counsel, the judgment of the District Court, following waiver of jurisdiction by the Juvenile Court, was reversed. The court relied upon its decision in *Shioutakon* v. *District of Columbia,* 98 U. S. App. D. C. 371, 236 F. 2d 666 (1956), in which it had held that effective assistance of counsel in juvenile court proceedings is essential. See also *McDaniel* v. *Shea,* 108 U. S. App. D. C. 15, 278 F. 2d 460 (1960). In *Black,* the court referred to the Criminal Justice Act, enacted four years after *Shioutakon,* in which Congress provided for the assistance of counsel "in proceedings before the juvenile court of the District of Columbia." D. C. Code § 2–2202 (1961). The court held that "The need is even greater in the adjudication of waiver [than in a case like *Shioutakon*] since it contemplates the imposition of criminal sanctions." 122 U. S. App. D. C., at 395, 355 F. 2d, at 106.

In *Watkins* v. *United States,* 119 U. S. App. D. C. 409, 343 F. 2d 278 (1964), decided in November 1964, the

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[28] The panel was composed of Circuit Judges Miller, Fahy and Burger. Judge Fahy concurred in the result. It appears that the attack on the regularity of the waiver of jurisdiction was made 17 years after the event, and that no objection to waiver had been made in the District Court.

[29] Bazelon, C. J., and Fahy and Leventhal, JJ.

Juvenile Court had waived jurisdiction of appellant who was charged with housebreaking and larceny. In the District Court, appellant sought disclosure of the social record in order to attack the validity of the waiver. The Court of Appeals held that in a waiver proceeding a juvenile's attorney is entitled to access to such records. The court observed that

> "All of the social records concerning the child are usually relevant to waiver since the Juvenile Court must be deemed to consider the entire history of the child in determining waiver. The relevance of particular items must be construed generously. Since an attorney has no certain knowledge of what the social records contain, he cannot be expected to demonstrate the relevance of particular items in his request.
>
> "The child's attorney must be advised of the information upon which the Juvenile Court relied in order to assist effectively in the determination of the waiver question, by insisting upon the statutory command that waiver can be ordered only after 'full investigation,' and by guarding against action of the Juvenile Court beyond its discretionary authority." 119 U. S. App. D. C., at 413, 343 F. 2d, at 282.

The court remanded the record to the District Court for a determination of the extent to which the records should be disclosed.

The Court of Appeals' decision in the present case was handed down on October 26, 1964, prior to its decisions in *Black* and *Watkins*. The Court of Appeals assumed that since petitioner had been a probationer of the Juvenile Court for two years, that court had before it sufficient evidence to make an informed judgment. It therefore concluded that the statutory requirement of a "full investigation" had been met. It noted the absence of

"a specification by the Juvenile Court Judge of precisely why he concluded to waive jurisdiction." 119 U. S. App. D. C., at 384, 343 F. 2d, at 253. While it indicated that "in some cases at least" a useful purpose might be served "by a discussion of the reasons motivating the determination," *id.*, at 384, 343 F. 2d, at 253, n. 6, it did not conclude that the absence thereof invalidated the waiver.

As to the denial of access to the social records, the Court of Appeals stated that "the statute is ambiguous." It said that petitioner's claim, in essence, is "that counsel should have the opportunity to challenge them, presumably in a manner akin to cross-examination." *Id.*, at 389, 343 F. 2d, at 258. It held, however, that this is "the kind of adversarial tactics which the system is designed to avoid." It characterized counsel's proper function as being merely that of bringing forward affirmative information which might help the court. His function, the Court of Appeals said, "is not to denigrate the staff's submissions and recommendations." *Ibid.* Accordingly, it held that the Juvenile Court had not abused its discretion in denying access to the social records.

We are of the opinion that the Court of Appeals misconceived the basic issue and the underlying values in this case. It did note, as another panel of the same court did a few months later in *Black* and *Watkins*, that the determination of whether to transfer a child from the statutory structure of the Juvenile Court to the criminal processes of the District Court is "critically important." We hold that it is, indeed, a "critically important" proceeding. The Juvenile Court Act confers upon the child a right to avail himself of that court's "exclusive" jurisdiction. As the Court of Appeals has said, "[I]t is implicit in [the Juvenile Court] scheme that non-criminal treatment is to be the rule—and the adult criminal treatment, the exception which must be gov-

erned by the particular factors of individual cases." *Harling* v. *United States,* 111 U. S. App. D. C. 174, 177–178, 295 F. 2d 161, 164–165 (1961).

Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not "assume" that there are adequate reasons, nor may it merely assume that "full investigation" has been made. Accordingly, we hold that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor. We do not read the statute as requiring that this statement must be formal or that it should necessarily include conventional findings of fact. But the statement should be sufficient to demonstrate that the statutory requirement of "full investigation" has been met; and that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review.

Correspondingly, we conclude that an opportunity for a hearing which may be informal, must be given the child prior to entry of a waiver order. Under *Black,* the child is entitled to counsel in connection with a waiver proceeding, and under *Watkins,* counsel is entitled to see the child's social records. These rights are meaningless—an illusion, a mockery—unless counsel is given an opportunity to function.

The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice. Appointment of counsel without affording an opportunity for hearing on a "critically important" decision is tantamount to denial of counsel. There is no justification

for the failure of the Juvenile Court to rule on the motion for hearing filed by petitioner's counsel, and it was error to fail to grant a hearing.

We do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment. *Pee* v. *United States,* 107 U. S. App. D. C. 47, 50, 274 F. 2d 556, 559 (1959).

With respect to access by the child's counsel to the social records of the child, we deem it obvious that since these are to be considered by the Juvenile Court in making its decision to waive, they must be made available to the child's counsel. This is what the Court of Appeals itself held in *Watkins.* There is no doubt as to the statutory basis for this conclusion, as the Court of Appeals pointed out in *Watkins.* We cannot agree with the Court of Appeals in the present case that the statute is "ambiguous." The statute expressly provides that the record shall be withheld from "indiscriminate" public inspection, "except that such records or parts thereof *shall* be made available by rule of court or special order of court to such persons . . . as have a *legitimate interest* in the protection . . . of the child . . . ." D. C. Code § 11–929 (b) (1961), now § 11–1586 (b) (Supp. IV, 1965). (Emphasis supplied.)[30] The Court of Appeals has held in *Black,* and we agree, that counsel must be afforded to the child in waiver proceedings. Counsel, therefore,

[30] Under the statute, the Juvenile Court has power by rule or order, to subject the examination of the social records to conditions which will prevent misuse of the information. Violation of any such rule or order, or disclosure of the information "except for purposes for which . . . released," is a misdemeanor. D. C. Code § 11–929 (1961), now, without substantial change, § 11–1586 (Supp. IV, 1965).

have a "legitimate interest" in the protection of the child, and must be afforded access to these records.[31]

We do not agree with the Court of Appeals' statement, attempting to justify denial of access to these records, that counsel's role is limited to presenting "to the court anything on behalf of the child which might help the court in arriving at a decision; it is not to denigrate the staff's submissions and recommendations." On the contrary, if the staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to "denigrate" such matter. There is no irrebuttable presumption of accuracy attached to staff reports. If a decision on waiver is "critically important" it is equally of "critical importance" that the material submitted to the judge—which is protected by the statute only against "indiscriminate" inspection—be subjected, within reasonable limits having regard to the theory of the Juvenile Court Act, to examination, criticism and refutation. While the Juvenile Court judge may, of course, receive *ex parte* analyses and recommendations from his staff, he may not, for purposes of a decision on waiver, receive and rely upon secret information, whether emanating from his staff or otherwise. The Juvenile Court is governed in this respect by the established principles which control courts and quasi-judicial agencies of the Government.

For the reasons stated, we conclude that the Court of Appeals and the District Court erred in sustaining the validity of the waiver by the Juvenile Court. The Government urges that any error committed by the Juvenile

[31] In *Watkins*, the Court of Appeals seems to have permitted withholding of some portions of the social record from examination by petitioner's counsel. To the extent that *Watkins* is inconsistent with the standard which we state, it cannot be considered as controlling.

Court was cured by the proceedings before the District Court. It is true that the District Court considered and denied a motion to dismiss on the grounds of the invalidity of the waiver order of the Juvenile Court, and that it considered and denied a motion that it should itself, as authorized by statute, proceed in this case to "exercise the powers conferred upon the juvenile court." D. C. Code § 11–914 (1961), now § 11–1553 (Supp. IV, 1965). But we agree with the Court of Appeals in *Black*, that "the waiver question was primarily and initially one for the Juvenile Court to decide and its failure to do so in a valid manner cannot be said to be harmless error. It is the Juvenile Court, not the District Court, which has the facilities, personnel and expertise for a proper determination of the waiver issue." 122 U. S. App. D. C., at 396, 355 F. 2d, at 107.[32]

Ordinarily we would reverse the Court of Appeals and direct the District Court to remand the case to the Juvenile Court for a new determination of waiver. If on remand the decision were against waiver, the indictment in the District Court would be dismissed. See *Black* v. *United States, supra.* However, petitioner has now passed the age of 21 and the Juvenile Court can no longer exercise jurisdiction over him. In view of the unavailability of a redetermination of the waiver question by the Juvenile Court, it is urged by petitioner that the conviction should be vacated and the indictment dismissed. In the circumstances of this case, and in light of the remedy which the Court of Appeals fashioned in

[32] It also appears that the District Court requested and obtained the Social Service file and the probation staff's report of September 8, 1961, and that these were made available to petitioner's counsel. This did not cure the error of the Juvenile Court. Perhaps the point of it is that it again illustrates the maxim that while nondisclosure may contribute to the comfort of the staff, disclosure does not cause heaven to fall.

Black, supra, we do not consider it appropriate to grant this drastic relief.[33] Accordingly, we vacate the order of the Court of Appeals and the judgment of the District Court and remand the case to the District Court for a hearing *de novo* on waiver, consistent with this opinion.[34] If that court finds that waiver was inappropriate, petitioner's conviction must be vacated. If, however, it finds that the waiver order was proper when originally made, the District Court may proceed, after consideration of such motions as counsel may make and such further proceedings, if any, as may be warranted, to enter an appropriate judgment. Cf. *Black* v. *United States, supra.*

Reversed and remanded.

APPENDIX TO OPINION OF THE COURT.

Policy Memorandum No. 7, November 30, 1959.

The authority of the Judge of the Juvenile Court of the District of Columbia to waive or transfer jurisdiction to the U. S. District Court for the District of Columbia is contained in the Juvenile Court Act (§ 11–914 D. C. Code, 1951 Ed.). This section permits the Judge to waive jurisdiction "after full investigation" in the case of any child "sixteen years of age or older [who is] charged with an offense which would amount to a felony in the case of an adult, or any child charged with an

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[33] Petitioner is in St. Elizabeths Hospital for psychiatric treatment as a result of the jury verdict on the rape charges.

[34] We do not deem it appropriate merely to vacate the judgment and remand to the Court of Appeals for reconsideration of its present decision in light of its subsequent decisions in *Watkins* and *Black, supra.* Those cases were decided by different panels of the Court of Appeals from that which decided the present case, and in view of our grant of certiorari and of the importance of the issue, we consider it necessary to resolve the question presented instead of leaving it open for further consideration by the Court of Appeals.

offense which if committed by an adult is punishable by death or life imprisonment."

The statute sets forth no specific standards for the exercise of this important discretionary act, but leaves the formulation of such criteria to the Judge. A knowledge of the Judge's criteria is important to the child, his parents, his attorney, to the judges of the U. S. District Court for the District of Columbia, to the United States Attorney and his assistants, and to the Metropolitan Police Department, as well as to the staff of this court, especially the Juvenile Intake Section.

Therefore, the Judge has consulted with the Chief Judge and other judges of the U. S. District Court for the District of Columbia, with the United States Attorney, with representatives of the Bar, and with other groups concerned and has formulated the following criteria and principles concerning waiver of jurisdiction which are consistent with the basic aims and purpose of the Juvenile Court Act.

An offense falling within the statutory limitations (set forth above) will be waived if it has prosecutive merit and if it is heinous or of an aggravated character, or—even though less serious—if it represents a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action.

The determinative factors which will be considered by the Judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived are the following:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.

3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

4. The prosecutive merit of the complaint, i. e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U. S. District Court for the District of Columbia.

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

It will be the responsibility of any officer of the Court's staff assigned to make the investigation of any complaint in which waiver of jurisdiction is being considered to develop fully all available information which may bear upon the criteria and factors set forth above. Although not all such factors will be involved in an individual case, the Judge will consider the relevant factors in a

specific case before reaching a conclusion to waive juvenile jurisdiction and transfer the case to the U. S. District Court for the District of Columbia for trial under the adult procedures of that Court.

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

This case involves the construction of a statute applicable only to the District of Columbia. Our general practice is to leave undisturbed decisions of the Court of Appeals for the District of Columbia Circuit concerning the import of legislation governing the affairs of the District. *General Motors Corp.* v. *District of Columbia,* 380 U. S. 553, 556. It appears, however, that two cases decided by the Court of Appeals subsequent to its decision in the present case may have considerably modified the court's construction of the statute. Therefore, I would vacate this judgment and remand the case to the Court of Appeals for reconsideration in the light of its subsequent decisions, *Watkins* v. *United States,* 119 U. S. App. D. C. 409, 343 F. 2d 278, and *Black* v. *United States,* 122 U. S. App. D. C. 393, 355 F. 2d 104.

MALAT ET UX. *v.* RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE.

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

No. 487. Argued March 3, 1966.—Decided March 21, 1966.

Upon the sale of real estate which had been acquired by a joint venture in which petitioners participated, petitioners reported the profits therefrom as capital gains. Respondent argued that the venture had a dual purpose, to develop the property for rental or to sell it, and that the profit was taxable as ordinary income. The District Court ruled that petitioners failed to establish that the property was not held primarily for sale to customers in the ordinary course of business, and that the profits were not capital gains under 26 U. S. C. § 1221 (1). The Court of Appeals affirmed. Respondent urges the construction of "primarily" as meaning that a purpose may be "primary" if it is a "substantial" one. *Held:* The word "primarily," as used in § 1221 (1), means "of first importance" or "principally."

347 F. 2d 23, vacated and remanded.

George T. Altman argued the cause and filed briefs for petitioners.

Jack S. Levin argued the cause for respondent. With him on the brief were *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Melva M. Graney* and *Carolyn R. Just.*

PER CURIAM.

Petitioner [1] was a participant in a joint venture which acquired a 45-acre parcel of land, the intended use for which is somewhat in dispute. Petitioner contends that the venturers' intention was to develop and operate an apartment project on the land; the respondent's posi-

[1] The taxpayer and his wife who filed a joint return are the petitioners, but for simplicity are referred to throughout as "petitioner."

tion is that there was a "dual purpose" of developing the property for rental purposes or selling, whichever proved to be the more profitable. In any event, difficulties in obtaining the necessary financing were encountered, and the interior lots of the tract were subdivided and sold. The profit from those sales was reported and taxed as ordinary income.

The joint venturers continued to explore the possibility of commercially developing the remaining exterior parcels. Additional frustrations in the form of zoning restrictions were encountered. These difficulties persuaded petitioner and another of the joint venturers of the desirability of terminating the venture; accordingly, they sold out their interests in the remaining property. Petitioner contends that he is entitled to treat the profits from this last sale as capital gains; the respondent takes the position that this was "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business," [2] and thus subject to taxation as ordinary income.

The District Court made the following finding:

> "The members of [the joint venture], as of the date the 44.901 acres were acquired, intended either to sell the property or develop it for rental, depending upon which course appeared to be most profitable. The venturers realized that they had made a good purchase price-wise and, if they were unable to obtain acceptable construction financing or rezoning . . . which would be prerequisite to commercial development, they would sell the property

[2] Internal Revenue Code of 1954, § 1221 (1), 26 U. S. C. § 1221 (1):

"For purposes of this subtitle, the term 'capital asset' means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

"(1) . . . property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

> in bulk so they wouldn't get hurt. The purpose of either selling or developing the property continued during the period in which [the joint venture] held the property."

The District Court ruled that petitioner had failed to establish that the property was not held *primarily* for sale to customers in the ordinary course of business, and thus rejected petitioner's claim to capital gain treatment for the profits derived from the property's resale. The Court of Appeals affirmed, 347 F. 2d 23. We granted certiorari (382 U. S. 900) to resolve a conflict among the courts of appeals [3] with regard to the meaning of the term "primarily" as it is used in § 1221 (1) of the Internal Revenue Code of 1954.

The statute denies capital gain treatment to profits reaped from the sale of "property held by the taxpayer *primarily* for sale to customers in the ordinary course of his trade or business." (Emphasis added.) The respondent urges upon us a construction of "primarily" as meaning that a purpose may be "primary" if it is a "substantial" one.

As we have often said, "the words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses." *Crane* v. *Commissioner,* 331 U. S. 1, 6. And see *Hanover Bank* v. *Commissioner,* 369 U. S. 672, 687–688; *Commissioner* v. *Korell,* 339 U. S. 619, 627–628. Departure from a literal reading of statutory language may, on occasion, be indicated by relevant internal evidence of the statute itself

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[3] Compare *Rollingwood Corp.* v. *Commissioner,* 190 F. 2d 263, 266 (C. A. 9th Cir.); *American Can Co.* v. *Commissioner,* 317 F. 2d 604, 605 (C. A. 2d Cir.), with *United States* v. *Bennett,* 186 F. 2d 407, 410–411 (C. A. 5th Cir.); *Municipal Bond Corp.* v. *Commissioner,* 341 F. 2d 683, 688–689 (C. A. 8th Cir.). Cf. *Recordak Corp.* v. *United States,* 163 Ct. Cl. 294, 300–301, 325 F. 2d 460, 463–464.

and necessary in order to effect the legislative purpose. See, *e. g., Board of Governors* v. *Agnew,* 329 U. S. 441, 446–448. But this is not such an occasion. The purpose of the statutory provision with which we deal is to differentiate between the "profits and losses arising from the everyday operation of a business" on the one hand (*Corn Products Co.* v. *Commissioner,* 350 U. S. 46, 52) and "the realization of appreciation in value accrued over a substantial period of time" on the other. (*Commissioner* v. *Gillette Motor Co.,* 364 U. S. 130, 134.) A literal reading of the statute is consistent with this legislative purpose. We hold that, as used in § 1221 (1), "primarily" means "of first importance" or "principally."

Since the courts below applied an incorrect legal standard, we do not consider whether the result would be supportable on the facts of this case had the correct one been applied. We believe, moreover, that the appropriate disposition is to remand the case to the District Court for fresh fact-findings, addressed to the statute as we have now construed it.

Vacated and remanded.

Mr. Justice Black would affirm the judgments of the District Court and the Court of Appeals.

Mr. Justice White took no part in the decision of this case.

CROSS *v.* CALIFORNIA.

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

No. 1161, Misc. Decided March 21, 1966.

Appeal dismissed.

PER CURIAM.

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

MOTORLEASE CORP. *v.* UNITED STATES.

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

No. 24. Decided March 21, 1966.

Certiorari granted; 334 F. 2d 617, reversed.

Ellis Lyons for petitioner.

Solicitor General Cox for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the United States Court of Appeals for the Second Circuit is reversed. *Fribourg Navigation Co., Inc.* v. *Commissioner of Internal Revenue, ante,* p. 272.

MR. JUSTICE BLACK, MR. JUSTICE CLARK and MR. JUSTICE WHITE dissent for the reasons stated in the dissenting opinion of MR. JUSTICE WHITE in *Fribourg Navigation Co., Inc.* v. *Commissioner of Internal Revenue, supra.*

BRIDGES *v.* CITY OF BILOXI, MISSISSIPPI.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 923. Decided March 21, 1966.

253 Miss. 812, 178 So. 2d 683, appeal dismissed.

Upton Sisson and *Forrest B. Jackson* for appellant.

L. Arnold Pyle and *Albert Sidney Johnston, Jr.,* for appellee.

PER CURIAM.

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

KUKICH ET AL. *v.* SERBIAN EASTERN ORTHODOX CHURCH OF PITTSBURGH ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 931. Decided March 21, 1966.

418 Pa. 634, 213 A. 2d 80, appeal dismissed and certiorari denied.

Harry Alan Sherman for appellants.

Harry Edward Leas 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 a writ of certiorari, certiorari is denied.

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

COUNTY BOARD OF ELECTION OF MONROE COUNTY, NEW YORK, ET AL. *v.* UNITED STATES.

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

No. 1040. Decided March 21, 1966.

248 F. Supp. 316, appeal dismissed.

Louis J. Lefkowitz, Attorney General of New York, *Jean M. Coon,* Assistant Attorney General, *Ruth Kessler Toch,* Acting Solicitor General, and *William A. Stevens* for appellants.

Solicitor General Marshall for the United States.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. *Swift & Co.* v. *Wickham,* 382 U. S. 111; *Pennsylvania Public Utility Commission* v. *Pennsylvania Railroad Co.,* 382 U. S. 281.

PUGACH *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 131, Misc. Decided March 21, 1966.

Appeal dismissed.

Petitioner *pro se.*

Isidore Dollinger and *Bertram R. Gelfand* for respondent.

PER CURIAM.

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

INTERSTATE COMMERCE COMMISSION *v.* ATLANTIC COAST LINE R. CO. ET AL.

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

No. 14. Argued December 6, 1965.—Decided March 22, 1966.

Upon a complaint by Thomson Phosphate Company the ICC found that rates on shipments by Thomson on respondent railroads were unjust and unreasonable and that the shipper was entitled to reparations. The respondents refused to certify Thomson's statements showing shipments made and then the ICC determined the amount of reparations due and entered an order directing payment. Respondents refused to comply and brought this suit in the District Court for the Middle District of Florida under § 17 (9) of the Interstate Commerce Act to enjoin and annul the ICC orders. Thereafter Thomson brought suit under § 16 (2) of the Act in the District Court for the Southern District of New York to enforce the ICC's reparation order, but that suit was stayed pending disposition of the carrier-initiated action. The District Court in Florida denied the ICC's motion to dismiss which alleged that the carriers' sole remedy was to defend the suit brought by the shipper under § 16 (2). The court set aside the ICC order on the ground that Thomson's claim was barred by the statute of limitations. The Court of Appeals sustained the District Court's jurisdiction and affirmed. *Held:* Carriers may obtain full review of ICC reparation orders by defending actions brought by shippers under § 16 (2) of the Act to enforce such orders. The policy underlying that section precludes the carriers from obtaining review in a forum other than that chosen by the shippers, but there is no obstacle to a cross-proceeding under § 17 (9) brought by the carriers in that forum. Pp. 579–606.

(a) The carriers have ample opportunity to secure review of the ICC's orders through defense of the shipper's § 16 (2) enforcement action. *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202, and *United States* v. *Interstate Commerce Comm'n*, 337 U. S. 426, distinguished, as those cases dealt with situations where the challenged orders could only be reviewed in § 17 (9) proceedings. Pp. 589–595.

(b) To effectuate the policy of encouraging prompt payment of reparation awards expressed in § 16 (2) Congress provided the

shipper with certain procedural and substantive benefits, particularly choice of venue, which would not be available in an action instituted by the carrier under § 17 (9). Pp. 595–598.

(c) Limiting review of the ICC's orders to § 16 (2) enforcement actions would not be likely to result in disparity of treatment of shippers. Pp. 598–602.

(d) The language and history of the direct review provisions of § 17 (9) are consistent with limitation of review to the forum selected by the shipper in his enforcement proceeding, and the direct review proceeding may be brought as a cross-action in that forum. Pp. 603–606.

334 F. 2d 46, reversed.

Robert W. Ginnane argued the cause for petitioner. With him on the briefs for petitioner and for the United States, as *amicus curiae,* were *Solicitor General Marshall,* former *Solicitor General Cox, Bruce J. Terris, Leonard S. Goodman* and *Richard A. Posner.*

J. Edgar McDonald argued the cause for respondents. With him on the brief were *Phil C. Beverly* and *Urchie B. Ellis.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This case is before the Court for a determination of when and in what proceedings a common carrier by rail may challenge an order of the Interstate Commerce Commission awarding reparations to a shipper claiming injury because of the carrier's violation of the Act.

A shipper, Thomson Phosphate Company, filed a complaint with the Commission alleging that certain rates charged by respondent railroads were unjust and unreasonable and seeking reimbursement of those transportation charges to the extent they were unlawful. Interstate Commerce Act §§ 8 and 9, 24 Stat. 382, as amended, 49 U. S. C. §§ 8 and 9 (1964 ed.). The Commission sustained the complaint and issued a report finding that

the assailed rates were unjust and unreasonable and that the shipper was entitled to reparations. *Thomson Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 303 I. C. C. 25 (Div. 2, 1958). When respondents refused to certify the shipper's statements showing the shipments made during the period involved, the Commission reopened the proceeding for a determination of the amount of reparations due. After such additional proceedings, the Commission found Thomson was entitled to reparations of $8,889.76 with interest, and an order was entered authorizing and directing respondents to pay such sum by a specified date, later amended to August 28, 1961. 311 I. C. C. 315. Respondents refused to comply with the order and brought suit in the United States District Court for the Middle District of Florida under § 17 (9) of the Interstate Commerce Act, 24 Stat. 385, as amended, 49 U. S. C. § 17 (9), and 28 U. S. C. §§ 1336 and 1398 (1964 ed.) to enjoin, set aside, and annul the orders of the Commission. Respondents claimed, *inter alia,* that the Commission erred in finding the rates unreasonable and in not finding Thomson's claims barred by the Act's limitation provision, Interstate Commerce Act § 16 (3), 24 Stat. 384, as amended, 49 U. S. C. § 16 (3) (1964 ed.). Thomson, which was not a party to the carriers' action, filed in the Southern District of New York a suit against respondents and other railroads to enforce the Commission's reparation award pursuant to § 16 (2) of the Interstate Commerce Act, 49 U. S. C. § 16 (2) (1964 ed.). By stipulation, the New York case has been held in abeyance pending the outcome of the Florida case, which is presently before this Court.

The Commission moved to dismiss the carriers' injunction action, contending that reparation orders are not reviewable in such a suit and that the carriers were required to await the shipper's enforcement action to attack the Commission's order. The Florida District

Court denied the motion to dismiss and, on the merits, held that Thomson's claims were barred by limitations. 213 F. Supp. 199. The sole issue raised on appeal was whether the District Court had jurisdiction. The Court of Appeals affirmed, sustaining the jurisdiction of the Florida District Court. 334 F. 2d 46. We granted certiorari because of the importance of this question in the administration of the Act. 379 U. S. 957. We reverse and hold that when the Commission issues a reparation order, not accompanied by a cease-and-desist order, a carrier may obtain review of the Commission's order only in the court where the shipper commences its enforcement action—or where the shipper seeks review of the Commission's order, see *Consolo* v. *Federal Maritime Comm'n, post,* p. 607.

I.

The Interstate Commerce Act contains detailed provisions governing the presentation and adjudication of claims for reparations. Section 8 is the basic provision creating liability and declares that any common carrier by rail which violates the Act "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation . . . ." By § 9, the complainant is given the alternatives of seeking such damages by complaint to the Commission, under the procedures established by § 13 (1), or of bringing suit in a federal district court. But the primary jurisdiction doctrine requires initial submission to the Commission of questions that raise "issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by [the] Act." *United States* v. *Western Pac. R. Co.,* 352 U. S. 59, 65; *Texas & Pac. R. Co.* v. *American Tie & Timber Co.,* 234 U. S. 138. Accordingly, a shipper who commences his § 9 reparation proceeding in the District

Court will nevertheless be required to repair to the Commission for decision of issues, like the reasonableness of rates, which call the primary jurisdiction doctrine into play. When that occurs, the court ordering the reference of such issues to the Commission has exclusive jurisdiction of any civil action to enforce, enjoin, set aside, or annul a Commission order arising out of the referral, 28 U. S. C. § 1336 (b) (1964 ed.), such action to be brought within 90 days of the entry of the Commission's final order, 28 U. S. C. § 1336 (c) (1964 ed).

Our concern here, however, is with the alternative procedure provided in § 9, which involves an initial complaint before the Commission and culminates in the § 16 (2) suit to enforce the Commission's reparation award. Section 16 (1) provides that if the Commission determines the complainant is entitled to reparations it "shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." If the carrier fails to comply with the order by the designated time, the shipper then has the right under § 16 (2) to file suit in either federal or state court to enforce the Commission's reparation award. Moreover, Congress has provided that in such a suit the shipper is to have certain procedural advantages designed to discourage "harassing resistance by a carrier to [the] reparation order." *St. Louis & S. F. R. Co.* v. *Spiller,* 275 U. S. 156, 159; see also *Meeker & Co.* v. *Lehigh Valley R. Co.,* 236 U. S. 412, 433; *Baldwin* v. *Milling Co.,* 307 U. S. 478. The shipper has a broad choice of venue. If the suit is brought in a federal court, see *Lewis-Simas-Jones Co.* v. *Southern Pac. Co.,* 283 U. S. 654, 661, the shipper is free from liability for costs, except as they accrue on its appeal, and it may introduce at trial the findings and order of the Commission, which "shall be prima facie evidence of the facts therein stated. . . ." In addition, the shipper is to be allowed

a reasonable attorney's fee if it prevails, an advantage also accorded under § 8 to shippers who elect to proceed in court in the first instance.[1]

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[1] The relevant text of the provisions discussed in text above reads as follows:

"§ 8. Liability in damages to persons injured by violation of law.

"In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

"§ 9. Remedies of persons damaged; election; witnesses.

"Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. . . .

. . . . . .

"§ 13. Complaints to and investigations by Commission.

"(1) Complaint to Commission of violation of law by carrier; reparation; investigation.

"Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable

The Interstate Commerce Act likewise contains general provision for judicial review of Commission orders. Section 17 (9) provides that after an application for

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time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

. . . . . .

"§ 16. Orders of Commission and enforcement thereof.

"(1) Award of damages.

"If, after hearing on a complaint made as provided in section 13 of this title, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"(2) Proceedings in courts to enforce orders; costs; attorney's fee.

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent state of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit." Interstate Commerce Act §§ 8, 9, 13 (1) and 16 (1) and (2), 49 U. S. C. §§ 8, 9, 13 (1) and 16 (1) and (2) (1964 ed.).

rehearing, reargument, or reconsideration has been denied or otherwise disposed of, a suit may be brought to enforce, enjoin, suspend, or set aside the Commission decision, order or requirement.[2]

Jurisdiction of both § 16 (2) and § 17 (9) suits is vested in the federal district courts by 28 U. S. C. § 1336 (a) (1964 ed.). Venue is determined by 28 U. S. C. § 1398 (a) (1964 ed.), which, "except as otherwise provided by law," limits suits to the judicial district where the party bringing the action has his residence or principal office. But because of the quoted exception, this venue restriction does not apply to suits commenced pursuant to § 16 (2), as that section contains its own venue provision.

Procedures for review of Commission orders "other than for the payment of money," see 28 U. S. C. § 2321 (1964 ed.), are governed by 28 U. S. C. §§ 2321–2325 (1964 ed.). Such actions must be brought by or against

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[2] "§ 17 (9) Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing, etc.

"When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise." Interstate Commerce Act § 17 (9), 49 U. S. C. § 17 (9) (1964 ed.).

This provision was not added until 1940, Transportation Act of 1940, 54 Stat. 916, and is basically a provision requiring exhaustion of administrative remedies prior to resort to the courts. The first provision for direct judicial review of Commission orders appeared in § 5 of the Hepburn Act of 1906, 34 Stat. 590, 592, which was phrased in terms of venue only. For ease of reference, we will refer to direct review proceedings as § 17 (9) proceedings.

the United States, § 2322; the Commission and parties in interest appearing before the Commission may intervene as of right, § 2323; and no interlocutory or permanent injunction restraining enforcement of a Commission order may be granted unless the application is heard and determined by a three-judge district court, § 2325,[3] with direct review here, 28 U. S. C. § 1253 (1964 ed.). In

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[3] The above-described provisions of the Judicial Code read in pertinent part:

"§ 1336. Interstate Commerce Commission's orders.

"(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in any part, any order of the Interstate Commerce Commission.

. . . . . .

"§ 1398. Interstate Commerce Commission's orders.

"(a) Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

. . . . . .

"§ 2321. Procedure generally; process.

"The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter. . . .

"§ 2322. United States as party.

"All actions specified in section 2321 of this title shall be brought by or against the United States.

"§ 2323. Duties of Attorney General; intervenors.

"The Attorney General shall represent the Government in the actions specified in section 2321 of this title . . . in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

"The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any

United States v. *Interstate Commerce Comm'n*, 337 U. S. 426, however, this Court held that Commission orders which determine in a reparation proceeding that assailed rates are unlawful but do not direct the carrier to cease and desist charging such rates, because the rates have been discontinued, "are not of sufficient public importance to justify the accelerated judicial review procedure," 337 U. S., at 442. Thus, though the procedures set out in 28 U. S. C. §§ 2321–2325 (1964 ed.) otherwise govern § 17 (9) proceedings to review such orders, § 2325 is not applicable and the matter may be adjudicated by a single judge. Because § 16 (2) actions seek enforcement of an order "for the payment of money," the above-described procedures do not apply. Section 16 (2) directs that actions thereunder "shall proceed in all respects like other civil suits for damages," with the exception of the special procedural advantages accorded the shipper to which we have previously referred.

II.

From the foregoing summary it will be observed that § 16 (2) actions for enforcement of Commission reparation awards and § 17 (9) actions to set aside Commission orders are quite distinct proceedings, with different venue restrictions and different procedures. Moreover, Congress conferred certain procedural advantages on shippers bringing § 16 (2) actions that may well be lost

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action involving the validity of such order or requirement or any part thereof, and the interest of such party. . . .

. . . . . .

"§ 2325. Injunctions; three-judge court required.

"An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." 28 U. S. C. §§ 1336 (a), 1398 (a), 2321–2323, 2325 (1964 ed.).

or impaired if carriers may attack the Commission's order in a direct review proceeding pursuant to § 17 (9). Accordingly, we are asked to harmonize the language and purposes of the two provisions.[4]

At the outset, however, it should be emphasized that we are here concerned with a narrow, though important, category of cases. First, it is conceded that if the Commission's reparation order is accompanied by a cease-and-desist order, as it usually will be when the proceeding originates before the Commission and the rates or practices under attack continue in use, the carrier may obtain immediate review of the cease-and-desist order pursuant to § 17 (9); and such review will ordinarily determine the validity of the finding of statutory violation on which the reparation order is founded. A Commission cease-and-desist order respecting rates and charges, for example, which may be issued pursuant to the authority granted by § 15 (1) to prescribe just and reasonable rates, subjects the carrier to $5,000 per day penalties for noncompliance, 49 U. S. C. § 16 (8) (1964 ed.), and is typical of orders reviewed in suits to set aside Commission orders since the first such suit, *Stickney* v. *Interstate Commerce Comm'n*, 164 F. 638 (C. C. D. Minn.), aff'd, 215 U. S. 98; see also *Interstate Commerce Comm'n* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *United States* v. *Interstate Commerce Comm'n*, 337 U. S. 426, 454 (Frankfurter, J., dissenting). Second, even when a cease-and-desist order is not joined with the reparation order, the latter order will be subject to direct review when no other means of securing review is available, re-

[4] As is readily apparent from this opinion, the statutory provisions governing this case and the companion case, *Consolo, post*, are an historical patchwork subject to more than one interpretation. The entire matter is surely ripe for congressional consideration, for it is of continuing significance and the competing considerations of yesterday may not be those of overriding importance today.

gardless of whether review is sought by a shipper, *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426; *Consolo* v. *Federal Maritime Comm'n, post,* p. 607, or the carrier, *Pennsylvania R. Co.* v. *United States,* 363 U. S. 202. In the cited cases the party seeking review could not obtain such review in a § 16 (2) suit, either directly or through interposition of a defense.

Thus in *United States* v. *Interstate Commerce Comm'n, supra,* the Government filed with the Commission a complaint seeking reparations, but the Commission found the assailed charges did not violate the Act and dismissed the complaint. As there was no award upon which to base a § 16 (2) suit, the United States would have been denied all review had jurisdiction of the § 17 (9) action not been sustained. Similarly, in *Consolo* v. *Federal Maritime Comm'n, post,* p. 607, we hold that a shipper may challenge in a direct review proceeding the adequacy of a reparation award, such a challenge being one that could not be pressed in an enforcement action, see *Baltimore & Ohio R. Co.* v. *Brady,* 288 U. S. 448, 457–458; *D. L. Piazza Co.* v. *West Coast Line,* 210 F. 2d 947 (C. A. 2d Cir. 1954), cert. denied, 348 U. S. 839.

Pennsylvania R. Co. v. *United States, supra,* involved a suit by a carrier in the Court of Claims to collect the charges due under its tariff. The United States defended on the ground that the rates were unreasonable, and the Court of Claims referred that issue to the Commission pursuant to the primary jurisdiction doctrine, *United States* v. *Western Pac. R. Co.,* 352 U. S. 59, 62–70. The Commission found certain rates unjust and unreasonable, without ordering reparations or issuing a cease-and-desist order, and the carrier filed a § 17 (9) suit in federal district court to set the order aside. On review of the Court of Claims' refusal to further suspend its proceedings pending the District Court action, this

Court held that the carrier was entitled to judicial review of the Commission order, that the Court of Claims had no jurisdiction to afford such review, and that the Court of Claims should therefore have suspended its proceedings. Because of the holding that the Court of Claims could not review the Commission order, failure to sustain the District Court's jurisdiction of the carrier's § 17 (9) action would again have precluded judicial review.

The essential question in this case is the extent to which *United States* v. *Interstate Commerce Comm'n* and *Pennsylvania R. Co.* v. *United States,* compel allowance of respondents' direct review action. The Commission asks us to limit those cases to their facts—situations where judicial review would not have been available if the § 17 (9) suit was not permitted. It argues that sufficient opportunity to obtain review of the Commission's finding that a statutory violation has occurred is afforded respondents by their right to challenge that determination in defense of Thomson's § 16 (2) action to enforce the reparation award. If jurisdiction to review in a § 17 (9) suit should be sustained, the Commission further contends, shippers will be deprived of many of the advantages bestowed by § 16 (2). And the historical development of § 16 (2) and the direct review proceeding is said to establish that Congress did not contemplate that the carrier could obtain direct review in a case like that at bar and thereby short-circuit the shipper's suit. Finally, the Commission urges that in reparation cases where the assailed rates are no longer in effect and no cease-and-desist order issues the Commission's order has little continuing or general significance but is comparable to an adjudication in a private damages action of interest only to the parties involved; therefore, it is appropriate for the order to be defended by the shipper, who is in effect compensated for such defense by the procedural

advantages accorded by § 16 (2), rather than by the United States and the Commission.

Respondents argue that, to the contrary, past practice and the decisions of this Court establish that the exclusive method of reviewing Commission findings that a statutory violation has occurred [5] is through a § 17 (9) proceeding and that such a finding may not be challenged and is not open to review in a § 16 (2) action. Respondents also argue that limiting review to the § 16 (2) proceeding would result in disparate treatment of shippers, through conflicting decisions in enforcement suits, and would thus violate the Act's cardinal principle of uniformity of rates.

As will appear more fully below, we take a middle course. We conclude that carriers may obtain full review by defending the § 16 (2) action and that the policy underlying that section precludes the carriers from obtaining review in a forum other than that chosen by the shipper. But we find no obstacle to the carriers' bringing a § 17 (9) cross-proceeding in the forum selected by the shipper, should they so desire.

III.

A threshold question is raised by respondents' contention that the statutory violation issue is not open to review in a § 16 (2) enforcement action, the Commission's finding being conclusive on the enforcement court unless set aside in a § 17 (9) proceeding. If respondents are correct on this point, their § 17 (9) action must be

[5] Frequent Commission practice, illustrated by the procedure adopted in the present case, is to separate from the issue of shipper's damages issues respecting the existence of a statutory violation and the availability of statutory defenses such as the statute of limitations defense asserted by respondents and to try the latter issues first. The core of the dispute here concerns the forum for review of Commission findings on such issues of violation and limitations.

allowed under even the Commission's interpretation of *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426, and *Pennsylvania R. Co.* v. *United States,* 363 U. S. 202.

To support their view of the scope of review in the enforcement action, respondents refer principally to *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.,* 230 U. S. 247. In that case, a shipper commenced its reparation suit under §§ 8 and 9 in a federal district court. This Court held that since the dispute raised "administrative" questions concerning the reasonableness of rates, the primary jurisdiction doctrine required the shipper to proceed first before the Commission. Regarding the weight to be accorded the Commission's resulting order, the Court said:

> "Such orders, so far as they are administrative are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers, who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial and only *prima facie* correct in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is by § 16 of the act given its day in court and the right to a judicial hearing . . . ." 230 U. S., at 258.

Accord, *Morrisdale Coal Co.* v. *Pennsylvania R. Co.,* 230 U. S. 304.

The prima facie evidence provision in § 16 (2), however, draws no express distinction between administrative and quasi-judicial findings of the Commission, and we said of that provision in *Meeker & Co.* v. *Lehigh Valley R. Co.,* 236 U. S. 412, 430, that "[i]t cuts off no defense [and] interposes no obstacle to a full contestation of all the issues . . . ." See also *United States* v. *Inter-*

state Commerce Comm'n, 337 U. S. 426, 435 (§ 16 (2) proceedings afford "railroads complete judicial review of adverse reparation orders"). Moreover, in one of the earliest cases under the Hepburn Act, the Court reviewed the question of statutory violation in a § 16 (2) case, concluded that the legal theory applied by the Commission was erroneous, and set aside the Commission's determination that the disputed rates were unreasonable. *Southern R. Co.* v. *St. Louis Hay & Grain Co.,* 214 U. S. 297. See also *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.,* 284 U. S. 370. The seemingly contradictory statements in the contemporaneous *Mitchell Coal* and *Meeker* decisions require explanation, which we believe can be found in the general course of decisions in that era respecting the scope of review of Commission orders.

From our brief résumé of the Court's opinion in *Mitchell Coal* it should be immediately apparent that the case did not, strictly speaking, require the determination of the scope of judicial review in § 16 (2) enforcement actions. The proceeding under review had been commenced in court pursuant to § 9 rather than § 16 and no Commission order had yet been entered. The question directly in issue concerned the applicability of the primary jurisdiction doctrine to cases involving discontinued, rather than present, rates.

Initially formulated in cases arising under the Interstate Commerce Act, the primary jurisdiction doctrine was premised in the early cases on the policy of the Act of assuring uniform rates. The Court reasoned that many questions arising under the Act, such as whether rates were unreasonable or discriminatory, were essentially questions of fact particularly appropriate for determination by an expert Commission. If shippers could challenge the filed rates by proceedings before a court, without prior resort to the Commission, different conclusions might be reached by different courts; and the pre-

vailing shippers would thereby obtain a rate preference as compared to unsuccessful shippers, which would violate the principle of uniform rates. See, *e. g., Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440–441; *Baltimore & Ohio R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 493–495; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 255–260. Of course a preliminary determination by the Commission would have little effect in achieving uniformity if its determination were subject to *de novo* review, and it was for that reason that the Court pointed out in *Mitchell Coal* the "conclusive" effect that would be accorded "administrative" findings of the Commission in any ensuing § 16 action.

But other decisions rendered by the Court during the same period indicate that it was not only in § 16 proceedings that the Commission findings would be conclusive, in the sense the Court was actually using that term. Under the original Act, failure to comply with any order of the Commission did not in itself entail any penalty. Commission orders were judicially enforceable at the instance of the Commission or any party in interest, and the Act provided that in an enforcement action "the findings of fact in the report of said Commission shall be prima facie evidence of the matters therein stated." Interstate Commerce Act, § 16, 24 Stat. 384 (1887), as amended, 25 Stat. 860 (1889). Though retaining the prima facie evidence provision for actions on reparation awards, the Hepburn Act of 1906 included no provision respecting the weight to be given Commission findings in nonreparation cases. Section 15 of the amended Act, however, made Commission orders, except orders for the payment of money, self-enforcing for purposes of incurring liability for penalties for noncompliance, unless such orders had been suspended or set aside by a court of competent jurisdiction. In *Interstate Commerce*

Comm'n v. *Illinois Central R. Co.*, 215 U. S. 452, a suit to set aside a cease-and-desist order, the changes effected by the Hepburn Act in making Commission orders self-enforcing were interpreted as reducing the scope of judicial review from that prevailing when Commission orders were only prima facie evidence. The Court stated it could consider whether the Commission action exceeded constitutional power or right, whether the administrative order was within the scope of authority delegated, and whether the exercise of authority was reasonable, but it could not "usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised. Power to make the order and not the mere expediency or wisdom of having made it, is the question." 215 U. S., at 470. Through frequent repetition, see *Interstate Commerce Comm'n* v. *Union Pac. R. Co.*, 222 U. S. 541, 547–548; *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, 297–298, the principles elaborated in *Illinois Central* gradually became restated as a doctrine "that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the *Illinois Central* and other cases . . . ," *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320. Accord, *Central R. Co.* v. *United States*, 257 U. S. 247, 256–257; *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 525–526 and n. 7. See generally, *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 139–140. By a parallel development, the Court placed increasing reliance in primary jurisdiction cases on the "conclusive" effect of Commission orders as a factor demonstrating that the requirement of preliminary resort to the Commission on administrative questions would indeed further the statutory policy of uniform treatment. Compare *Baltimore & Ohio R. Co.* v. *Pitcairn Coal Co.*,

215 U. S. 481, 494, with *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 258, quoted, *supra*, p. 590.

When *Mitchell Coal* and *Meeker* are read together against the background of the *Illinois Central* and *Louisville & Nashville* cases it becomes clear that Commission orders are fully reviewable in § 16 (2) suits, but Commission findings on questions required under the primary jurisdiction doctrine to be determined first by the Commission are conclusive in the same sense that such findings would be conclusive in suits to set aside the Commission's order. That is, findings on primary jurisdiction issues are to be reviewed by the Court on the administrative record under the familiar standards elaborated in direct review proceedings, while findings on other questions are subject to review under the prima facie evidence provision of § 16 (2), with the statutory rights of introducing evidence not before the Commission and obtaining a jury determination of disputed issues of fact.[6] Such an interpretation of § 16 (2)'s prima facie evidence provision is required if that provision is to be consonant with the primary jurisdiction doctrine. That interpretation seems to have been applied by the Court in *Pennsylvania R. Co.* v. *Weber*, 257 U. S. 85, 90–91; *Louisville & Nashville R. Co.* v. *Sloss-Shef-*

[6] Section 16 (2), of course, does not limit the carrier to introducing opposing evidence to rebut the prima facie effect of the Commission's order. It may also challenge the admissibility of the order on the grounds, for example, that the Commission did not afford the carrier a fair hearing or that the order was not based upon substantial evidence, *Spiller* v. *Atchison, T. & S. F. R. Co.*, 253 U. S. 117, 126. But if a Commission order containing findings on all matters essential to the shipper's recovery is admitted and the carrier produces no opposing evidence, the findings and order of the Commission may not be rejected by the jury and the shipper is entitled to judgment. *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 434, 439; see *Pennsylvania R. Co.* v. *Jacoby & Co.*, 242 U. S. 89, 94 (dictum).

field Co., 269 U. S. 217; *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179; *Adams* v. *Mills*, 286 U. S. 397, 409–410.[7] It is urged in the present case by the Commission and in a companion case by the Federal Maritime Commission, was accepted by the court below, 334 F. 2d, at 49, n. 12, and has been applied by several other lower federal courts, *New Process Gear Corp.* v. *New York Central R. Co.*, 250 F. 2d 569, 571–572 (C. A. 2d Cir. 1957), cert. denied, 356 U. S. 959; *Midland Valley R. Co.* v. *Excelsior Coal Co.*, 86 F. 2d 177, 181–182 (C. A. 8th Cir. 1936); *Baltimore & O. R. Co.* v. *Brady*, 61 F. 2d 242, 246, 248 (C. A. 4th Cir. 1932), rev'd on other grounds, 288 U. S. 448; *City of Danville* v. *Chesapeake & O. R. Co.*, 34 F. Supp. 620, 625, 627–628 (D. C. W. D. Va. 1940); *Hillsdale Coal & Coke Co.* v. *Pennsylvania R. Co.*, 237 F. 272, 275 (D. C. E. D. Pa. 1916). We adhere to that interpretation now.

IV.

Having established that the carrier has ample opportunity to secure review in the enforcement action, we must now consider whether affording the carrier the alternative of bringing direct review proceedings pursuant to § 17 (9) would vitiate the congressional policy expressed in § 16 (2) of encouraging prompt payment of reparation awards. To effectuate that policy, Congress has provided for the shipper certain procedural and substantive benefits pertaining to venue, freedom from costs, prima facie effect of the Commission's order, and allowance of a reasonable attorney's fee. The Commission

[7] In *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, the Court considered a carrier's statute of limitations defense on review of a judgment for the shipper in a § 16 (2) enforcement action. Accord, *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412. Thus, it would seem beyond question that respondents here could have presented in Thomson's New York action the defense on which they prevailed in the courts below.

contends that permitting the carrier to bring direct review proceedings will materially impair the benefits derived by the shipper from the procedural dispensations of § 16 (2). We conclude that although the degree of impairment would be less than that claimed by the Commission, it would nevertheless be substantial.

The Commission argument respecting venue, which we accept, proceeds as follows: Because the carrier may bring its § 17 (9) action as soon as the final Commission order is entered but the shipper's § 16 (2) suit must await passage of the date set for compliance, the carrier may file its suit first and thus obtain priority. Although the carrier's suit must be brought against the United States, 28 U. S. C. § 2322 (1964 ed.), the Commission and the shipper may intervene as of right, 28 U. S. C. § 2323 (1964 ed.), and the shipper will be under compulsion to do so to protect its interest since a decision setting aside the Commission's order would destroy the foundation of the enforcement action. In this way, the shipper will frequently be denied his choice of forum on the statutory violation issue as the § 17 (9) suit must be brought in the judicial district of the residence or principal office of the party bringing the suit, 28 U. S. C. § 1398 (a), which may be far removed from the district in which the shipper resides or through which the road of the carrier runs—alternatives that are open to the shipper under § 16 (2) and, being likely to offer a more convenient venue to the shipper, would frequently be the shipper's choice.

By a similar analysis the Commission also contends that a shipper forced to intervene in the carrier's § 17 (9) action would lose the advantages of freedom from costs and the right to a reasonable attorney's fee, since those rights are conferred only in the § 16 (2) action and not in § 17 (9) actions. But since both the § 16 (2) action and the § 17 (9) action may be heard and determined by

a single district judge when the reparation order is not accompanied by a cease-and-desist order, *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426, 440–443; *Pennsylvania R. Co.* v. *United States,* 363 U. S. 202, it would be possible, apart from venue problems,[8] for the shipper to press its action in the same district as the carrier's action, either by an independent action to be consolidated with the carrier's action, Fed. Rule Civ. Proc. 42 (a), or by a counterclaim after intervention in the carrier's action, see *Switzer Bros., Inc.* v. *Locklin,* 207 F. 2d 483 (C. A. 7th Cir. 1953); 3 Moore, Federal Practice ¶ 13.05 (2d ed. 1964), 4 Moore, Federal Practice ¶ 24.17 (2d ed. 1963). Then to the extent that the shipper's costs and attorney's fees were attributable

[8] Venue of suits to set aside the Commission's order is limited by 28 U. S. C. § 1398 (1964 ed.) to the district in which the party bringing the action has its residence or principal office. Section 16 (2) provides for venue in the district where the shipper resides "or in which is located the principal operating office of the carrier, or through which the road of the carrier runs . . . ." As § 16 (2) does not expressly provide for venue in the district in which the carrier resides and that district may not coincide with one of the districts that are listed, it would appear that in some cases in which the carrier elects to file its § 17 (9) action in the district of its residence, rather than the district of its principal office, the district chosen by the carrier will not be one where the shipper could originally have brought suit. It was primarily similar venue problems that prompted enactment in 1964 of 28 U. S. C. § 1336 (b), which provides that exclusive jurisdiction of a § 17 (9) action to set aside a Commission order arising out of a primary jurisdiction reference to the Commission shall be vested in the referring court. 1964–2 U. S. Code Cong. and Admin. News 3235–3239. When the § 17 (9) action is filed first, however, venue difficulties are less likely to occur as the § 16 (2) venue provisions are in general broader than those applicable to § 17 (9) actions. In any event, venue objections may perhaps be overcome by transfer of the § 17 (9) action, 28 U. S. C. § 1404 (1964 ed.), or by application of the doctrine of waiver, see 3 Moore, Federal Practice ¶ 13.16, at p. 45 (2d ed. 1964) (venue of counterclaims by interveners).

to its § 16 (2) counterclaim or action the § 16 (2) advantages would clearly be applicable. And it would be arguable—an issue we do not decide—that the shipper would be entitled to the benefit of § 16 (2) as to all its costs and attorney's fees in the combined action.

Since the Commission believes that the scope of review of findings on primary jurisdiction issues would be the same regardless of whether review was sought in a § 16 (2) or a § 17 (9) action, it makes no claim that allowance of the direct review proceeding would undercut the prima facie evidence provision of § 16 (2).

In summary, the principal, if not sole, effect of permitting respondents' direct review proceeding would be to force on shippers the alternatives of either forgoing the opportunity to defend the Commission order or accepting the carrier's choice of a distant venue. The first alternative is obviously counter to the policy expressed in § 16 (2), and, as we have said, it is to be expected that shippers would elect to defend the Commission's order even at the expense of loss of their venue advantage. The importance of choice of venue in these actions should not be discounted. Since the record in the enforcement action is not limited to that made before the Commission, the shipper may desire to call witnesses or to introduce documentary evidence either in direct support of the Commission's order or in rebuttal to opposing evidence produced by the carrier, thus bringing into play those factors relating to the convenience of witnesses and the relative burden of making proof that make the choice of venue so important in other contexts. See *Mercantile National Bank* v. *Langdeau,* 371 U. S. 555; *Schnell* v. *Peter Eckrich & Sons, Inc.,* 365 U. S. 260.

V.

But respondents contend that confining review to the enforcement action would introduce into the administra-

tion of the Act problems of greater severity and importance than any effect such a course might have in safeguarding the shipper's § 16 (2) privileges. Respondents note that under the doctrine of *Phillips Co.* v. *Grand Trunk Western R. Co.,* 236 U. S. 662, shippers who are not complainants before the Commission may nevertheless obtain the advantage of the Commission's reparation order as a basis for their own § 16 (2) action. It is argued that the enforcement court has no power to set aside the Commission order and, therefore, a decision upholding a carrier's attack on the Commission's order in one enforcement proceeding would not preclude another shipper from successfully invoking that order in a separate enforcement proceeding, thus resulting in disparate treatment of shippers contrary to the Act's objective of securing uniform rates.

It is of course true that the court may not formally set aside the Commission's order in an action in which neither the Commission nor the United States is a party. Cf. *United States* v. *Jones.* 336 U. S. 641, 651–653, 670–671; *Pennsylvania R. Co.* v. *United States,* 363 U. S. 202, 205. But we do not read *Phillips Co.* v. *Grand Trunk Western R. Co., supra,* to permit reliance by a nonparticipating shipper on the Commission's order when it has been disapproved in litigation between the complainant shipper and the railroad. In the *Phillips* case, the Commission had separately determined that challenged rates were unlawful and had issued a cease-and-desist order, which was sustained in an enforcement proceeding brought by the Commission. *Illinois Central R. Co.* v. *Interstate Commerce Comm'n,* 206 U. S. 441. Thereafter, some reparation claims were settled, and Phillips, which had not been a complainant before the Commission, commenced its reparation action. The Court reasoned that if Phillips could not rely on the Commission order, shippers prevailing before the Com-

mission would obtain a preference as compared to nonparticipating shippers. Therefore, the Court ruled that if:

> "there was a finding of unreasonableness in the proceedings begun by others, [the nonparticipating shipper] could, if in time, present his claim, and await the result of the litigation over the validity of any order made at the instance of those parties. If it was ultimately sustained by the court as valid he would then be in position to obtain reparation from the Commission—or a judgment from a court of competent jurisdiction, on a claim that had been seasonably presented." 236 U. S., at 666.

The *Phillips* case thus contemplates that the suit of a nonparticipating shipper is to await the outcome of litigation over the validity of the Commission order and that the nonparticipating shipper may rely on the Commission's order only when the policy of uniformity will thereby be served.

It might still be argued that disparity in treatment of shippers would result in cases involving multiple complainants before the Commission. The several shippers could commence separate enforcement actions in different courts, and those courts might disagree concerning the validity of the Commission's order. But such conflicts could be completely avoided only by limiting review on the question of statutory violation to a single suit by a carrier to set aside the Commission's order, and the long and unvarying course of decisions permitting review in the enforcement court precludes our limiting review to § 17 (9) proceedings. *Southern R. Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297; *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370; *Adams* v. *Mills*, 286 U. S. 397; *Brown Lumber Co.* v. *Louisville & N. R. Co.*, 299 U. S. 393; *Porter Co.* v. *Central Vermont R.*

Co., 366 U. S. 272, 274, n. 6 (dictum). In any event, we do not believe that in practice such conflicts will frequently occur. If the first enforcement court to issue its decision sustains the Commission order, that decision will generally be accepted as persuasive authority by other courts. Such conflicts as do occur will be similar to those that may arise when, in a suit commenced in court under § 9, the primary jurisdiction doctrine is not applicable and the court is free to decide questions under the Act as an original matter; and such conflicts may ultimately be resolved here. If the first court to reach a decision strikes down the Commission order, it may do so on grounds permitting reconsideration of the matter by the Commission. When the primary jurisdiction doctrine requires initial decision by the Commission, it also precludes the court from redetermining the question itself should the Commission decision be defective. The proper course is to remand to the Commission, *Southern R. Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, 302; *Louisville & Nashville R. Co.* v. *Behlmer*, 175 U. S. 648; compare *United States* v. *Jones*, 336 U. S. 641, 651–653, 670–671, with *United States* v. *Bianchi & Co.*, 373 U. S. 709, 718, which has continuing power to suspend or to modify its orders, Interstate Commerce Act § 16 (6), 49 U. S. C. § 16 (6) (1964 ed.). The carrier will naturally request the Commission to reopen the prior order as to all shippers. See *Baldwin* v. *Milling Co.*, 307 U. S. 478; but cf. *Gulf, M. & N. R. Co.* v. *Merchants' Specialty Co.*, 50 F. 2d 21 (C. A. 5th Cir. 1931). In some cases, however, a decision refusing to enforce the Commission's order will finally determine its validity as between the parties to that action without any necessity for a remand to the Commission. Here too the first adjudication will generally be persuasive and, if not, conflicting decisions may be reviewed in this Court. Finally, under the interpretation of §§ 16 (2) and 17 (9) that we elaborate below

the carrier may bring a direct review proceeding as a cross-action in the forum selected by a shipper, thus ensuring that the court will have power to affect the order itself and thereby maintain uniformity as between shippers.

VI.

Recent decisions of this Court have recognized that Commission orders determining a "right or obligation" so that "legal consequences" will flow therefrom are judicially reviewable. *Pennsylvania R. Co.* v. *United States,* 363 U. S. 202, 205; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 131, 132, 143. Such review "is equally available whether a Commission order relates to past or future rates, or whether its proceeding follows referral by a court or originates with the Commission." *Pennsylvania R. Co.* v. *United States, supra,* at 205. Under these established principles the order attacked in this case is unquestionably subject to review, and in *Pennsylvania R. Co.* v. *United States, supra,* and *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426, similar orders were held reviewable in direct proceedings.

The question before us now, however, is not whether review is to be afforded but where that review is to occur. In the three preceding sections of this opinion we have established three conclusions that must serve as guideposts for our decision of that question. First, respondents have ample opportunity to secure review of the Commission's order through defense of the shipper's enforcement action. By contrast, the *Pennsylvania R. Co.* and *Interstate Commerce Comm'n* cases dealt with situations where the order in dispute could only be reviewed in § 17 (9) proceedings, and those cases thus do not control decision here. Second, allowing respondents the alternative of bringing direct review proceedings would substantially impair the shipper's § 16 (2) right to select a convenient venue. Third, contrary to respond-

ents' contention, limiting review to the enforcement action would not be likely to result in disparity in treatment of shippers. If, therefore, review can be limited to the enforcement forum selected by the shipper consistent with the language and history of the provisions establishing the direct review proceeding, we should adopt that course.

During the first 19 years of the Commission's existence its orders were not reviewable through direct proceedings. Until 1906, noncompliance with a Commission order did not expose a carrier to immediate sanctions; an order was enforceable only after judicial proceedings in which the carrier could challenge its validity. The Hepburn Act imposed penalties of $5,000 a day for violation of Commission orders and "[t]he statutory jurisdiction to enjoin and set aside an order was granted in 1906, because then, for the first time, the rate-making power was conferred upon the Commission, and then disobedience of its orders was first made punishable," *United States* v. *Los Angeles R. Co.*, 273 U. S. 299, 309; see also 40 Cong. Rec. 5133 (remarks of Senator Foraker). Thus the genesis of the direct review proceeding was the desire to afford an injunctive remedy for persons faced with the threat of irreparable injury through exposure to liability for mounting penalties without any other opportunity for judicial review until the Commission or some interested party should choose to commence enforcement proceedings. Compare *Ex parte Young*, 209 U. S. 123, 147–148. The essentially equitable nature of the direct review proceeding was remarked in early cases denying review of "negative orders" that did not command any action by the carrier and therefore did not threaten the carrier with any sanctions. Compare *United States* v. *Los Angeles R. Co.*, 273 U. S. 299, with *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125. Similarly, as the per diem penalties do not apply to non-

compliance with orders for the payment of money, two of the three courts to have considered the issue presented in the case at bar denied carriers direct review on the ground that no equitable cause of action had been stated. *Pittsburgh & W. V. R. Co.* v. *United States,* 6 F. 2d 646, 648–649 (D. C. W. D. Pa. 1924); *Baltimore & O. R. Co.* v. *United States,* 12 F. Supp. 261, 263 (D. C. D. Del. 1935), appeal dismissed, 87 F. 2d 605 (C. A. 3d Cir. 1937); contra, *Southern R. Co.* v. *United States,* 193 F. 664 (Commerce Ct. 1911). And decisions sustaining direct review of reparation orders have stressed the absence of alternative means for obtaining review—in equity terms, inadequacy of remedies at law. See, *supra,* at pp. 587–588.

As the principles stated at the beginning of this section demonstrate, the test of reviewability is no longer pregnant with the concept of irreparable injury to the same extent as when the negative order doctrine held sway, and we do not mean to resurrect the strict equity approach. This history nevertheless establishes that the main concern of Congress in creating the direct review proceeding was with orders that were "self-enforcing" in the sense of exposing recalcitrant carriers to substantial monetary penalties. The legislative history permits absolutely no inference that Congress intended to undercut the shipper's remedies in the enforcement action. To the contrary, the Hepburn Act simplified those enforcement procedures so as to provide additional assistance to shippers. H. R. Rep. No. 591, 59th Cong., 1st Sess., p. 5; 40 Cong. Rec. 2256 (remarks of Congressman Hepburn). Moreover, the equitable nature of the direct review proceedings certainly affords ample basis for requiring the direct review court to defer its proceedings pending the outcome of the enforcement action, a course that is consistent with the legislative history of the direct

review proceeding and that will maximize the remedial purposes of § 16 (2).

Lest there be any misunderstanding, we emphasize that our reasons for finding the direct review proceeding unavailable in a case such as this where the carriers began that proceeding in a forum other than that selected by the shipper for its enforcement action are inapplicable when the direct review proceeding is brought as a cross-action in the enforcement court.[9] Obviously allowance of the cross-action will not impair the shipper's venue right. And we think that the § 16 (2) provisions respecting court costs and attorney's fees unquestionably would be applicable to the whole of the combined action in such a case. The Commission argues, nevertheless, that reparation orders respecting past rates are not of sufficient general importance to require their defense by the United States and the Commission, and that the direct review proceeding should not be permitted regardless of the court in which it is brought. That apparently is not the view of Congress, however, for when it provided in 1964 that review of Commission orders entered on reference of primary jurisdiction issues should be had only in the court making the reference, 28 U. S. C. §§ 1336 (b) and 1398 (b) (1964 ed.), it did so by placing jurisdiction and venue of the direct review proceeding in

[9] "Except as otherwise provided by law," 28 U. S. C. § 1398 (a) (1964 ed.), quoted, *supra*, n. 3, limits venue of direct review proceedings to the judicial district of the residence or principal place of business of the party bringing the action. Since we interpret § 16 (2) as precluding a carrier from bringing an enforcement action in any court but the enforcement court, that section provides venue for the carrier's cross-action under the "except as otherwise provided by law" provision of § 1398 (a). In the rare cases when the enforcement action is brought in state, rather than federal, court it will of course not be possible for the carrier to bring a § 17 (9) cross-action.

that court, see generally S. Rep. No. 1394, 88th Cong., 2d Sess. (1964), in 1964–2 U. S. Code Cong. and Admin. News 3235, rather than by providing for review as an incident of the original action. See also Brief for the United States in *Pennsylvania R. Co.* v. *United States* (No. 451 O. T. 1959), 7–9, 21–22. As we indicated in the preceding section, in some cases there will be some advantage for purposes of assuring the uniform application of the Act in the courts having jurisdiction to directly affect the Commission's order, and we see no justifiable reason for preventing the carrier from bringing the United States into the enforcement court should it so desire.

The proceeding before us, however, was not brought in the enforcement court. Indeed, proceedings in the latter court have been deferred pending the outcome of this case. For the reasons stated herein, the District Court erred in entertaining respondents' action and the judgment of the Court of Appeals sustaining the District Court must be

Reversed.

Mr. Justice Douglas concurs in the result.

Mr. Justice Black took no part in the consideration or decision of this case.

Syllabus.

CONSOLO *v.* FEDERAL MARITIME COMMISSION ET AL.

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

No. 63. Argued December 6–7, 1965.—Decided March 22, 1966.

Respondent Flota, a common carrier by water, made an exclusive contract with Panama Ecuador to transport bananas. The contract was executed after a Federal Maritime Board ruling, later reiterated, that Flota's competitor had violated the Shipping Act, 1916 by its exclusive contracts and refusal to allocate banana shipping space among all qualified shippers. Petitioner, a competitor of Panama Ecuador, demanded a reasonable amount of Flota's banana carrying space under the Board's decisions and threatened litigation if rejected. Flota rejected the demand and brought a proceeding before the Board for declaratory relief exonerating it from liability to petitioner. Petitioner then filed a complaint with the Board asking for damages. The actions were consolidated and the Board ruled that Flota's exclusive contract violated the Shipping Act and ordered a fair allocation of banana shipping space. Flota, pursuant to the Administrative Orders Review Act, petitioned the Court of Appeals to set aside the order, and the appeal was stayed pending determination of the reparation proceeding. Following the Board's reparation order, Flota and petitioner each appealed, Flota asking that the award and finding of a Shipping Act violation be set aside, petitioner that the award be increased. After holding that it had jurisdiction over the appeals, the Court of Appeals affirmed the Board's finding of a Shipping Act violation but remanded the case for the Board to consider whether it was inequitable to make Flota pay reparations. The Federal Maritime Commission (FMC) held that it was not inequitable but reduced the award. Following renewed appeals, the Court of Appeals reversed and vacated the award as inequitable and an abuse of discretion, in effect on the ground that there was substantial evidence to support a conclusion contrary to that reached by the FMC. *Held:*

1. The Court of Appeals had jurisdiction to consider petitioner, shipper's, direct appeal challenging the adequacy of the FMC reparation order. Section 2 of the Administrative Orders Review Act in conjunction with Section 31 of the Shipping Act, 1916 provides a procedure for direct review of FMC orders similar to that applicable to ICC orders. Such orders are reviewable on

direct appeal by a shipper denied reparations in whole or in part, since the adequacy of a reparation award cannot be challenged in an enforcement proceeding, *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426. Pp. 612–614.

2. Since the jurisdiction of the Court of Appeals had been invoked by the shipper seeking to increase the amount of his damages, that court also had jurisdiction over the carrier's direct review appeal as to the validity of the FMC order and the amount of reparations, whether considered as a consolidated appeal or as an intervenor's cross-claim. *ICC* v. *Atlantic Coast Line R. Co., ante,* p. 576. Pp. 614–618.

3. The FMC's finding that it would not be inequitable to require Flota to pay petitioner reparations was supported by substantial evidence and must be sustained on review. Pp. 618–626.

(a) A reviewing court is not at liberty to weigh the evidence and substitute its discretion for that of the administrative agency. Pp. 619–621.

(b) In determining whether to exercise its discretion to award reparations to a complainant under the Shipping Act, the FMC may be guided by such factors as whether an award would further the Act's enforcement, injury to the shipper, the carrier's culpability, and whether the award would conform to previous application of the Act. P. 622.

(c) The findings that Flota had unjustly discriminated against petitioner and given undue preference to his competitor in violation of the Shipping Act undercut Flota's claimed equities. Pp. 622–623.

119 U. S. App. D. C. 345, 342 F. 2d 924, reversed.

Robert N. Kharasch argued the cause for petitioner. With him on the briefs were *William J. Lippman* and *Amy Scupi.*

Richard A. Posner argued the cause for the Federal Maritime Commission and the United States, *pro hac vice,* by special leave of Court. With him on the briefs were *Solicitor General Marshall, Assistant Attorney General Turner, Irwin A. Seibel, Milan C. Miskovsky* and *Walter H. Mayo III.*

J. Alton Boyer argued the cause for respondent Flota Mercante Grancolombiana, S. A. With him on the brief was *Odell Kominers.*

MR. JUSTICE WHITE delivered the opinion of the Court.

We have been asked, in this case, to determine whether the Court of Appeals had jurisdiction to set aside a reparation order of the Federal Maritime Commission which was before it upon the consolidated appeals of the shipper and the carrier, the shipper asking that the award be increased and the carrier asking that it be set aside. In addition, we have been asked to determine whether the Court of Appeals applied the proper standard of review when it set aside the reparation award. We answer the first question in the affirmative and the second in the negative. Accordingly, we reverse.

Flota Mercante Grancolombiana, S. A. (Flota) is a common carrier engaged in carrying bananas from South America to the United States. In July 1955, it entered into an exclusive two-year carrying contract with Panama Ecuador, a banana shipper, and gave Panama Ecuador an option to renew the contract for an additional three years, subject to its meeting the rate offered by any other shipper. This exclusive contract was executed after the Federal Maritime Board, in June 1953, had ruled that Flota's competitor, Grace Line, was a common carrier of bananas and had violated the Shipping Act, 1916, §§ 14 Fourth [1] and 16 First,[2] by refusing

[1] "§ 14 Fourth. [No common carrier by water shall] Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims." 39 Stat. 733, as amended, 46 U. S. C. § 812 (1964 ed.).

[2] "§ 16 First. [It shall be unlawful for any common carrier by water] To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person,

to allocate its banana shipping space equitably among all qualified shippers.[3] In April 1957, the Board reiterated its view that Grace Line had violated the Shipping Act by signing exclusive carrying contracts and it ordered Grace Line to offer to all qualified shippers, upon a fair basis, shipping space on forward-booking contracts not to exceed two years in length.[4] One month after this ruling Flota rejected a bid by Consolo, a banana shipper competing with Panama Ecuador, for the entire shipping space and honored the option given Panama Ecuador by executing to it a three-year exclusive carrying contract. Shortly thereafter Consolo demanded a "fair and reasonable" amount of the carrying space pursuant to the previous *Grace Line* decisions of the Board and threatened to file a complaint if its demand were rejected. Flota rejected the demand and itself filed a petition before the Board for declaratory relief exonerating it from liability to Consolo. Consolo followed with a complaint before the Board asking for damages. These proceedings were consolidated and, in June 1959, the Board ruled that Flota's three-year exclusive contract with Panama Ecua-

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locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . ." 39 Stat. 734, as amended, 46 U. S. C. § 815 (1964 ed.).

[3] *Philip R. Consolo* v. *Grace Line Inc.*, 4 F. M. B. 293 (1953). No order was issued pursuant to this report.

[4] *Banana Distributors, Inc.* v. *Grace Line Inc.*, 5 F. M. B. 278 (1957). This decision predicated liability upon the theory that bananas were "susceptible to common carriage" and could be carried by a carrier only under terms of common carriage. This decision was reversed and remanded by the Second Circuit, 263 F. 2d 709. On remand the Board dropped its "susceptibility" theory but nevertheless found Grace Line to be a common carrier under the Shipping Act and held it could not evade the requirements of the Act as to any part of the goods it carried. 5 F. M. B. 615 (1959). This was affirmed by the Second Circuit upon appeal. 280 F. 2d 790, cert. denied, 364 U. S. 933.

dor violated the Shipping Act, §§ 14 Fourth and 16 First, and it ordered Flota to allocate its space fairly among all qualified banana shippers.[5] Pursuant to § 2 (c) of the Administrative Orders Review Act (64 Stat. 1129, as amended, 5 U. S. C. § 1032 (c) (1964 ed.)), Flota petitioned the Court of Appeals for the District of Columbia Circuit to set aside this order. This appeal was stayed, pending determination of the reparations proceeding. In March 1961, the Board ordered Flota to pay Consolo certain reparations for the violation of the Shipping Act.[6] Both Flota and Consolo appealed from this reparation order and each intervened in the appeal of the other, Consolo asking that the reparation award be increased and Flota asking that it be set aside. These appeals were consolidated together with Flota's appeal to set aside the Board's finding of a violation of the Shipping Act.

The Court of Appeals held that it had jurisdiction to consider these appeals. It affirmed the Board's finding that Flota had violated the Shipping Act but remanded to the Board the issue of reparations so that it could "consider whether, under all the circumstances, it is inequitable to force Flota to pay reparations . . . ."[7] On remand the Federal Maritime Commission[8] concluded that it was not inequitable to require Flota to pay Consolo reparations, although it did reduce the amount of the award.[9] Again, both Flota and Consolo appealed to the Court of Appeals for the District of

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[5] 5 F. M. B. 633, 641. This order was issued on July 2, 1959. Flota complied by September 1, 1959.

[6] 6 F. M. B. 262.

[7] 112 U. S. App. D. C. 302, 311, 302 F. 2d 887, 896.

[8] The functions and duties of the Federal Maritime Board, so far as relevant to this case, were transferred to the Federal Maritime Commission on August 12, 1961. Reorganization Plan No. 7 of 1961, 75 Stat. 840, 46 U. S. C. § 1111, note (1964 ed.).

[9] 7 F. M. C. 635.

Columbia Circuit, each intervened in the appeal of the other, and the two appeals were consolidated.[10] Again Consolo maintained that the award was too small and Flota argued that it should be set aside in part or in whole. The Court of Appeals reversed and vacated the reparation award, concluding that "[i]n view of the substantial evidence showing that it would be inequitable to assess damages against Flota in favor of Consolo, . . . the Commission abused the discretion granted it under Section 22 of the Shipping Act[11] [to issue reparation awards] . . . ." 119 U. S. App. D. C. 345, 352, 342 F. 2d 924, 931. Consolo petitioned this Court for a writ of certiorari to review that decision, which we granted. 381 U. S. 933.

I.

The first question we have is whether the Court of Appeals had jurisdiction of the appeals filed by Consolo and Flota.[12]

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[10] None of the parties challenged, at this time, the jurisdiction of the Court of Appeals to hear these consolidated appeals.

[11] "Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. . . . If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation." 39 Stat. 736, as amended, 46 U. S. C. § 821 (1964 ed.).

[12] Much of what we said in *Interstate Commerce Comm'n* v. *Atlantic Coast Line R. Co., ante,* is relevant to the jurisdictional issue presented by this case. The Senate Report explaining the Shipping Act expressly observed that the enforcement provisions of the Shipping Act were "modeled very closely after the interstate-commerce act . . . ." S. Rep. No. 689, 64th Cong., 1st Sess., p. 13. That report also counsels that "the administration and enforcement

As we read the controlling statutory provisions, it seems clear that the Court of Appeals had jurisdiction to consider Consolo's direct appeal from the Commission's reparation order granting only part of the relief requested. Section 2 of the Administrative Orders Review Act (5 U. S. C. § 1032 (1964 ed.)) gives the courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . (c) such final orders of the . . . Federal Maritime Board . . . as are now subject to judicial review pursuant to the provisions of section 830 of Title 46 . . . ." Section 830 of Title 46 (§ 31 of the Shipping Act, 1916, 39 Stat. 738, as amended), in turn, says that, "except as otherwise provided," orders of the Federal Maritime Board are reviewable pursuant to the same procedures as are available "in similar suits in regard to orders of the Interstate Commerce Commission . . . ." Accordingly, if pursuant to provisions in the Interstate Commerce Act a shipper can bring a direct review proceeding to challenge the adequacy of a reparation award issued by the Interstate Commerce Commission, he should be permitted to bring a similar proceeding to challenge the adequacy of a reparation award from the Federal Maritime Commission, subject of course to any special provisions applicable to maritime cases such as the provision in § 2 of the Administrative Orders Review Act that direct review proceedings shall be conducted in the courts of appeals rather than the district courts.

The Court has previously held that an order of the Interstate Commerce Commission denying a shipper's reparation claim is subject to direct review at the instance of the shipper, *United States* v. *Interstate Com-*

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provisions of the [interstate commerce] act and the nearly 30 years' experience of the Interstate Commerce Commission [may] be adapted with slight modifications to the purposes of [the Shipping Act]." *Id.*, p. 12.

merce Comm'n, 337 U. S. 426, primarily because the adverse order would be wholly unreviewable unless the shipper is permitted to bring an appeal. See *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125. Likewise, in *D. L. Piazza Co.* v. *West Coast Line, Inc.,* 210 F. 2d 947, cert. denied, 348 U. S. 839, the Court of Appeals for the Second Circuit was of the opinion that the principles of *United States* v. *Interstate Commerce Comm'n* were authority for allowing the shipper to seek direct review of an order of the Federal Maritime Board denying a major part, but not all, of the shipper's reparation claim. We think *Piazza* was correct in this respect and we accordingly agree with the court below that it would have jurisdiction to consider Consolo's appeal.

As for Flota's appeal, much of what we have said in *Interstate Commerce Comm'n* v. *Atlantic Coast Line R. Co.,* decided today, is pertinent to our consideration here. In that case, where direct review had not been sought by the shipper, we held that the carrier may have review of a reparation order of the Interstate Commerce Commission only in connection with the shipper's enforcement action under § 16 (2) of the Interstate Commerce Act. Section 30 of the Shipping Act, 39 Stat. 737, as amended, provides for a similar action by the shipper to enforce a reparation award by the Maritime Commission and extends certain procedural advantages to the shipper generally comparable to those provided by § 16 (2) of the Interstate Commerce Act. He has a wide scope of venue; he is not liable for costs unless they accrue on his own appeal; he is allowed reasonable attorney fees if he ultimately prevails; he is the beneficiary of broad service of process and joinder provisions; and the findings and order of the Commission are given prima facie effect in the enforcement action. These advantages were given to the shipper because he was considered generally to be the weaker party in the controversy and he serves an impor-

tant role in the enforcement of the Shipping Act. It was to protect advantages similar to these by preventing the carrier from emasculating the enforcement action that we concluded in *Interstate Commerce Comm'n* v. *Atlantic Coast Line R. Co.*, that the carrier could not seek review of the reparation award except in connection with a shipper's enforcement action. It is readily apparent, we think, that this holding is applicable to Shipping Act cases when the shipper himself has not sought direct review in the Court of Appeals.

Here, however, the jurisdiction of the Court of Appeals has been invoked by the shipper, who seeks to increase the amount of his damages. In these circumstances, we find nothing in the Shipping Act or the Administrative Orders Review Act that would prevent the Court of Appeals from also considering Flota's request, either as a consolidated appeal pursuant to § 2 of the Administrative Orders Review Act or as an intervenor's cross-claim, to have the reparation order set aside or reduced, a result which will not, in our view, substantially impair the procedural advantages intended for a shipper under § 30.

Concerning venue, the shipper will still be able to select the forum. Although the venue provisions governing an appeal are somewhat different from those governing an enforcement suit, the shipper still has relatively wide opportunities to find a convenient forum. Section 3 of the Administrative Orders Review Act (64 Stat. 1130, 5 U. S. C. § 1033 (1964 ed.)) enables the petitioner to bring suit in the judicial circuit where he resides, where his principal office is located or in the District of Columbia. By requiring that the carrier's review proceeding be brought in the court selected by the shipper for his appeal, all the issues in the controversy will be tried in a relatively convenient forum for the shipper.

The shipper will not have the benefit in a direct review of those provisions in § 30 that exempt him from his costs and enable him to collect his attorney's fees if he ultimately prevails.[13] However, the only additional costs and attorney's fees that the shipper will incur if the carrier is permitted to challenge the reparation award upon a consolidated appeal or cross-claim are those costs and fees attributable to additional issues not otherwise raised by the shipper's appeal. To the extent the arguments a carrier may advance to decrease or set aside an award would be asserted in any event as defenses to the shipper's claim for increased reparations, no additional costs or fees will be incurred beyond those which the shipper would normally assume for his appeal. And, if the shipper prevails against the carrier's appeal, any additional costs, although not attorney's fees, as are incurred may be assessed against the carrier as the losing party under 28 U. S. C. § 1912 (1964 ed.). See also District of Columbia Cir. R. 20 (b).

The minimal disadvantages resulting to the shipper from permitting the carrier to attack the reparation order are more than offset by the desirability of a prompt and efficient determination of the validity of the Commission's order. Many of the arguments a carrier might make in defense against a shipper's suit to increase the award could also be advanced to show that the award should be reduced or set aside entirely. And, once the carrier intervenes in the shipper's appeal, all the parties interested in the complete resolution of the validity of

[13] Unlike the Interstate Commerce Commission situation, there is no possibility here that an enforcement action can be joined with a direct review proceeding (thereby raising the possibility that the favorable provisions of the enforcement section may become applicable and ensuring that the Commission will be a party), because enforcement suits must be in the district courts and direct reviews can be taken only to the courts of appeals.

the Commission's order are before the court. In this situation it would make little sense to require the carrier to break off his argument short of its logical conclusion and relitigate it anew before a district court in an enforcement action.[14]

With the jurisdiction of the Court of Appeals properly invoked by the shipper, there is, therefore, every reason to permit the carrier not only to litigate the amount of the reparation order but also to insist upon a determination of the validity of the Commission's order, both with respect to the carrier's violation of the Act[15] and with respect to the reparation award itself. If the carrier finally prevails on either of these claims, there would then be no occasion for a separate enforcement suit in the District Court. If the carrier's claims going to the validity of the order are rejected by the Court of Appeals, the determination of a violation by the carrier would be binding in the subsequent enforcement action by the shipper; nor would there be any basis in the course of a subsequent enforcement action conducted in accordance with § 30 to redetermine whether or not the award itself is supported by substantial evidence in the administrative record.[16] Hence, the shipper will need to litigate the

[14] These same considerations of judicial economy and fairness to all the parties lie behind the doctrine of ancillary jurisdiction, *Moore* v. *New York Cotton Exchange*, 270 U. S. 593; *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175; 2 Moore, Federal Practice ¶ 8.07 [5] (2d ed. 1965), and the doctrine that an intervenor of right may assert a cross-claim without independent jurisdictional grounds, 4 Moore, Federal Practice ¶ 24.17 (2d ed. 1963).

[15] Of course, in this case the issue of Flota's violation of the Act was resolved in a previous direct appeal by Flota from the Board's cease-and-desist order. There is no question of the jurisdiction of the Court of Appeals to consider that appeal.

[16] See our discussion of the defenses available to a carrier in an enforcement action at *Interstate Commerce Comm'n* v. *Atlantic Coast Line R. Co.*, *ante*, p. 594, n. 6.

issue of validity only once, and this in the Court of Appeals at the instance of the carrier. Although two proceedings may be required to collect his damages, this is only a necessary incident of the shipper's decision to bring his appeal in the first place.

In short, although a shipper may lose some of the procedural advantages given him by § 30 if he is forced to defend the validity of the Commission's order in conjunction with his appeal, these losses generally will not be substantial. To the extent that he is disadvantaged, this is the result of a conscious choice he has made. And from the point of view of the enforcement of the Shipping Act, it is certainly less important that the shipper be assisted in his efforts to obtain a greater award than it is to assist him in his efforts to enforce an existing award. The Court of Appeals was correct in sustaining its own jurisdiction to hear Flota's appeal.

II.

We turn, then, to the standard of review used by the Court of Appeals when it reversed the Commission's reparation order.

The Court of Appeals rejected the Commission's finding that it would not be inequitable to award Consolo reparations because it felt this finding "ignores . . . the substantial weight of the evidence . . . ." 119 U. S. App. D. C. 345, 347, 342 F. 2d 924, 926. It then concluded that the Commission abused its discretion in ordering reparations because "of the substantial evidence showing that [the reparations] would be inequitable." *Id.*, at 352, 342 F. 2d, at 931. In effect, the standard of review applied and articulated by the Court of Appeals in this case was that if "substantial evidence" or "the substantial evidence" supports a conclusion contrary to that reached by the Commission, then the Commission

must be reversed.[17] This standard is not consistent with that provided by the Administrative Procedure Act.

Section 10 (e) of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. § 1009 (e) (1964 ed.)) gives a reviewing court authority to "set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, [or] an abuse of discretion . . . [or] (5) unsupported by substantial evidence . . . ." Cf. *United States* v. *Interstate Commerce Comm'n,* 91 U. S. App. D. C. 178, 183–184, 198 F. 2d 958, 963–964, cert. denied, 344 U. S. 893. We have defined "substantial evidence"

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[17] In its first opinion, remanding the issue of reparations to the Commission, the Court of Appeals said, "But in reviewing the evidence [as opposed to reviewing issues of law], we are confined to a much more restricted standard, as the Administrative Procedure Act, § 1 et seq., 5 U. S. C. A. § 1001 et seq., and a long line of Supreme Court decisions, clearly indicate. See, e. g., Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1951); United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 489, 62 S. Ct. 722, 86 L. Ed. 971 (1942). We have examined the appeals from the reparations award with these considerations in mind." 112 U. S. App. D. C. 302, 309, 302 F. 2d 887, 894. However, in its second opinion, when it reviewed the Commission's finding that it would not be inequitable to award reparations, the Court of Appeals made no reference to the Administrative Procedure Act. The standard of review articulated and apparently applied in that opinion was inconsistent with the Administrative Procedure Act.

We do not read the opinion below as asserting that the Court of Appeals, in a direct review proceeding, may conduct a *de novo* review of the equities of a reparation award. We find nothing in the Shipping Act, the Hobbs Act, or the Administrative Procedure Act that would authorize a *de novo* review in these circumstances, and in the absence of specific statutory authorization, a *de novo* review is generally not to be presumed. 4 Davis, Administrative Law Treatise § 29.08 (1958). See *United States* v. *Carlo Bianchi & Co., Inc.,* 373 U. S. 709, 715; *Morrison-Knudsen Co.* v. *O'Leary,* 288 F. 2d 542, 543–544.

as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 229. "[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Labor Board* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 292, 300.[18] This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Labor Board* v. *Nevada Consolidated Copper Corp.,* 316 U. S. 105, 106; *Keele Hair & Scalp Specialists, Inc.* v. *FTC,* 275 F. 2d 18, 21.

Congress was very deliberate in adopting this standard of review.[19] It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute.[20] These policies are particularly important when a court is asked to review an agency's

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[18] Although these two cases were decided before the enactment of the Administrative Procedure Act, they are considered authoritative in defining the words "substantial evidence" as used in the Act. 4 Davis, Administrative Law Treatise § 29.02.

[19] The test of substantial evidence in the record considered as a whole had been applied by some reviewing courts even before Congress acted. See *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 483, 490.

[20] See *Federal Trade Comm'n* v. *Mary Carter Paint Co.,* 382 U. S. 46; *Labor Board* v. *Southland Mfg. Co.,* 201 F. 2d 244, 246. These same policies are behind the "primary jurisdiction doctrine." *Far East Conference* v. *United States,* 342 U. S. 570, 574–575; *United States Navigation Co., Inc.* v. *Cunard Steamship Co., Ltd.,* 284 U. S. 474. See generally, Stason, "Substantial Evidence" in Administrative Law, 89 U. Pa. L. Rev. 1026 (1941).

fashioning of discretionary relief.[21] In this area agency determinations frequently rest upon a complex and hard-to-review mix of considerations. By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency. These policies would be damaged by the standard of review articulated by the court below.

Ordinarily we would be inclined to remand to the Court of Appeals for further consideration in light of the standard of review established by the Administrative Procedure Act. *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474; *Labor Board* v. *Walton Mfg. Co.,* 369 U. S. 404. However, in view of the fact that this controversy already dates back more than eight years, that it has been before the Court of Appeals twice and that the relevant standard is not hard to apply in this instance, we think this controversy had better terminate now. See *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U. S. 504.

Section 22 of the Shipping Act, 1916, provides that "The Board . . . *may* direct the payment . . . of full reparation to the complainant for the injury caused by such violation." 46 U. S. C. § 821 (1964 ed.). (Emphasis added.) This contemplates that the Commission shall have a certain amount of discretion,[22] but it does not

[21] See *Labor Board* v. *Seven-Up Bottling Co. of Miami, Inc.,* 344 U. S. 344; *Securities & Exchange Comm'n* v. *Chenery Corp.,* 332 U. S. 194, 207–209; *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177. See also *Security Administrator* v. *Quaker Oats Co.,* 318 U. S. 218, where considerable deference was given the Federal Security Administrator in the promulgation of rules pursuant to the Federal Food, Drug, and Cosmetic Act.

[22] See *Grace Line, Inc.* v. *Skips A/S Viking Line,* 7 F. M. C. 432. See also *Johnston Seed Co.* v. *United States,* 90 F. Supp. 358,

specify what factors are to be considered by the Commission in exercising this discretion. However, we assume that the Commission could validly consider such factors as whether a reparation award would enhance the enforcement of the Act, whether the shipper had suffered compensable injury and whether the award of reparations would be consistent with the previous application of the Act, as well as the factor of culpability of the carrier.[23] Hence, even if the carrier's conduct were such that it would be inequitable to require it to pay a reparation award, this by itself might not be sufficient to establish that the Commission abused its discretion under the Act. However, we need not rest upon this distinction because we feel that it is clear that there is substantial evidence in the record, considered as a whole, to support the Commission's findings that it would not be inequitable in this case to require Flota to pay Consolo reparations.

The Maritime Board determined, and the Court of Appeals agreed, that Flota had been guilty of "unfairly" or "unjustly" discriminating against Consolo and of giving an "undue unreasonable preference" to Panama Ecuador in violation of § 14 Fourth and § 16 First

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aff'd 191 F. 2d 228; *Boston Wool Trade Assn.* v. *Director General,* 69 I. C. C. 282, 309, where, to avoid an award of reparations that would be inequitable, the I. C. C. and the courts found certain practices by the carriers to be unreasonable only prospectively. See also *Delaware, Lackawanna & Western Coal Co.* v. *Delaware, Lackawanna & W. R. Co.,* 46 I. C. C. 506, 509.

[23] The Senate Report says that the enforcement provisions in the Shipping Act "confer upon the board power to make orders necessary *for the enforcement of the act . . . .*" S. Rep. No. 689, 64th Cong., 1st Sess., p. 13. (Emphasis added.) Later on, the report says the board shall "make such order as may be proper, including an award of reparation for an injury resulting from the violation." *Ibid.*

of the Shipping Act.[24] These findings, which were essential to the determination that Flota had violated the Shipping Act, substantially undercut any equities that Flota might claim. Nevertheless, the Court of Appeals considered it inequitable to make Flota pay reparations because Flota might have believed, in view of the unsettled law, that it was not illegal to exclude Consolo.

Prior to Flota's rejection of Consolo's request for a fair portion of the shipping space, the Federal Maritime Board had decided only two cases relevant to this issue: *Consolo* v. *Grace Line, supra,* and *Banana Distributors, Inc.* v. *Grace Line, supra.* Both cases held invalid exclusive dealing contracts similar to the one in question here. The Court of Appeals would minimize these two cases as precedents because no order was issued in the first *Grace Line* decision and the second *Grace Line* decision was ultimately reversed and remanded by the Court of Appeals for the Second Circuit. Nevertheless, at the time Flota entered into the 1957 exclusive contract with Panama Ecuador and at the time it rejected Consolo's request for a fair share of the shipping space, these decisions were authoritative pronouncements by the agency primarily responsible for administering and interpreting the Shipping Act. And, although the second *Grace Line* decision was ultimately reversed and remanded, upon reconsideration the Board still found the exclusive contract there in question to be illegal and that

[24] The Court of Appeals said it is "beyond question" that the Board considered and made sufficient findings, supported by the record, that Flota's exclusive contract with Panama Ecuador was "unjust" and "unreasonable." It also said that the Board was "entitled to conclude that neither the exclusive contract nor the request for a declaratory order rendered Flota's discriminatory refusal of space reasonable or just." 112 U. S. App. D. C. 302, 307–308, 302 F. 2d 887, 892–893.

decision was ultimately affirmed upon appeal to the Second Circuit.[25]

As further evidence of good faith, the Court of Appeals was of the opinion that Flota could reasonably have believed its situation was different from that presented to the Board in the *Grace Line* cases because of physical differences between its vessels and those owned by Grace Line. However, in its first decision affirming the Board's finding of a violation the Court of Appeals had affirmed that the record "adequately supported" the Board's finding that "the differences between Flota's vessels and Grace's vessels are not impressive." 112 U. S. App. D. C. 302, 307, 302 F. 2d 887, 892. We think the Court's first judgment was the correct one. The record is adequate to establish that Flota took a deliberate, and we think substantial, risk when it gambled that the previous contrary precedent could be distinguished. We agree with the Commission that there is nothing inhering in this situation that would make it inequitable to require Flota to pay reparations.

Nor do we feel the record reveals that the reparation award is inequitable because Flota had asked for declaratory relief or because that request was pending before the Board for almost two years. In the first place, Flota did not request declaratory relief until after it had entered into the offending exclusive-dealing contract with Panama Ecuador and until it became clear that Consolo was going to sue anyway. Under these circumstances, the Commission was justifiably skeptical about Flota's motives in bringing suit. Further, although Flota's suit was pending for about two years, the record indicates that much of the delay involved in this case was at the request or approval of Flota. At any rate, it has never

[25] It is important to distinguish this situation from one where a litigant affirmatively relies upon an agency declaration, later reversed, that specifically authorized particular behavior. See *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe R. Co.*, 284 U. S. 370.

been the law that a litigant is absolved from liability for that time during which his litigation is pending. *Labor Board* v. *Electric Cleaner Co.*, 315 U. S. 685; *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217. During this time Flota was able to postpone the predictable demise of its discriminatory contract and Consolo continued to suffer injury.

Similarly, we do not believe that Flota acquired any "equities" by being caught between the conflicting demands of Consolo and Panama Ecuador. Not only was this a dilemma of Flota's own making, but in 1958 Flota rejected an opportunity to escape it. At that time Panama Ecuador announced that it was going to cancel the contract unless Flota reduced its rates. Although believing itself under no legal obligation to reduce rates, Flota nevertheless did so in order to perpetuate the illegal exclusive-dealing contract with Panama Ecuador. Finally, there was a provision in Flota's contract with Panama Ecuador that absolved Flota from liability for refusing to comply with the contract if it was illegal. Although absolution of liability depended upon the contract being declared, in fact, illegal, in light of the previous *Grace Line* decisions we think this would have been the more reasonable course of action.

Finally we reject the argument that Flota did not benefit from its policy of excluding Consolo and that Consolo lost "only" expected profits. There is evidence in the record that Flota considered its exclusive-dealing contract with Panama Ecuador more profitable than would have been a multiple contract with several shippers.[26] If Flota did not believe there was an advantage

[26] Flota's operating manager in the United States testified that "it is better to deal with one [shipper] than with three." There is also evidence that Flota had been able to settle Panama Ecuador's claims for shipment damages on a basis of only "2.4% which is a very low percentage in comparison with the usual 15% deduction which applies to this type of transportation."

in retaining its exclusive contract with Panama Ecuador it is reasonable to think that it would have taken the opportunity given it in 1958 by Panama Ecuador to cancel that contract and offer space equitably to all shippers. Furthermore, we think the court below wrongly minimized the sting of losing expected profits resulting from being unjustly and illegally denied shipping space. Such a loss is real and it is certainly compensable under the Shipping Act. See *McLean* v. *Denver & Rio Grande R. Co.*, 203 U. S. 38, 48–49; *Roberto Hernandez, Inc.* v. *Arnold Bernstein Schiffahrtsgesellschaft, M. B. H.*, 116 F. 2d 849, cert. denied, *sub nom. Compania Espanola de Navegacion Maritima, S. A.* v. *Roberto Hernandez, Inc.*, 313 U. S. 582.

Without further belaboring this issue, suffice it to say that there is substantial evidence in the record considered as a whole for the Commission to conclude that, "Flota initiated and pursued the unlawful act without good cause and without a satisfactory showing of good faith, and we have been unable, except as noted, to find any equity in its contentions whether viewed separately or together." This being so, it was clear error on the part of the Court of Appeals to reverse the Commission's award of reparations.[27]

Reversed.

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

[27] Because of its disposition of this case, the Court of Appeals found it unnecessary to consider Flota's objection that counsel for the Commission, who participated in the writing of the Commission's reparation award upon remand, had violated 5 U. S. C. § 1004 (1964 ed.) because he had previously participated as Public Counsel in the trial before the Hearing Examiner on the issue of whether Flota had violated the Shipping Act (although not in the trial on the reparation issue) and had defended the Commission's finding of violation and award of reparations before the Court of Appeals in the first consolidated appeals. We have examined Flota's contention in this regard and find it without merit.

Syllabus.

UNITED STATES *v.* O'MALLEY ET AL.

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

No. 127. Argued January 24–25, 1966.—Decided March 23, 1966.

Decedent created five irrevocable trusts, each of which allowed the trustees, of whom he was one, discretion to pay the beneficiary trust income or to accumulate it, in which case it became a part of the trust principal. The Commissioner of Internal Revenue included in decedent's gross estate both the original principal of the trusts and the accumulated income added thereto, on the ground that the power retained by decedent to pay out or accumulate the income of the trusts constituted a power to designate the persons who would possess or enjoy the income under § 811 (c) (1) (B) (ii) of the Internal Revenue Code of 1939, which deals with the includability in the gross estate of property involved in certain *inter vivos* transfers. Respondents, the executors, paid the estate tax deficiency and brought this refund action, contending in part that accumulated trust income since not part of the property "transferred" at the time of the creation of the trust did not come within that statutory provision and should not be included in the decedent's gross estate. The District Court found the original corpus includable in the estate (a holding not challenged here) but excluded the portion of the trust principal representing accumulated income. The Court of Appeals affirmed. *Held:* The grantor, by virtue of the original *inter vivos* transfer and the exercise of the right reserved in the trust instrument to retain trust income as part of the trust principal rather than disburse it, made a "transfer" of accumulated income within the meaning of § 811 (c) (1) (B) (ii). The "transfer" requirement of that provision was therefore met, as well as the requirement for retention of the power to determine who would enjoy the income from the transferred property; the accumulated income was therefore properly included in the grantor's gross estate. Pp. 630–634.

340 F. 2d 930, reversed.

Solicitor General Marshall argued the cause for the United States. With him on the brief were *Acting*

Assistant Attorney General Roberts, Meyer Rothwacks, Loring W. Post and *Richard A. Posner.*

Leon Fieldman argued the cause for respondents. With him on the brief were *Thomas P. Sullivan* and *Walter F. Cunningham.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The Internal Revenue Code of 1939 imposes an estate tax "upon the transfer of the net estate of every decedent." § 810. The gross estate is to include not only all property "[t]o the extent of the interest therein of the decedent at the time of his death," § 811 (a), but also, under § 811 (c)(1), all property

> "To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—
>
> "(A) in contemplation of his death; or
>
> "(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; or [1]
>
> "(C) intended to take effect in possession or enjoyment at or after his death,"

[1] Section 2036 of the Int. Rev. Code of 1954, as amended, 26 U. S. C. § 2036 (1964 ed.), is materially the same as § 811 (c)(1)(B) of the Int. Rev. Code of 1939.

and, under § 811 (d), property which has been the subject of a revocable transfer described in that section.[2]

Edward H. Fabrice, who died in 1949, created five irrevocable trusts in 1936 and 1937, two for each of two daughters and one for his wife. He was one of three trustees of the trusts, each of which provided that the trustees, in their sole discretion, could pay trust income to the beneficiary or accumulate the income, in which event it became part of the principal of the trust.[3] Basing his action on § 811 (c)(1)(B)(ii) and § 811 (d)(1), the Commissioner included in Fabrice's gross estate both the original principal of the trusts and the accumulated income added thereto. He accordingly assessed a deficiency, the payment of which prompted this refund action by the respondents, the executors of the estate. The District Court found the original corpus of the trusts includable in the estate, a holding not challenged in the Court of Appeals or here. It felt obliged, how-

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[2] Section 811 (d)(1) provides:

"To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death."

[3] The following provision in the trust for Janet Fabrice is also contained in the other trusts:

"The net income from the Trust Estate shall be paid, in whole or in part, to my daughter, JANET FABRICE, in such proportions, amounts and at such times as the Trustees may, from time to time, in their sole discretion, determine, or said net income may be retained by the Trustees and credited to the account of said beneficiary, and any income not distributed in any calendar year shall become a part of the principal of the Trust Estate."

ever, by *Commissioner* v. *McDermott's Estate*, 222 F. 2d 665, to exclude from the taxable estate the portion of the trust principal representing accumulated income and to order an appropriate refund. 220 F. Supp. 30. The Court of Appeals affirmed, 340 F. 2d 930, adhering to its own decision in *McDermott's Estate* and noting its disagreement with *Round* v. *Commissioner*, 332 F. 2d 590, in which the Court of Appeals for the First Circuit declined to follow *McDermott's Estate*. Because of these conflicting decisions we granted certiorari. 382 U. S. 810. We now reverse the decision below.

The applicability of § 811 (c)(1)(B)(ii), upon which the United States now stands, depends upon the answer to two inquiries relevant to the facts of this case: first, whether Fabrice retained a power "to designate the persons who shall possess or enjoy the property or the income therefrom"; and second, whether the property sought to be included, namely, the portions of trust principal representing accumulated income, was the subject of a previous transfer by Fabrice.

Section 811 (c)(1)(B)(ii), which originated in 1931, was an important part of the congressional response to *May* v. *Heiner*, 281 U. S. 238, and its offspring [4] and of

[4] In *May* v. *Heiner* the Court dealt with a trust providing for payment of income to the spouse for his life, then to the grantor for her life, with remainder to the children. The corpus of the trust was held not includable in the gross estate under Revenue Act of 1918, c. 18, § 402 (c), 40 Stat. 1097, which was the predecessor of § 811 (c), I. R. C. 1939, and which then provided for the inclusion of all property ". . . to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death . . . ." 281 U. S. 238, 244. There followed on March 2, 1931, three *per curiam* opinions in the same vein: *Burnet* v. *Northern Trust Co.*, 283 U. S. 782 (grantor reserved life interest in income); *Morsman* v. *Burnet*, 283 U. S. 783 (the same); *McCormick* v. *Burnet*, 283 U. S. 784 (trustees directed to accumulate income sub-

the legislative policy of subjecting to tax all property which has been the subject of an incomplete *inter vivos* transfer. Cf. *Commissioner* v. *Estate of Church,* 335 U. S. 632, 644–645; *Helvering* v. *Hallock,* 309 U. S. 106, 114. The section requires the property to be included not only when the grantor himself has the right to its income but also when he has the right to designate those who may possess and enjoy it. Here Fabrice was empowered, with the other trustees, to distribute the trust income to the income beneficiaries or to accumulate it and add it to the principal, thereby denying to the beneficiaries the privilege of immediate enjoyment and conditioning their eventual enjoyment upon surviving the termination of the trust. This is a significant power, see *Commissioner* v. *Estate of Holmes,* 326 U. S. 480, 487, and of sufficient substance to be deemed the power to "designate" within the meaning of § 811 (c)(1)(B)(ii). This was the holding of the Tax Court and the Court of Appeals almost 20 years ago. *Industrial Trust Co.* v.

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ject to power in the grantor to request distributions for certain specified purposes; grantor also had a power to terminate contingent upon approval of any one beneficiary and a remainder interest contingent upon surviving all named beneficiaries). On March 3, 1931, § 302 (c) of the Revenue Act of 1926 was amended by joint resolution to read as follows:

"To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth." Revenue Act of 1926, c. 27, § 302 (c), 44 Stat. 70, as amended, c. 454, § 302 (c), 46 Stat. 1516.

Through various amendments in other years, § 302 (c) evolved into § 811 (c), Int. Rev. Code of 1939.

Commissioner, 165 F. 2d 142, affirming in this respect *Estate of Budlong* v. *Commissioner,* 7 T. C. 756. The District Court here followed *Industrial Trust* and affirmed the includability of the original principal of each of the Fabrice trusts. That ruling is not now disputed. By the same token, the first condition to taxing accumulated income added to the principal is satisfied, for the income from these increments to principal was subject to the identical power in Fabrice to distribute or accumulate until the very moment of his death.

The dispute in this case relates to the second condition to the applicability of § 811 (c)(1)(B)(ii)—whether Fabrice had ever "transferred" the income additions to the trust principal. Contrary to the judgment of the Court of Appeals, we are sure that he had. At the time Fabrice established these trusts, he owned all of the rights to the property transferred, a major aspect of which was his right to the present and future income produced by that property. *Commissioner* v. *Estate of Church,* 335 U. S. 632, 644. With the creation of the trusts, he relinquished all of his rights to income except the power to distribute that income to the income beneficiaries or to accumulate it and hold it for the remaindermen of the trusts. He no longer had, for example, the right to income for his own benefit or to have it distributed to any other than the trust beneficiaries. Moreover, with respect to the very additions to principal now at issue, he exercised his retained power to distribute or accumulate income, choosing to do the latter and thereby adding to the principal of the trusts. All income increments to trust principal are therefore traceable to Fabrice himself, by virtue of the original transfer and the exercise of the power to accumulate. Before the creation of the trusts, Fabrice owned all rights to the property and to its income. By the time of his death he had divested himself of all power and control over accumulated income

which had been added to the principal, except the power to deal with the income from such additions. With respect to each addition to trust principal from accumulated income, Fabrice had clearly made a "transfer" as required by § 811 (c)(1)(B)(ii). Under that section, the power over income retained by Fabrice is sufficient to require the inclusion of the original corpus of the trust in his gross estate. The accumulated income added to principal is subject to the same power and is likewise includable. *Round* v. *Commissioner,* 332 F. 2d 590; *Estate of Yawkey* v. *Commissioner,* 12 T. C. 1164.[5]

Respondents rely upon two cases in which the Tax Court and two circuit courts of appeals have concluded that where an irrevocable *inter vivos* transfer in trust, not incomplete in any respect, is subjected to tax as a gift in contemplation of death under § 811 (c), the income of the trust accumulated prior to the grantor's death is not includable in the gross estate. *Commissioner* v. *Gidwitz' Estate,* 196 F. 2d 813, affirming 14 T. C. 1263; *Burns* v. *Commissioner,* 177 F. 2d 739, affirming 9 T. C. 979. The courts in those cases considered the taxable event to be a completed *inter vivos* transfer, not a transfer at death, and the property includable to be only the property subject to that transfer. The value of that property, whatever the valuation date, was apparently deemed an adequate reflection of any income rights included in the transfer since the grantor retained no interest in the property and no power over income

[5] This same result was reached, but without discussion, in *Estate of Spiegel* v. *Commissioner,* 335 U. S. 701, under the "take effect in possession or enjoyment" provision of § 811 (c) and in *Commissioner* v. *Estate of Holmes,* 326 U. S. 480, under § 811 (d). Other cases reaching the same conclusion under § 811 (d) or its predecessors are *Commissioner* v. *Hager's Estate,* 173 F. 2d 613, petition for cert. dismissed, 337 U. S. 937; *Estate of Showers* v. *Commissioner,* 14 T. C. 902; *Estate of Guggenheim* v. *Commissioner,* 40 B. T. A. 181, aff'd, 117 F. 2d 469, cert. denied, 314 U. S. 621.

which might justify the addition of subsequently accumulated income to his own gross estate. Cf. *Maass* v. *Higgins*, 312 U. S. 443.

This reasoning, however, does not solve those cases arising under other provisions of § 811. The courts in both *Burns*, 9 T. C. 979, 988–989 and *Gidwitz*, 196 F. 2d 813, 817–818, expressly distinguished those situations where the grantor retains an interest in a property or its income, or a power over either, and his death is a significant step in effecting a transfer which began *inter vivos* but which becomes final and complete only with his demise. *McDermott's Estate* failed to note this distinction and represents an erroneous extension of *Gidwitz*.[6] In both *McDermott* and the case before us now, the grantor reserved the power to accumulate or distribute income. This power he exercised by accumulating and adding income to principal and this same power he held until the moment of his death with respect to both the original principal and the accumulated income. In these circumstances, § 811 (c)(1)(B)(ii) requires inclusion in Fabrice's gross estate of all of the trust principal, including those portions representing accumulated income.

Reversed.

MR. JUSTICE STEWART, with whom MR. JUSTICE HARLAN joins, dissenting.

In the 1930's Edward Fabrice made an irrevocable transfer of certain property to trusts for the benefit of

[6] The Court of Appeals in *McDermott's Estate* was clearly wrong in saying that the transfer there involved was as complete as was the transfer in *Gidwitz*. In *Gidwitz* the transfer was in trust and the grantor was one of the trustees but there was a specific direction to accumulate with no discretionary powers in the trustees over either income or principal. In *McDermott*, as in this case, the grantor retained the power, with other trustees, to accumulate or distribute trust income.

his wife and daughters. Twelve years later he died. Because of the provisions of § 811 (c)(1)(B)(ii) of the Internal Revenue Code of 1939,[1] the value of the property Fabrice had irrevocably transferred was nonetheless included in his gross estate for estate tax purposes. The respondents do not question the correctness of that determination. But in this case the Court holds that the accumulated income which that property generated during the 12 years that elapsed after Fabrice had irrevocably transferred it is also to be included in his gross estate under § 811 (c)(1)(B)(ii). I think the Court misreads the statute.

By its terms the statutory provision applies only to property "of which the decedent has at any time made a transfer." Fabrice "made a transfer" only of the original trust corpus. He never "made a transfer" of the income which the corpus thereafter produced, whether accumulated or not.[2] I can put the matter no more clearly than did the Court of Appeals for the Seventh Circuit in *Commissioner* v. *McDermott's Estate,* 222 F. 2d 665, 668:

> "Irrespective of all other considerations, property to be includible must have been transferred. Obviously, the accumulations here involved were not transferred by the decedent to the trustee. It is true, of course, that the accumulations represented the fruit derived from the property which was transferred but, even so, Congress did not make provision for including the fruit, it provided only for the property transferred. If it desired and intended to in-

[1] The relevant text of the statute is set out on page 628 of the Court's opinion.

[2] The value of the original trust corpus at the time of transfer and at the time of Fabrice's death no doubt reflected its income-producing capacity.

clude the accumulations, it would have been a simple matter for it to have so stated."

See also *Michigan Trust Co.* v. *Kavanagh,* 284 F. 2d 502, 506–507 (C. A. 6th Cir.).

Nothing in the legislative history persuades me that the statute should not be applied as it was written, and I would therefore affirm the judgment.

Syllabus.

FEDERAL TRADE COMMISSION *v.* BORDEN CO.

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

No. 106. Argued January 19, 1966.—Decided March 23, 1966.

Respondent produces and sells evaporated milk under its nationally advertised Borden name, and markets physically and chemically identical milk under various private brands owned by its customers. The FTC found the milk to be of like grade and quality as required for the applicability of § 2 (a) of the Robinson-Patman Act, held the price differential to be discriminatory, ascertained the requisite adverse effect on competition, rejected respondent's claim of cost justification and issued a cease-and-desist order. The Court of Appeals set aside the FTC order on the ground that as a matter of law private label milk was not of the same grade and quality as Borden brand milk. *Held:* Labels do not differentiate products for the purpose of determining grade or quality under § 2 (a) of the Act, even though one label may have more customer appeal and command a higher price in the marketplace. Pp. 639–647.

(a) This has been the long-standing view of the FTC, and its construction of the Act is entitled to respect. *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U. S. 385, 391. P. 640.

(b) This construction of the statute is supported by the legislative history and furthers the purpose and policy of the Act. Pp. 641–645.

(c) Economic realities are not ignored, but economic factors inherent in brand names and national advertising are not to be considered in the jurisdictional inquiry under the statutory "like grade and quality" test. Pp. 645–646.

(d) Transactions like those involved here may be examined by the FTC under § 2 (a) to determine, subject to judicial review, whether the price differential is discriminatory, whether competition may be injured, and whether the differential is cost-justified or is defensible as a good-faith effort to meet a competitor's price. P. 646.

(e) The question of whether the FTC's rulings under § 2 (b) of the Act are inconsistent with its construction of § 2 (a) is not before this Court and is not passed upon. Pp. 646–647.

339 F. 2d 133, reversed and remanded.

Robert B. Hummel argued the cause for petitioner. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Turner, Daniel M. Friedman, Gerald Kadish* and *James McI. Henderson.*

John E. F. Wood argued the cause for respondent. With him on the brief were *Kent V. Lukingbeal, Robert C. Johnston, Philip S. Campbell* and *C. Brien Dillon.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The Borden Company, respondent here, produces and sells evaporated milk under the Borden name, a nationally advertised brand. At the same time Borden packs and markets evaporated milk under various private brands owned by its customers. This milk is physically and chemically identical with the milk it distributes under its own brand but is sold at both the wholesale and retail level at prices regularly below those obtained for the Borden brand milk. The Federal Trade Commission found the milk sold under the Borden and the private labels to be of like grade and quality as required for the applicability of § 2 (a) of the Robinson-Patman Act,[1] held the price differential to be discriminatory

[1] Section 2 (a) of the Clayton Act, 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 15 U. S. C. § 13 (a) (1964 ed.), provides in pertinent part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person

within the meaning of the section, ascertained the requisite adverse effect on commerce, rejected Borden's claim of cost justification and consequently issued a cease-and-desist order. The Court of Appeals set aside the Commission's order on the sole ground that as a matter of law, the customer label milk was not of the same grade and quality as the milk sold under the Borden brand. 339 F. 2d 133. Because of the importance of this issue, which bears on the reach and coverage of the Robinson-Patman Act, we granted certiorari. 382 U. S. 807. We now reverse the decision of the Court of Appeals and remand the case to that court for the determination of the remaining issues raised by respondent Borden in that court. Cf. *Federal Trade Comm'n* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 542.

The position of Borden and of the Court of Appeals is that the determination of like grade and quality, which is a threshold finding essential to the applicability of § 2 (a), may not be based solely on the physical properties of the products without regard to the brand names they bear and the relative public acceptance these brands enjoy—"consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional." 339 F. 2d, at 137. Here, because the milk bearing the Borden brand regularly sold at a higher price than did the milk with a buyer's label, the court considered the products to be "commercially" different and hence of different "grade" for the purposes of § 2 (a), even though they were physically identical and of equal quality. Although a mere

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who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . ."

difference in brand would not in itself demonstrate a difference in grade, decided consumer preference for one brand over another, reflected in the willingness to pay a higher price for the well-known brand, was, in the view of the Court of Appeals, sufficient to differentiate chemically identical products and to place the price differential beyond the reach of § 2 (a).

We reject this construction of § 2 (a), as did both the examiner and the Commission in this case. The Commission's view is that labels do not differentiate products for the purpose of determining grade or quality, even though the one label may have more customer appeal and command a higher price in the marketplace from a substantial segment of the public. That this is the Commission's long-standing interpretation of the present Act, as well as of § 2 of the Clayton Act before its amendment by the Robinson-Patman Act,[2] may be gathered from the Commission's decisions dating back to 1936. *Whitaker Cable Corp.*, 51 F. T. C. 958 (1955); *Page Dairy Co.*, 50 F. T. C. 395 (1953); *United States Rubber Co.*, 46 F. T. C. 998 (1950); *United States Rubber Co.*, 28 F. T. C. 1489 (1939); *Hansen Inoculator Co.*, 26 F. T. C. 303 (1938); *Goodyear Tire & Rubber Co.*, 22 F. T. C. 232 (1936). These views of the agency are entitled to respect, *Federal Trade Comm'n* v. *Mandel Brothers, Inc.*, 359 U. S. 385, 391, and represent a more reasonable construction of the statute than that offered by the Court of Appeals.[3]

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[2] A proviso to § 2 of the original Clayton Act excepted price discrimination "on account of differences in the grade, quality, or quantity of the commodity sold . . . ." 38 Stat. 730 (1914).

[3] The commentators are somewhat divided on the dispute involved in this case. Supporting the Commission's view are the Report of The Attorney General's National Committee to Study the Antitrust Laws 158 (1955); Austin, Price Discrimination and Related Problems under the Robinson-Patman Act 39 (2d ed. 1959); Patman, The Robinson-Patman Act 27 (1938); Edwards, The Price Discrimina-

Obviously there is nothing in the language of the statute indicating that grade, as distinguished from quality, is not to be determined by the characteristics of the product itself, but by consumer preferences, brand acceptability or what customers think of it and are willing to pay for it. Moreover, what legislative history there is concerning this question supports the Commission's construction of the statute rather than that of the Court of Appeals.

During the 1936 hearings on the proposed amendments to § 2 of the Clayton Act, the attention of the Congress was specifically called to the question of the applicability of § 2 to the practice of a manufacturer selling his product under his nationally advertised brand at a different price than he charged when the product was sold under a private label. Because it was feared that the Act would require the elimination of such price differentials, Hearings on H. R. 4995 before the House Committee on the Judiciary, 74th Cong., 2d Sess., p. 355, and because private brands "would [thus] be put out of business by the nationally advertised brands," it was suggested that the proposed § 2 (a) be amended so as to apply only to sales of commodities of "like grade, quality and *brand*." (Emphasis added.) *Id.*, at 421. There was strong objection to the amendment and it was not adopted by the Committee.[4] The rejection of this

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tion Law 31, 463–464 (1959); Seidman, Price Discrimination Cases, reprinted in 2 Hoffmann's Antitrust Law and Techniques 409, 424–428 (1963). Contrary views are expressed by a minority of the Attorney General's Committee; in Rowe, Price Discrimination Under the Robinson-Patman Act 75 (1962); and in Cassady & Grether, The Proper Interpretation of "Like Grade and Quality" within the Meaning of Section 2 (a) of the Robinson-Patman Act, 30 So. Cal. L. Rev. 241 (1957).

[4] Mr. H. B. Teegarden, who was then counsel to the United States Wholesale Grocers Association, and who apparently played a large part in drafting the bill, Hearings on H. R. 4995 before the House

amendment assumes particular significance since it was pointed out in the hearings that the legality of price differentials between proprietary and private brands was then pending before the Federal Trade Commission in *Goodyear Tire & Rubber Co.*, 22 F. T. C. 232. By the time the Committee Report was written, the Commission had decided *Goodyear*. The report quoted from the decision and interpreted it as holding that *Goodyear* had violated the Act because "at no time did it offer to its own dealers prices on Goodyear brands of tires which were comparable to prices at which respondent was selling tires of equal or comparable quality to Sears, Roebuck & Co." H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 4.

Committee on the Judiciary, 74th Cong., 1st Sess., p. 9, supplemented his oral testimony with a letter addressed in part to the proposed amendment:

"To amend the bill by inserting 'and brands,' after the words 'commodities of like grade and quality,' as suggested by Judge Watkins, although it may seem harmless at first sight, is a specious suggestion that would destroy entirely the efficacy of the bill against larger buyers. So amended, the bill would impose no limitation whatever upon price differentials, except as between different purchasers of the same brand. But where goods are put up under a private brand, there can only be one purchaser, namely the one for whom the brand is designed. Neither Kroger nor any independent could use an A. & P. private brand of canned fruit, for example; and to so amend the bill would leave every manufacturer free to put up his standard goods under a private brand for a particular purchaser and give him any price discount or discriminations that he might demand.

"Under the Patman bill as it stands, manufacturers are still free to put up their products under private brands; but if they do so for one purchaser under his private brand, then they must be ready to do so on the same terms, relative to their comparative costs, for a competing purchaser under his private brand; and unless that equality of treatment is required and assured, the discriminations at which the bill is aimed cannot be suppressed." *Id.*, 2d Sess., at 469.

During the debates on the bill, Representative Patman, one of the bill's sponsors, was asked about the private label issue. His brief response is wholly consistent with the Commission's interpretation of § 2 (a), 80 Cong. Rec. 8115:

> "Mr. TAYLOR of South Carolina. There has grown up a practice on the part of manufacturers of making certain brands of goods for particular chain stores. Is there anything in this bill calculated to remedy that situation?
>
> "Mr. PATMAN. . . . I have not time to discuss that feature, but the bill will protect the independents in that way, because they will have to sell to the independents at the same price for the same product where they put the same quality of merchandise in a package, and this will remedy the situation to which the gentleman refers.
>
> "Mr. TAYLOR of South Carolina. Irrespective of the brand.
>
> "Mr. PATMAN. Yes; so long as it is the same quality. . . ."

The Commission's construction of the statute also appears to us to further the purpose and policy of the Robinson-Patman Act. Subject to specified exceptions and defenses, § 2 (a) proscribes unequal treatment of different customers in comparable transactions, but only if there is the requisite effect upon competition, actual or potential. But if the transactions are deemed to involve goods of disparate grade or quality, the section has no application at all and the Commission never reaches either the issue of discrimination or that of anticompetitive impact. We doubt that Congress intended to foreclose these inquiries in situations where a single seller markets the identical product under several different brands, whether his own, his customers' or both. Such

transactions are too laden with potential discrimination and adverse competitive effect to be excluded from the reach of § 2 (a) by permitting a difference in grade to be established by the label alone or by the label and its consumer appeal.[5]

If two products, physically identical but differently branded, are to be deemed of different grade because the seller regularly and successfully markets some quantity of both at different prices, the seller could, as far as § 2 (a) is concerned, make either product available to some customers and deny it to others, however discriminatory this might be and however damaging to competition. Those who were offered only one of the two products would be barred from competing for those customers who want or might buy the other. The retailer who was permitted to buy and sell only the more expensive brand would have no chance to sell to those who always buy the cheaper product or to convince others, by experience or otherwise, of the fact which he and all other dealers already know—that the cheaper product is actually identical with that carrying the more expensive label.

The seller, to escape the Act, would have only to succeed in selling some unspecified amount of each product to some unspecified portion of his customers, however large or small the price differential might be. The seller's pricing and branding policy, by being successful, would apparently validate itself by creating a difference

[5] Borden argues that it spends large sums to ensure the high quality of its Borden brand milk on customers' shelves, inferring that there really is a difference between its own milk and the milk sold under private labels, at least by the time it reaches the consumer. Of course, if Borden could prove this difference, it is unlikely that the case would be here. The findings are to the contrary in this case and we write on the premise that the two products are physically the same at the time of consumer purchase. Borden's extra expenses in connection with its own milk are more relevant to the cost justification issue than to the question we have before us.

in "grade" and thus taking itself beyond the purview of the Act.[6]

Our holding neither ignores the economic realities of the marketplace nor denies that some labels will command a higher price than others, at least from some portion of the public. But it does mean that "the economic

[6] The market acceptability test would hardly stop with insulating from inquiry the price differential between proprietary and private label sales. That test would also immunize from the Act sales at different prices of the same product under two different producer-owned labels, the one being less advertised and having less market acceptability than the other. And if it is "consumer preferences," dissenting opinion, p. 648, which create the difference in grade or quality, why should not Borden be able to discriminate between two purchasers of private label milk, as long as one label commands a higher price from consumers than the other and hence is of a different grade and quality? In this context perhaps the market acceptability test would be refined to preclude this differential on the grounds that Borden's customer, as distinguished from the consumer, will not pay more than his competitor for private label milk and therefore the milk sold by Borden under one private brand is really of the same grade and quality as the milk sold under the other brand even though ultimate consumers will pay more for one than the other. Taking this approach, if Borden packed for one wholesale customer under two private labels, one having more consumer appeal than the other because of the customer's own advertising program, Borden must sell both brands at the same price it charges other private label customers because all such milk is of the same grade and quality. At the same time, the customer buying from Borden under two labels could himself sell one label at a reduced price without inquiry under § 2 (a) because the milk in one container is no longer of the same grade and quality as that in the other, although both the milk and the containers came from Borden. Such an approach would obviously focus not on consumer preference as determinative of grade and quality but on who spent the advertising money that created the preference—Borden's customer, not Borden, created the preference and hence the milk is of the same grade and quality in Borden's hands but not in its customer's. The dissent would exempt the effective advertiser from the Act. We think Congress intended to remit him to his defenses under the Act, including that of cost justification.

factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test." Report of The Attorney General's National Committee to Study the Antitrust Laws 158 (1955). And it does mean that transactions like those involved in this case may be examined by the Commission under § 2 (a). The Commission will determine, subject to judicial review, whether the differential under attack is discriminatory within the meaning of the Act, whether competition may be injured, and whether the differential is cost-justified or is defensible as a good-faith effort to meet the price of a competitor. "[T]angible consumer preferences as between branded and unbranded commodities should receive due legal recognition in the more flexible 'injury' and 'cost justification' provisions of the statute." *Id.*, at 159. This, we think, is precisely what Congress intended. The arguments for exempting private brand selling from § 2 (a) are, therefore, more appropriately addressed to the Congress than to this Court.[7]

The Court of Appeals suggested that the Commission's views of like grade and quality for the purposes of § 2 (a) cannot be squared with its rulings in cases where a seller presents the defense under § 2 (b)[8] that he is in good

[7] This is not, of course, a helpful suggestion to those who think the congressional remedy would be "very difficult if not impossible" and who thus prefer the more "reasonable approach" through the courts. See Cassady & Grether, *supra*, n. 3, at 277.

[8] Section 2 (b), 15 U. S. C. § 13 (b) (1964 ed.), provides as follows:

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of serv-

faith meeting the equally low price of a competitor.[9] In those cases, it is said, the Commission has given full recognition to the significance of the higher prices commanded by the nationally advertised brand "in holding that a seller who reduces the price of his premium product to the level of his non-premium competitors is not merely meeting competition, but undercutting it." 339 F. 2d, at 138.

The Commission, on the other hand, sees no inconsistency between its present decision and its § 2 (b) cases. In its view, the issue under § 2 (b) of whether a seller's lower price is a good-faith meeting of competition involves considerations different from those presented by the jurisdictional question of "like grade and quality" under § 2 (a).

We need not resolve these contrary positions. The issue we have here relates to § 2 (a), not to § 2 (b), and we think the Commission has resolved it correctly. The § 2 (b) cases are not now before us and we do not venture to decide them. 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 STEWART, with whom MR. JUSTICE HARLAN joins, dissenting.

I cannot agree that mere physical or chemical identity between premium and private label brands is, without

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ices or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

[9] The Court of Appeals relied upon *Callaway Mills Co., sub nom. Bigelow-Sanford Carpet Co.*, CCH Trade Reg. Rep. Transfer Binder, 1963–1965, ¶ 16,800; *Anheuser-Busch, Inc.*, 54 F. T. C. 277 (1957); *Standard Oil Co.*, 49 F. T. C. 923 (1953); and *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351 (1948). Borden adds *Gerber Products Co.* v. *Beech-Nut Life Savers Co.*, 160 F. Supp. 916 (D. C. S. D. N. Y. 1958).

more, a sufficient basis for a finding of "like grade and quality" within the meaning of § 2 (a) of the Robinson-Patman Act. The conclusion that a product that travels at a premium in the marketplace is of "like grade and quality" with products of inferior commercial value is not required by the language of the Robinson-Patman Act, by its logic, or by its legislative history.

It is undisputed that the physical attributes and chemical constituents of Borden's premium and private label brands of evaporated milk are identical. It is also undisputed that the premium and private label brands are not competitive at the same price, and that if the private label milk is to be sold at all, it must be sold at prices substantially below the price commanded by Borden's premium brand.[1] This simple market fact no more than reflects the obvious economic reality that consumer preferences can and do create significant commercial distinctions between otherwise similar products. By pursuing product comparison only so far as the result of laboratory analysis, the Court ignores a most relevant aspect of the inquiry into the question of "like grade and quality" under § 2 (a): Whether the products are different in the eyes of the consumer.[2]

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[1] For example, one wholesaler, a witness for the Commission, stated:

"Private label merchandise is no good for nobody unless there is a price on it. . . . In the retail trade as a whole they haven't been too much interested in [private label evaporated milk] . . . frankly if it was the same price as advertised or 15 cents or 25 cents a case under, it wouldn't sell, they couldn't give it away. . . . It has got to have $1.50 or $2 a case spread to make it interesting."

[2] No suggestion is made that any of the private label brands involved in this case show significant commercial differentiation from one another. It is possible, of course, that by extensive promotion private label brands could achieve consumer acceptance equivalent to that of a premium brand. In that situation, the products would still be economically different under the market test of § 2 (a) eluci-

There is nothing intrinsic to the concepts of grade and quality that requires exclusion of the commercial attributes of a product from their definition. The product purchased by a consumer includes not only the chemical components that any competent laboratory can itemize, but also a host of commercial intangibles that distinguish the product in the marketplace.[3] The premium paid

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dated in this opinion, since the relevant comparison would exclude promotional efforts by persons other than the producer of the premium brand. Thus, promotional activities by customers of Borden in the present case could not affect the determination of "like grade and quality" with regard to sales by Borden. Cf. Jordan, Robinson-Patman Act Aspects of Dual Distribution by Brand of Consumer Goods, 50 Cornell L. Q. 394, 406–407 (1965).

[3] Cf. Chamberlin, The Theory of Monopolistic Competition 56 (8th ed. 1962):

"A general class of product is differentiated if any significant basis exists for distinguishing the goods (or services) of one seller from those of another. Such a basis may be real or fancied, so long as it is of any importance whatever to buyers, and leads to a preference for one variety of the product over another. Where such differentiation exists, even though it be slight, buyers will be paired with sellers, not by chance and at random (as under pure competition), but according to their preferences.

"Differentiation may be based upon certain characteristics of the product itself, such as exclusive patented features; trade-marks; trade names; peculiarities of the package or container, if any; or singularity in quality, design, color, or style. . . . In so far as these and other intangible factors vary from seller to seller, the 'product' in each case is different, for buyers take them into account, more or less, and may be regarded as purchasing them along with the commodity itself."

See also Brown, Advertising and the Public Interest: Legal Protection of Trade Symbols, 57 Yale L. J. 1165, 1181 (1948):

". . . The buyer of an advertised good buys more than a parcel of food or fabric; he buys the pause that refreshes, the hand that has never lost its skill, the priceless ingredient that is the reputation of its maker. All these may be illusions, but they cost money to create, and if the creators can recoup their outlay, who is the poorer? Among the many illusions which advertising can fashion are those

for Borden brand milk reflects the consumer's awareness, promoted through advertising, that these commercial attributes are part and parcel of the premium product he is purchasing.[4] The record in the present case indicates that wholesale purchasers of Borden's private label brands continued to purchase the premium brand in undiminished quantities. The record also indicates that retail purchasers who bought the premium brand did so with the specific expectation of acquiring a product of premium quality.[5] Contrary to the Court's suggestion,

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of lavishness, refinement, security, and romance. Suppose the monetary cost of compounding a perfume is trivial; of what moment is this if the ads promise, and the buyer believes, that romance, even seduction, will follow its use? The economist, whose dour lexicon defines as irrational any market behavior not dictated by a logical pecuniary calculus, may think it irrational to buy illusions; but there is a degree of that kind of irrationality even in economic man; and consuming man is full of it."

[4] For example, a grocer testified in the proceedings before the Commission that:

"People are going into a grocery store to pick up groceries, the majority of the people buy something that is advertised that they have known for years or heard of for years or see highly advertised. They know it is a good product, they know it is fancy merchandise or best quality."

Another grocer testified that:

"A. Some people say they want [Borden's] Silver Cow milk. In other words, for maybe a coupon on the side of the can or because they have been educated to want that brand. Some of them won't have anything but that. Some of them won't have anything except Carnation, and some of them don't want anything except Pet.

"Q. They don't care what price—

"A. If the doctor tells the woman to put the baby on Pet milk, that is all she wants, you couldn't interest her in something else.

"Q. You couldn't give her something else, could you?

"A. I doubt if I could."

[5] The results of a house-to-house survey conducted for Borden by National Analysts, Inc., indicated that consumers selected Borden's premium brand because of its superior quality. Comparable

ante, p. 644, this consumer expectation cannot accurately be characterized as a misapprehension. Borden took extensive precautions to insure that a flawed product did not reach the consumer.[6] None of these precautions was taken for the private brand milk packed by Borden.[7] An important ingredient of the premium brand inheres in the consumer's belief, measured by past satisfaction and the market reputation established by Borden for its products, that tomorrow's can will contain the same premium product as that purchased today. To say, as the Court does, that these and other intangibles, which comprise an important part of the commercial value of a product, are not sufficient to confer on Borden's premium brand a "grade" or "quality" different from that of private label brands is to ignore the obvious market acceptance of that difference. "[C]ommercially the 'advertised' brands had come in the minds of the public to mean a different grade of milk. The public may have

studies have reached a similar conclusion. Cf. "Mom Feels Quality, not Ad Cost, Makes Brand Item Costlier, 'Good House' Reports," Advertising Age, Dec. 7, 1964, p. 30.

[6] Borden's Food Products Division maintained a staff of field representatives who inspected code-datings on cans of Borden brand milk in retail stores, in order to insure that older milk was sold first off the retailer's shelves. A witness for Borden testified that the principal dangers of long storage were discoloration of the milk, precipitation of calcium and other minerals, and separation and hardening of fat from the milk. As a further precaution against sales of defective milk, Borden dispatched its milk to wholesalers and retailers under a first-packed, first-shipped rotation plan that occasionally involved high-cost shipments from distant plants or warehouses. In addition, before shipment from a cold storage warehouse, Borden "tempered" its premium brand milk in order to prevent condensation on the cans, which might have resulted in rust to the cans and damage to the labels.

[7] As counsel for the respondent candidly stated on oral argument to the Court, "The difference as to the private label brand packed by Borden is that, as to that product, the Borden Company washes its hands of it at the factory door."

been wrong; . . . it may have been right . . . . But right or wrong, that is what it believed, and its belief was the important thing." *Borden's Farm Products Co.* v. *Ten Eyck,* 11 F. Supp. 599, 601 (D. C. S. D. N. Y.) (opinion of L. Hand, J.).[8]

The spare legislative history of the Robinson-Patman Act is in no way inconsistent with a construction of § 2 (a) that includes market acceptance in the test of "like grade and quality." That history establishes no more than that mere differences in brand or design, unaccompanied by any genuine physical, chemical, or market

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[8] The Court's suggestion that the commentators are about equally divided upon the issue before us is somewhat misleading. It is true that the members of the Attorney General's National Committee to Study the Antitrust Laws, Report, pp. 156–159 (1955), were sharply divided as to whether significant consumer preferences should be taken into account under the "like grade and quality" test of § 2 (a). However, the very brief discussions of "like grade and quality" in Austin, Price Discrimination and Related Problems under the Robinson-Patman Act 39 (2d ed. 1959); Patman, Complete Guide to the Robinson-Patman Act 34–35 (1963); and Edwards, The Price Discrimination Law 31, 463–464 (1959), are not addressed to the relevance of significant consumer preferences, and the minimal discussion in Seidman is at best ambiguous, Price Discrimination Cases, reprinted in 2 Hoffmann's Antitrust Law and Techniques 409, 427–428 (1963). Those cursory treatments go no further than the view, with which I wholly agree, that no blanket exemption from § 2(a) is available for private label brands. But that view in no sense disposes of the concrete issue presented in this case. Commentators who have in fact focussed on the significance of consumer preferences uniformly favor inclusion of commercial acceptance in the test of "like grade and quality." Rowe, Price Differentials and Product Differentiation: The Issues under the Robinson-Patman Act, 66 Yale L. J. 1 (1956); Rowe, Price Discrimination Under the Robinson-Patman Act 62–76 (1962); Cassady & Grether, The Proper Interpretation of "Like Grade and Quality" within the Meaning of Section 2 (a) of the Robinson-Patman Act, 30 So. Cal. L. Rev. 241 (1957); Jordan, Robinson-Patman Act Aspects of Dual Distribution by Brand of Consumer Goods, 50 Cornell L. Q. 394 (1965).

distinction, are insufficient to negate a finding of "like grade and quality" under § 2 (a).[9] Nothing that I have found in the legislative history speaks with precision to the sole issue before us here, the application of § 2 (a) to physically or chemically identical products that are in fact differentiated by substantial market factors.[10]

Neither the remarks of Representative Patman, *ante*, p. 643, nor the letter of Mr. Teegarden, *ante*, p. 641, n. 4, supports the Court's conclusion that Congress intended physical and chemical identity to be the sole touchstone of "like grade and quality." Aside from the obviously casual nature of Mr. Patman's reply to the question con-

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[9] The Court's suggestion, *ante*, p. 644, that a difference in label alone would exclude the reach of § 2 (a) if a market test were accepted for "like grade and quality" is no part of the present case and has never been offered as a serious interpretation of § 2 (a). Nor is there any issue raised here as to whether, under a market test of § 2 (a), a dubious pricing and branding policy adopted by a seller could "validate itself" and escape the Act by creating precarious distinctions in grade or quality. The price differential between Borden's premium and private label brands is concededly grounded upon a legitimate and stable market preference for the premium product. Moreover, the Commission's willingness to engage in the exhaustive analysis of injury to competition and cost justification under its "physical identity" test of § 2 (a) demonstrates that the Commission's resources would be more than adequate to determine the level of commercial preference sufficient to negate a finding of "like grade and quality" under a market test of § 2 (a).

[10] Certain general language in the congressional reports may be taken, however, as supporting the interpretation that market factors are relevant in the construction of § 2 (a). The Report of the House Committee on the Judiciary stated that the general object of the bill was "to amend section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller *not supported by sound economic differences in their business positions* . . . ." H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 7. (Emphasis added.) The Report of the Senate Committee on the Judiciary is phrased in substantially the same language. S. R. Rep. No. 1502, 74th Cong., 2d Sess., p. 3.

cerning the effect of the Act on private label brands,[11] his remarks go embarrassingly further than the circumspect reading sought to be given them by the Court. On its face, Mr. Patman's statement makes the blanket assertion that all products of the same quality must be sold at the same price. As thus stated, premium brands would have to be sold at the same price as private label brands, regardless of injury to competition, cost justification, or other available defenses under the Act. These undifferentiated remarks are therefore of little assistance in the determination of congressional intent. Far from supporting the Court's interpretation of § 2 (a), the final paragraph of the Teegarden letter suggests that Mr. Teegarden considered the bill to have no effect on a premium brand producer's decision to furnish private label brands to purchasers, so long as the private label brands were made available on the same terms to all purchasers. Mr. Teegarden's concern was with the prevention of discrimination between purchasers on the basis of artificial differences in brand.[12] That same concern, and no more,

[11] The remarks of Representative Patman were even more offhand than the opinion of the Court indicates. Prefacing the portion of his remarks quoted by the Court, Mr. Patman said, "I only have a very short time, and I must finish my statement. I have not time to discuss that feature . . . ."

[12] The predominant concern of Congress in enacting the Robinson-Patman amendments to the Clayton Act was to abolish the notorious price discriminations that infected the post-Depression economy, especially the blanket immunity then available for quantity discounts under § 2 of the Clayton Act. An obvious commercial evil at the time was the widespread practice of offering private label brands to favored customers at rates substantially lower than the rates offered to competing purchasers. The abortive attempt, vigorously opposed by Mr. Teegarden, to introduce "and brands" into the "like grade and quality" provision would have left that evil completely unremedied. Cf. 80 Cong. Rec. 8234–8236 (rejection of amendments proposing the addition of "and design" and "purchased under like conditions" to the "like grade and quality" clause).

is all that may legitimately be read into the rejection by Congress of the proposal to add "and brands" to the "like grade and quality" provision in the bill. By rejecting that proposal, it can be inferred only that Congress contemplated "no *blanket* exemption . . . for 'like' products which differed *only* in brand . . . , leaving open the application of the Act to differentiated products reflecting more than a nominal or superficial variation." Rowe, Price Discrimination Under the Robinson-Patman Act 65 (1962).

The references in the legislative hearings and the House Committee Report to the Commission's decision in *Goodyear Tire & Rubber Co.*, 22 F. T. C. 232, are equally inconclusive on the relevance of commercial acceptance to the determination of "like grade and quality." The striking aspect of that case is that Goodyear *conceded* that the differently branded tires involved in the proceeding were of like grade and quality, 22 F. T. C., at 290. Moreover, the tires purchased by Sears, Roebuck & Co. from Goodyear and sold under Sears' "All State" label were advertised by Sears as obtained from "the leading tire manufacturer" and "the world's foremost tire manufacturer," so that the market independence of Sears' private brand was compromised. *Id.*, at 295, 297.

The other administrative precedents relied on by the Court also fail to establish any consistently settled interpretation by the Federal Trade Commission that physical identity is the sole touchstone of "like grade and quality." Those decisions singularly fail to focus on the significance of consumer preference as a relevant factor in the test of grade and quality.[13] Moreover, the

[13] In *Hansen Inoculator Co.*, 26 F. T. C. 303, and the two *United States Rubber Co.* cases, 28 F. T. C. 1489; 46 F. T. C. 998, the finding of "like grade and quality" was either conceded by the respondent or not challenged. In addition, in *Hansen Inoculator*, there was significant evidence that the private label product was in fact trading

Commission has itself explicitly resorted to consumer preference or marketability to resolve the issue of "like grade and quality" in cases where minor physical variations accompany a difference in product brand.[14] The

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on the reputation of the premium product. Further, in *Hansen Inoculator,* as in *Page Dairy Co.,* 50 F. T. C. 395, it is doubtful that even the labels on the two products were distinguishable. In *Whitaker Cable Corp.,* 51 F. T. C. 958, the resale prices of both products were identical, so that no commercial preference could have been proved in any event. Finally, in the first *United States Rubber* case and in *Whitaker Cable Corp.,* there was substantial discrimination by the seller between various purchasers of the private label brands. In setting aside the order of the Commission in the present case, the Court of Appeals for the Fifth Circuit emphasized that in none of these cases was there any showing that the brand names affected the market price of the products sold.

[14] *Universal-Rundle Corp.,* CCH Trade Reg. Rep. Transfer Binder, 1963–1965, ¶ 16948, at pp. 22003–22005 (F. T. C. Dkt. 8070, June 12, 1964) (differences in plumbing fixtures); *Quaker Oats Co.,* CCH Trade Reg. Rep. Transfer Binder, 1963–1965, ¶ 17134, at p. 22215 (F. T. C. Dkt. 8112, Nov. 18, 1964) (differences in flour blends). Compare *E. Edelmann & Co.,* 51 F. T. C. 978 (differences in automobile replacement parts); *Bruce's Juices, Inc.* v. *American Can Co.,* 87 F. Supp. 985, aff'd 187 F. 2d 919 (C. A. 5th Cir.) (differences in size of juice cans); *Champion Spark Plug Co.,* 50 F. T. C. 30 (differences in insulator and "ribs" of spark plugs). Cf. Comment, Like Grade and Quality: Emergence of the Commercial Standard, 26 Ohio State L. J. 294, 296–302 (1965). The Commission appears at one time to have held that brand identity may create a presumption of "like grade and quality," regardless of the existence of physical differences between the products. *General Foods Corp.,* 52 F. T. C. 798, 817; *Atalanta Trading Corp.,* 53 F. T. C. 565, 571. In setting aside the Commission's order in *Atalanta,* the Court of Appeals for the Second Circuit stated that "The test of products of like grade and quality was evolved to prevent emasculation of the section by a supplier's making artificial distinctions in his product but this does not mean that all distinctions are to be disregarded." *Atalanta Trading Corp.* v. *FTC,* 258 F. 2d 365, 371. In a footnote to that opinion, the Court of Appeals indicated that price differences were among the distinctions to be considered. *Id.,* at 371, n. 5. Cf. Rowe, Price Discrimination Under the Robinson-Patman Act 71–72 (1962).

caprice of the Commission's present distinction thus invites Borden to incorporate slight tangible variations in its private label products, in order to bring itself within the Commission's current practice of considering market preferences in such cases.

The Commission's determination of "like grade and quality" under § 2 (a) in this case is seriously inconsistent with the position it has taken under § 2 (b) in cases where a seller has presented the defense that he is in good faith meeting the equally low price of a competitor. The Commission decisions are clear that the "meeting competition" defense is not available to a seller who reduces the price of his premium product to the level of nonpremium products sold by his competitors. The Commission decisions under § 2 (b) emphasize that market preference must be considered in determining whether a competitor is "meeting" rather than "beating" competition. In *Standard Oil Co.*, 49 F. T. C. 923, 952, the Commission put it baldly:

> "[I]n the retail distribution of gasoline public acceptance rather than chemical analysis of the product is the important competitive factor." [15]

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[15] See also *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351, 396–397: "To accept [the contrary] proposition would mean that any seller of a commodity which generally sells at a premium price may freely discriminate among its customers so long as it does not undercut the prices of competitors"; *Anheuser-Busch, Inc.*, 54 F. T. C. 277, 302: "It is evident that Budweiser could and did successfully command a premium price in the St. Louis market . . . . The test in such a case is not necessarily a difference in quality but the fact that the public is willing to buy the product at a higher price in a normal market"; *Callaway Mills Co., sub nom. Bigelow-Sanford Carpet Co.*, CCH Trade Reg. Rep. Transfer Binder, 1963–1965, ¶ 16,800, at p. 21755 (F. T. C. Dkt. 7634, Feb. 10, 1964): "Both the courts and the Commission have consistently denied the shelter of the [meeting competition] defense to sellers whose product, because of . . . intense public demand, normally commands a price higher than that usually received by sellers of competitive goods"; *Standard*

Could the Commission under § 2 (b) now prevent Borden from reducing the price of its premium milk to the level of private label milk? I can see no way that it could, short of maintaining a manifestly unstable equilibrium between § 2 (a) and § 2 (b). By adopting a keyhole approach to § 2 (a), the Court manages to escape resolution of the question, but it does so at the cost of casting grave doubt on what I had regarded as an important bulwark of § 2 (b) against a recognized competitive evil.

The Court gives no substantial economic justification for its construction of § 2 (a).[16] The principal rationale of the restriction of that section to commodities of "like

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Brands, Inc., 46 F. T. C. 1485, 1495; *Gerber Products Co.* v. *Beech-Nut Life Savers, Inc.*, 160 F. Supp. 916, 920, 921–922 (D. C. S. D. N. Y.). Cf. *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 237 (C. A. 2d Cir.). In the present case, the Court of Appeals for the Fifth Circuit specifically refused to "approve of the Commission's construing the Act inconsistently from one case to the next, as appears most advantageous to its position in a particular case." 339 F. 2d 133, at 139. See the comment of Commissioner Mason: "First the Commission finds you guilty of price discrimination by disregarding popularity of goods, and finds the grade and quality of the commodities in question are the same; then they knock out your meeting of competition defense because your goods are more popular than others, even if the commodities in question are of like grade and quality." Discriminate in Price between Different Purchasers of Commodities of Like Grade, Quality and Popularity, Proc. Am. Bar Assn. Section of Antitrust Law 82, 91–92 (Aug. 1953). Cf. Eine Kleine Juristische Schlummergeschichte, 79 Harv. L. Rev. 921, 928–929 (1966).

[16] The Court's brief discussion of the adverse economic effect of the Fifth Circuit's ruling is concerned primarily with the supposed injury to secondary line competition. The present proceeding arose as the direct result of the primary line injury caused to midwestern packers of private label evaporated milk when Borden expanded its plants in Tennessee and South Carolina to include private label operation, but the opinion of the Court nowhere discusses such competition.

grade and quality" is simply that it is not feasible to measure discrimination and injury to competition where different products are involved. That rationale is as valid for economic as for physical variation between products. Once a substantial economic difference between products is found, therefore, the inquiry of the Commission should be ended, just as it is ended when a substantial physical difference is found.

In spite of the assertion of the Attorney General's Report quoted by the Court, it is unlikely that economic differences between premium and private label brands can realistically be taken into account by the Commission under the "injury to competition" and "cost justification" provisions of § 2 (a).[17] Even if relevant cost data can be agreed upon, the cost ratio between Borden's premium and private label products is hardly the most significant factor in Borden's pricing decision and market return on those products. Moreover, even if price discrimination is found here, its effect on competition may prove even more difficult to determine than in more con-

[17] It is not clear that the "injury to competition" and "cost justification" issues will be reached on the remand. As the opinion of the Court suggests, *ante,* p. 646, the existence of price discrimination is an issue that remains open in the Court of Appeals. If Borden is able to demonstrate that the price differential between its premium and private label brands is not a price discrimination, the inquiry by the Commission is at an end, and no issue of injury to competition or cost justification under § 2 (a) is reached. Nothing in *FTC* v. *Anheuser-Busch, Inc.,* 363 U. S. 536, a case concerned only with territorial price discrimination, requires an equation in all circumstances between a price differential and price discrimination. So long as Borden makes private label brands available to all customers of its premium milk, it is unlikely that price discrimination within the meaning of § 2 (a) can be made out. *Boss Mfg. Co.* v. *Payne Glove Co.,* 71 F. 2d 768, 770–771 (C. A. 8th Cir.); Austin, Price Discrimination and Related Problems under the Robinson-Patman Act 21 (2d ed. 1959); Rowe, Price Discrimination Under the Robinson-Patman Act, *supra,* at 97–99.

ventional cases of price discrimination under § 2 (a). Cf. *FTC* v. *Morton Salt Co.*, 334 U. S. 37; *United Biscuit Co.* v. *FTC*, 350 F. 2d 615 (C. A. 7th Cir.).

The threat presented to primary line competition by Borden's distribution of premium and private label brands is unclear. No allegation was made that Borden has used its dominant position in the premium brand market to subsidize predatory price-cutting campaigns in the private label market. Borden packs its private label brands for national distribution, so that this case is essentially different from those in which geographical price discriminations are involved. Further, Borden's private label brands are aimed in part at a different, more price-conscious class of consumer. Because relevant economic factors differ in the premium and private label markets, conventional notions of price discrimination under the Robinson-Patman Act may not be applicable.[18] More important, Borden's extensive distribution of its private label brands has introduced significant low-cost competition for Borden's own premium product. Thus, the large retail chains and cooperative buyer organizations that are Borden's chief private label customers represent a significant source of countervailing power to the oligopoly pattern of evaporated milk production. The rise of this sort of competition is well known in other parts of the food industry.[19] In these circumstances, the anticompetitive leverage against primary line competition available to Borden through its private label production is sharply curtailed. There is, therefore, no real resemblance in this case to the serious discriminatory

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[18] Cf. Adelman, Price Discrimination as Treated in the Attorney General's Report, 104 U. Pa. L. Rev. 222, 228–230 (1955).

[19] See Staff Report to the Federal Trade Commission, Economic Inquiry into Food Marketing, Part II, The Frozen Fruit, Juice and Vegetable Industry (1962); Jordan, *supra*, n. 8, at 413–417.

practices that the Robinson-Patman Act was enacted to prevent.

The potential economic impact of Borden's distribution of private label brands on secondary line competition is equally ambiguous. It is true that a market test of "like grade and quality" would enable Borden, so far as § 2 (a) is concerned, to make private label brands selectively available to customers of its premium brand. Not all wholesale and retail dealers who carry Borden's premium brand would be able, as of right, to take advantage of Borden's private label production. But the Commission could still apply § 2 (a) with full force against discriminations between private label customers. And the Government could still invoke § 2 of the Sherman Act or § 5 of the Federal Trade Commission Act to deal with other forms of price discrimination by Borden against its customers or competitors.

Under the Court's view of § 2 (a), Borden must now make private label milk available to all customers of its premium brand.[20] But that interpretation of § 2 (a) is

[20] The Commission concedes that there is no evidence in the record that Borden refused to sell private label milk to any customer who specifically requested it. Borden's private label business in the period covered by these proceedings was substantial. In 1957, Borden sold 4,300,000 cases of its premium brand evaporated milk and 1,100,000 cases of private label milk (government and export business excluded); net sales of these products were $27,600,000 and $5,700,000, respectively. A major source of Borden's private label business was provided by cooperative associations of wholesalers and retailers, so that, in fact, there was an opportunity for large numbers of small retailers to compete in the sale of private label brands of evaporated milk obtained from Borden. One such group, whose purchases accounted for 11% of Borden's private label volume in 1957, had more than 1,000 retailer members. Not all retailers, however, availed themselves of the opportunity to market private label milk. One wholesaler testified that, a year after his private label brand had been offered to the 600 retail grocers in his service area, only 50 of the grocers had become regular customers.

hardly calculated to speed private label brands to the shelves of retailers. To avoid supplying a private label brand to a premium brand customer, Borden need only forgo further sales of its premium brand to that customer. It is, therefore, not unlikely that the Court's decision will foster a discrimination greater than that which it purports to eliminate, since retailers previously able to obtain the premium Borden brand but not a private label brand, may now find their access to the premium brand foreclosed as well.

In *Automatic Canteen Co.* v. *FTC*, 346 U. S. 61, 63, this Court cautioned against construction of the Robinson-Patman Act in a manner that might "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." Today that warning goes unheeded. In the guise of protecting producers and purchasers from discriminatory price competition, the Court ignores legitimate market preferences and endows the Federal Trade Commission with authority to disrupt price relationships between products whose identity has been measured in the laboratory but rejected in the marketplace. I do not believe that any such power was conferred upon the Commission by Congress, and I would, therefore, affirm the judgment of the Court of Appeals.

HARPER ET AL. *v.* VIRGINIA BOARD OF ELECTIONS ET AL.

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

No. 48. Argued January 25–26, 1966.—Decided March 24, 1966.*

Appellants, Virginia residents, brought this action to have Virginia's poll tax declared unconstitutional. The three-judge District Court dismissed the complaint on the basis of *Breedlove* v. *Suttles*, 302 U. S. 277. *Held:* A State's conditioning of the right to vote on the payment of a fee or tax violates the Equal Protection Clause of the Fourteenth Amendment. *Breedlove* v. *Suttles, supra, pro tanto* overruled. Pp. 665–670.

(a) Once the franchise is granted to the electorate, lines which determine who may vote may not be drawn so as to cause invidious discrimination. Pp. 665–667.

(b) Fee payments or wealth, like race, creed, or color, are unrelated to the citizen's ability to participate intelligently in the electoral process. Pp. 666–668.

(c) The interest of the State, when it comes to voting registration, is limited to the fixing of standards related to the applicant's qualifications as a voter. P. 668.

(d) Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored. P. 668.

(e) Classifications which might impinge on fundamental rights and liberties—such as the franchise—must be closely scrutinized. P. 670.

240 F. Supp. 270, reversed.

Allison W. Brown, Jr., argued the cause for appellants in No. 48. With him on the brief were *Lawrence Speiser* and *Philip Schwartz.*

Robert L. Segar and *J. A. Jordan, Jr.*, argued the cause for appellant in No. 655. With them on the brief were *Max Dean* and *Len W. Holt.*

*Together with No. 655, *Butts* v. *Harrison, Governor of Virginia, et al.*, also on appeal from the same court.

George D. Gibson argued the cause for appellees in both cases. With him on the briefs were *Robert Y. Button,* Attorney General of Virginia, *Richard N. Harris,* Assistant Attorney General, and *Joseph C. Carter, Jr.*

Solicitor General Marshall argued the cause for the United States, as *amicus curiae* in No. 48, by special leave of Court, urging reversal. With him on the brief were *Attorney General Katzenbach, Assistant Attorney General Doar, Ralph S. Spritzer, David Rubin, James L. Kelley* and *Richard A. Posner.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These are suits by Virginia residents to have declared unconstitutional Virginia's poll tax.[1] The three-judge

[1] Section 173 of Virginia's Constitution directs the General Assembly to levy an annual poll tax not exceeding $1.50 on every resident of the State 21 years of age and over (with exceptions not relevant here). One dollar of the tax is to be used by state officials "exclusively in aid of the public free schools" and the remainder is to be returned to the counties for general purposes. Section 18 of the Constitution includes payment of poll taxes as a precondition for voting. Section 20 provides that a person must "personally" pay all state poll taxes for the three years preceding the year in which he applies for registration. By § 21 the poll tax must be paid at least six months prior to the election in which the voter seeks to vote. Since the time for election of state officials varies (Va. Code §§ 24–136, 24–160—24–168; *id.,* at § 24–22), the six months' deadline will vary, election from election. The poll tax is often assessed along with the personal property tax. Those who do not pay a personal property tax are not assessed for a poll tax, it being their responsibility to take the initiative and request to be assessed. Va. Code § 58–1163. Enforcement of poll taxes takes the form of disenfranchisement of those who do not pay, § 22 of the Virginia Constitution providing that collection of delinquent poll taxes for a particular year may not be enforced by legal proceedings until the tax for that year has become three years delinquent.

District Court, feeling bound by our decision in *Breedlove* v. *Suttles*, 302 U. S. 277, dismissed the complaint. See 240 F. Supp. 270. The cases came here on appeal and we noted probable jurisdiction. 380 U. S. 930, 382 U. S. 806.

While the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution (*United States* v. *Classic*, 313 U. S. 299, 314–315), the right to vote in state elections is nowhere expressly mentioned. It is argued that the right to vote in state elections is implicit, particularly by reason of the First Amendment and that it may not constitutionally be conditioned upon the payment of a tax or fee. Cf. *Murdock* v. *Pennsylvania*, 319 U. S. 105, 113.[2] We do not stop to canvass the relation between voting and political expression. For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. That is to say, the right of suffrage "is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed." *Lassiter* v. *Northampton Election Board*, 360 U. S. 45, 51. We were speaking there of a state literacy test which we sustained, warning that the result would be different if a literacy test, fair on its face, were used to discriminate

[2] Judge Thornberry, speaking for the three-judge court which recently declared the Texas poll tax unconstitutional, said: "If the State of Texas placed a tax on the right to speak at the rate of one dollar and seventy-five cents per year, no court would hesitate to strike it down as a blatant infringement of the freedom of speech. Yet the poll tax as enforced in Texas is a tax on the equally important right to vote." 252 F. Supp. 234, 254 (decided February 9, 1966).

against a class.[3] *Id.*, at 53. But the *Lassiter* case does not govern the result here, because, unlike a poll tax, the "ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot." *Id.*, at 51.

We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.[4] Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate. Thus without questioning the power of a State to impose reasonable residence restrictions on the availability of the ballot (see *Pope* v. *Williams*, 193 U. S. 621), we

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[3] We recently held in *Louisiana* v. *United States*, 380 U. S. 145, that a literacy test which gave voting registrars "a virtually uncontrolled discretion as to who should vote and who should not" (*id.*, at 150) had been used to deter Negroes from voting and accordingly we struck it down. While the "Virginia poll tax was born of a desire to disenfranchise the Negro" (*Harman* v. *Forssenius*, 380 U. S. 528, 543), we do not stop to determine whether on this record the Virginia tax in its modern setting serves the same end.

[4] Only a handful of States today condition the franchise on the payment of a poll tax. Alabama (Ala. Const., §§ 178, 194, and Amendments 96 and 207; Ala. Code Tit. 17, § 12) and Texas (Tex. Const., Art. 6, § 2; Vernon's Ann. Stat., Election Code, Arts. 5.02, 5.09) each impose a poll tax of $1.50. Mississippi (Miss. Const., §§ 241, 243; Miss. Code §§ 3130, 3160, 3235) has a poll tax of $2. Vermont has recently eliminated the requirement that poll taxes be paid in order to vote. Act of Feb. 23, 1966, amending Vt. Stat. Ann. Tit. 24, § 701.

As already noted, note 2, *supra*, the Texas poll tax was recently declared unconstitutional by a three-judge United States District Court. *United States* v. *Texas*, 252 F. Supp. 234 (decided February 9, 1966). Likewise, the Alabama tax. *United States* v. *Alabama*, 252 F. Supp. 95 (decided March 3, 1966).

held in *Carrington* v. *Rash,* 380 U. S. 89, that a State may not deny the opportunity to vote to a bona fide resident merely because he is a member of the armed services. "By forbidding a soldier ever to controvert the presumption of non-residence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment." *Id.,* at 96. And see *Louisiana* v. *United States,* 380 U. S. 145. Previously we had said that neither homesite nor occupation "affords a permissible basis for distinguishing between qualified voters within the State." *Gray* v. *Sanders,* 372 U. S. 368, 380. We think the same must be true of requirements of wealth or affluence or payment of a fee.

Long ago in *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370, the Court referred to "the political franchise of voting" as a "fundamental political right, because preservative of all rights." Recently in *Reynolds* v. *Sims,* 377 U. S. 533, 561–562, we said, "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." There we were considering charges that voters in one part of the State had greater representation per person in the State Legislature than voters in another part of the State. We concluded:

> "A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of 'government of the people, by the people, [and] for the people.' The Equal Protection Clause

demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races." *Id.*, at 568.

We say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it. The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay.

It is argued that a State may exact fees from citizens for many different kinds of licenses; that if it can demand from all an equal fee for a driver's license,[5] it can demand from all an equal poll tax for voting. But we must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race (*Korematsu* v. *United States*, 323 U. S. 214, 216), are traditionally disfavored. See *Edwards* v. *California*, 314 U. S. 160, 184–185 (Jackson, J., concurring); *Griffin* v. *Illinois*, 351 U. S. 12; *Douglas* v. *California*, 372 U. S. 353. To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an "invidious" discrimination (*Skinner* v. *Oklahoma*, 316 U. S. 535, 541) that runs afoul of the Equal Protection Clause. Levy "by the poll," as stated in

[5] Maine has a poll tax (Maine Rev. Stat. Ann. Tit. 36, § 1381) which is not made a condition of voting; instead, its payment is a condition of obtaining a motor vehicle license (Maine Rev. Stat. Ann. Tit. 29, § 108) or a motor vehicle operator's license. *Id.*, § 584.

Breedlove v. *Suttles, supra,* at 281, is an old familiar form of taxation; and we say nothing to impair its validity so long as it is not made a condition to the exercise of the franchise. *Breedlove* v. *Suttles* sanctioned its use as "a prerequisite of voting." *Id.*, at 283. To that extent the *Breedlove* case is overruled.

We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics" (*Lochner* v. *New York,* 198 U. S. 45, 75). Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. See *Malloy* v. *Hogan,* 378 U. S. 1, 5–6. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. This Court in 1896 held that laws providing for separate public facilities for white and Negro citizens did not deprive the latter of the equal protection and treatment that the Fourteenth Amendment commands. *Plessy* v. *Ferguson,* 163 U. S. 537. Seven of the eight Justices then sitting subscribed to the Court's opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear.[6] When, in 1954—more than a half-century later—we repudiated the "separate-but-equal" doctrine of *Plessy*

[6] *E. g.,* "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." 163 U. S., at 551.

as respects public education [7] we stated: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written." *Brown* v. *Board of Education,* 347 U. S. 483, 492.

In a recent searching re-examination of the Equal Protection Clause, we held, as already noted, that "the opportunity for equal participation by all voters in the election of state legislators" is required.[8] *Reynolds* v. *Sims, supra,* at 566. We decline to qualify that principle by sustaining this poll tax. Our conclusion, like that in *Reynolds* v. *Sims,* is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires.

We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. See, *e. g., Skinner* v. *Oklahoma,* 316 U. S. 535, 541; *Reynolds* v. *Sims,* 377 U. S. 533, 561–562; *Carrington* v. *Rash, supra; Baxstrom* v. *Herold, ante,* p. 107; *Cox* v. *Louisiana,* 379 U. S. 536, 580–581 (BLACK, J., concurring).

Those principles apply here. For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.

Reversed.

MR. JUSTICE BLACK, dissenting.

In *Breedlove* v. *Suttles,* 302 U. S. 277, decided December 6, 1937, a few weeks after I took my seat as a member

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[7] Segregated public transportation, approved in *Plessy* v. *Ferguson, supra,* was held unconstitutional in *Gayle* v. *Browder,* 352 U. S. 903 (per curiam).

[8] Only MR. JUSTICE HARLAN dissented, while MR. JUSTICE CLARK and MR. JUSTICE STEWART each concurred on separate grounds.

of this Court, we unanimously upheld the right of the State of Georgia to make payment of its state poll tax a prerequisite to voting in state elections. We rejected at that time contentions that the state law violated the Equal Protection Clause of the Fourteenth Amendment because it put an unequal burden on different groups of people according to their age, sex, and ability to pay. In rejecting the contention that the law violated the Equal Protection Clause the Court noted at p. 281:

> "While possible by statutory declaration to levy a poll tax upon every inhabitant of whatsoever sex, age or condition, collection from all would be impossible for always there are many too poor to pay."

Believing at that time that the Court had properly respected the limitation of its power under the Equal Protection Clause and was right in rejecting the equal protection argument, I joined the Court's judgment and opinion. Later, May 28, 1951, I joined the Court's judgment in *Butler* v. *Thompson*, 341 U. S. 937, upholding, over the dissent of MR. JUSTICE DOUGLAS, the Virginia state poll tax law challenged here against the same equal protection challenges. Since the *Breedlove* and *Butler* cases were decided the Federal Constitution has not been amended in the only way it could constitutionally have been, that is, as provided in Article V [1] of the

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[1] Article V of the Constitution provides:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner

Constitution. I would adhere to the holding of those cases. The Court, however, overrules *Breedlove* in part, but its opinion reveals that it does so not by using its limited power to interpret the original meaning of the Equal Protection Clause, but by giving that clause a new meaning which it believes represents a better governmental policy. From this action I dissent.

It should be pointed out at once that the Court's decision is to no extent based on a finding that the Virginia law as written or as applied is being used as a device or mechanism to deny Negro citizens of Virginia the right to vote on account of their color. Apparently the Court agrees with the District Court below and with my Brothers HARLAN and STEWART that this record would not support any finding that the Virginia poll tax law the Court invalidates has any such effect. If the record could support a finding that the law as written or applied has such an effect, the law would of course be unconstitutional as a violation of the Fourteenth and Fifteenth Amendments and also 42 U. S. C. § 1971 (a). This follows from our holding in *Schnell* v. *Davis,* 336 U. S. 933, affirming 81 F. Supp. 872 (D. C. S. D. Ala.); *Gomillion* v. *Lightfoot,* 364 U. S. 339; *United States* v. *Mississippi,* 380 U. S. 128; *Louisiana* v. *United States,* 380 U. S. 145. What the Court does hold is that the Equal Protection Clause necessarily bars all States from making payment of a state tax, any tax, a prerequisite to voting.

(1) I think the interpretation that this Court gave the Equal Protection Clause in *Breedlove* was correct. The mere fact that a law results in treating some groups differently from others does not, of course, automatically amount to a violation of the Equal Protection Clause.

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affect the first and fourth clauses in the Ninth Section of the First Article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

To bar a State from drawing any distinctions in the application of its laws would practically paralyze the regulatory power of legislative bodies. Consequently "The constitutional command for a state to afford 'equal protection of the laws' sets a goal not attainable by the invention and application of a precise formula." *Kotch* v. *River Port Pilot Comm'rs,* 330 U. S. 552, 556. Voting laws are no exception to this principle. All voting laws treat some persons differently from others in some respects. Some bar a person from voting who is under 21 years of age; others bar those under 18. Some bar convicted felons or the insane, and some have attached a freehold or other property qualification for voting. The *Breedlove* case upheld a poll tax which was imposed on men but was not equally imposed on women and minors, and the Court today does not overrule that part of *Breedlove* which approved those discriminatory provisions. And in *Lassiter* v. *Northampton Election Board,* 360 U. S. 45, this Court held that state laws which disqualified the illiterate from voting did not violate the Equal Protection Clause. From these cases and all the others decided by this Court interpreting the Equal Protection Clause it is clear that some discriminatory voting qualifications can be imposed without violating the Equal Protection Clause.

A study of our cases shows that this Court has refused to use the general language of the Equal Protection Clause as though it provided a handy instrument to strike down state laws which the Court feels are based on bad governmental policy. The equal protection cases carefully analyzed boil down to the principle that distinctions drawn and even discriminations imposed by state laws do not violate the Equal Protection Clause so long as these distinctions and discriminations are not "irrational," "irrelevant," "unreasonable," "arbitrary," or "in-

vidious." [2] These vague and indefinite terms do not, of course, provide a precise formula or an automatic mechanism for deciding cases arising under the Equal Protection Clause. The restrictive connotations of these terms, however (which in other contexts have been used to expand the Court's power inordinately, see, *e. g.*, cases cited at pp. 728–732 in *Ferguson* v. *Skrupa*, 372 U. S. 726), are a plain recognition of the fact that under a proper interpretation of the Equal Protection Clause States are to have the broadest kind of leeway in areas where they have a general constitutional competence to act.[3] In view of the purpose of the terms to restrain the courts from a wholesale invalidation of state laws under the Equal Protection Clause it would be difficult to say that the poll tax requirement is "irrational" or "arbitrary" or works "invidious discriminations." State poll tax legislation can "reasonably," "rationally" and without an "invidious" or evil purpose to injure anyone be found to rest on a number of state policies including (1) the State's desire to collect its revenue, and (2) its belief that voters who pay a poll tax will be interested in furthering the State's welfare when they vote. Certainly it is rational to believe that people may be more likely to pay taxes if payment is a prerequisite to voting. And if history can be a factor in determining the "rationality" of discrimination in a state law (which we held it could in *Kotch* v. *River Port Pilot Comm'rs, supra*), then whatever may be our personal opinion, history is

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[2] See, *e. g.*, *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522; *Goesaert* v. *Cleary*, 335 U. S. 464; *Skinner* v. *Oklahoma*, 316 U. S. 535; *Minnesota* v. *Probate Court*, 309 U. S. 270; *Smith* v. *Cahoon*, 283 U. S. 553; *Watson* v. *Maryland*, 218 U. S. 173.

[3] "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Metropolitan Co.* v. *Brownell*, 294 U. S. 580, 584 (Stone, J.).

on the side of "rationality" of the State's poll tax policy. Property qualifications existed in the Colonies and were continued by many States after the Constitution was adopted. Although I join the Court in disliking the policy of the poll tax, this is not in my judgment a justifiable reason for holding this poll tax law unconstitutional. Such a holding on my part would, in my judgment, be an exercise of power which the Constitution does not confer upon me.[4]

(2) Another reason for my dissent from the Court's judgment and opinion is that it seems to be using the old "natural-law-due-process formula" [5] to justify striking down state laws as violations of the Equal Protection Clause. I have heretofore had many occasions to express my strong belief that there is no constitutional support whatever for this Court to use the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written so as to add to it substantive constitutional changes which a majority of

[4] The opinion of the Court, in footnote two, quotes language from a federal district court's opinion which implies that since a tax on speech would not be constitutionally allowed a tax which is a prerequisite to voting likewise cannot be allowed. But a tax or any other regulation which burdens and actually abridges the right to speak would, in my judgment, be a flagrant violation of the First Amendment's prohibition against abridgments of the freedom of speech which prohibition is made applicable to the States by the Fourteenth Amendment. Cf. *Murdock* v. *Pennsylvania,* 319 U. S. 105. There is no comparable specific constitutional provision absolutely barring the States from abridging the right to vote. Consequently States have from the beginning and do now qualify the right to vote because of age, prior felony convictions, illiteracy, and various other reasons. Of course the First and Fourteenth Amendments forbid any State from abridging a person's right to speak because he is under 21 years of age, has been convicted of a felony, or is illiterate.

[5] See my dissenting opinion in *Adamson* v. *California,* 332 U. S. 46, 90.

the Court at any given time believes are needed to meet present-day problems.[6] Nor is there in my opinion any more constitutional support for this Court to use the Equal Protection Clause, as it has today, to write into the Constitution its notions of what it thinks is good governmental policy. If basic changes as to the respective powers of the state and national governments are needed, I prefer to let those changes be made by amendment as Article V of the Constitution provides. For a majority of this Court to undertake that task, whether purporting to do so under the Due Process or the Equal Protection Clause amounts, in my judgment, to an exercise of power the Constitution makers with foresight and wisdom refused to give the Judicial Branch of the Government. I have in no way departed from the view I expressed in *Adamson* v. *California,* 332 U. S. 46, 90, decided June 23, 1947, that the "natural-law-due-process formula" under which courts make the Constitution mean what they think it should at a given time "has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government."

The Court denies that it is using the "natural-law-due-process formula." It says that its invalidation of the Virginia law "is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires." I find no statement in the Court's opinion, however, which advances even a plausible argument as to why the alleged discriminations which might possibly be effected by Virginia's poll tax law are "irrational," "unreasonable," "arbitrary," or "invid-

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[6] See for illustration my dissenting opinion in *Griswold* v. *Connecticut,* 381 U. S. 479, 507, and cases cited therein.

ious" or have no relevance to a legitimate policy which the State wishes to adopt. The Court gives no reason at all to discredit the long-standing beliefs that making the payment of a tax a prerequisite to voting is an effective way of collecting revenue and that people who pay their taxes are likely to have a far greater interest in their government. The Court's failure to give any reasons to show that these purposes of the poll tax are "irrational," "unreasonable," "arbitrary," or "invidious" is a pretty clear indication to me that none exist. I can only conclude that the primary, controlling, predominant, if not the exclusive reason for declaring the Virginia law unconstitutional is the Court's deep-seated hostility and antagonism, which I share, to making payment of a tax a prerequisite to voting.

The Court's justification for consulting its own notions rather than following the original meaning of the Constitution, as I would, apparently is based on the belief of the majority of the Court that for this Court to be bound by the original meaning of the Constitution is an intolerable and debilitating evil; that our Constitution should not be "shackled to the political theory of a particular era," and that to save the country from the original Constitution the Court must have constant power to renew it and keep it abreast of this Court's more enlightened theories of what is best for our society.[7]

[7] In *Brown* v. *Board of Education,* 347 U. S. 483, the Court today purports to find precedent for using the Equal Protection Clause to keep the Constitution up to date. I did not vote to hold segregation in public schools unconstitutional on any such theory. I thought when *Brown* was written, and I think now, that Mr. Justice Harlan was correct in 1896 when he dissented from *Plessy* v. *Ferguson,* 163 U. S. 537, which held that it was not a discrimination prohibited by the Equal Protection Clause for state law to segregate white and colored people in public facilities, there railroad cars. I did not join the opinion of the Court in *Brown* on any theory that segregation where practiced in the public schools denied equal protection in

It seems to me that this is an attack not only on the great value of our Constitution itself but also on the concept of a written constitution which is to survive through the years as originally written unless changed through the amendment process which the Framers wisely provided. Moreover, when a "political theory" embodied in our Constitution becomes outdated, it seems to me that a majority of the nine members of this Court are not only without constitutional power but are far less qualified to choose a new constitutional political theory than the people of this country proceeding in the manner provided by Article V.

The people have not found it impossible to amend their Constitution to meet new conditions. The Equal Protection Clause itself is the product of the people's desire to use their constitutional power to amend the Constitution to meet new problems. Moreover, the people, in §5 of the Fourteenth Amendment, designated the

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1954 but did not similarly deny it in 1868 when the Fourteenth Amendment was adopted. In my judgment the holding in *Brown* against racial discrimination was compelled by the purpose of the Framers of the Thirteenth, Fourteenth and Fifteenth Amendments completely to outlaw discrimination against people because of their race or color. See the *Slaughter-House Cases,* 16 Wall. 36, 71–72; *Nixon* v. *Herndon,* 273 U. S. 536, 541.

Nor does *Malloy* v. *Hogan,* 378 U. S. 1, stand as precedent for the amendatory power which the Court exercises today. The Court in *Malloy* did not read into the Constitution its own notions of wise criminal procedure, but instead followed the doctrine of *Palko* v. *Connecticut,* 302 U. S. 319, and made the Fifth Amendment's unequivocal protection against self-incrimination applicable to the States. I joined the opinion of the Court in *Malloy* on the basis of my dissent in *Adamson* v. *California, supra,* in which I stated, at p. 89:

"If the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process."

governmental tribunal they wanted to provide additional rules to enforce the guarantees of that Amendment. The branch of Government they chose was not the Judicial Branch but the Legislative. I have no doubt at all that Congress has the power under § 5 to pass legislation to abolish the poll tax in order to protect the citizens of this country if it believes that the poll tax is being used as a device to deny voters equal protection of the laws. See my concurring and dissenting opinion in *South Carolina* v. *Katzenbach, ante,* p. 355. But this legislative power which was granted to Congress by § 5 of the Fourteenth Amendment is limited to Congress.[8] This Court had occasion to discuss this very subject in *Ex parte Virginia,* 100 U. S. 339, 345–346. There this Court said, referring to the fifth section of the Amendment:

> "All of the amendments derive much of their force from this latter provision. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. *It is the power of Congress which has been enlarged.* Congress is authorized *to enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is ap-

[8] But § 1 of the Fourteenth Amendment itself outlaws any state law which either as written or as applied discriminates against voters on account of race. Such a law can never be rational. "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right [to vote] set up in this case." *Nixon* v. *Herndon,* 273 U. S. 536, 541 (Holmes, J.).

> propriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." (Emphasis partially supplied.)

Thus § 5 of the Fourteenth Amendment in accordance with our constitutional structure of government authorizes the Congress to pass definitive legislation to protect Fourteenth Amendment rights which it has done many times, *e. g.*, 42 U. S. C. § 1971 (a). For Congress to do this fits in precisely with the division of powers originally entrusted to the three branches of government—Executive, Legislative, and Judicial. But for us to undertake in the guise of constitutional interpretation to decide the constitutional policy question of this case amounts, in my judgment, to a plain exercise of power which the Constitution has denied us but has specifically granted to Congress. I cannot join in holding that the Virginia state poll tax law violates the Equal Protection Clause.

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

The final demise of state poll taxes, already totally proscribed by the Twenty-Fourth Amendment with respect to federal elections and abolished by the States themselves in all but four States with respect to state elections,[1] is perhaps in itself not of great moment. But the fact that the *coup de grace* has been administered by this Court instead of being left to the affected States or to the federal political process[2] should be a matter

[1] Alabama, Mississippi, Texas, and Virginia.

[2] In the Senate hearings leading to the passage of the Voting Rights Act of 1965, some doubt was expressed whether state poll taxes

of continuing concern to all interested in maintaining the proper role of this tribunal under our scheme of government.

I do not propose to retread ground covered in my dissents in *Reynolds* v. *Sims,* 377 U. S. 533, 589, and *Carrington* v. *Rash,* 380 U. S. 89, 97, and will proceed on the premise that the Equal Protection Clause of the Fourteenth Amendment now reaches both state apportionment (*Reynolds*) and voter-qualification (*Carrington*) cases. My disagreement with the present decision is that in holding the Virginia poll tax violative of the Equal Protection Clause the Court has departed from long-established standards governing the application of that clause.

The Equal Protection Clause prevents States from arbitrarily treating people differently under their laws. Whether any such differing treatment is to be deemed arbitrary depends on whether or not it reflects an appropriate differentiating classification among those affected; the clause has never been thought to require equal treatment of all persons despite differing circumstances. The test evolved by this Court for determining whether an asserted justifying classification exists is whether such a classification can be deemed to be founded on some rational and otherwise constitutionally permissible state policy. See, *e. g., Powell* v. *Pennsylvania,* 127 U. S. 678; *Barrett* v. *Indiana,* 229 U. S. 26; *Walters* v. *City of St. Louis,* 347 U. S. 231; *Baxstrom* v. *Herold, ante,* p. 107. This standard reduces to a minimum the likelihood that the federal judiciary will judge state policies in terms of the individual notions and predilections of its

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could be validly abolished through the exercise of Congress' legislative power under § 5 of the Fourteenth Amendment. See Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 194–197 (1965). I intimate no view on that question.

own members, and until recently it has been followed in all kinds of "equal protection" cases.[3]

Reynolds v. *Sims, supra,* among its other breaks with the past, also marked a departure from these traditional and wise principles. Unless its "one man, one vote" thesis of state legislative apportionment is to be attributed to the unsupportable proposition that "Equal Protection" simply means indiscriminate equality, it seems inescapable that what *Reynolds* really reflected was but this Court's own views of how modern American representative government should be run. For it can hardly be thought that no other method of apportionment may be considered rational. See the dissenting opinion of

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[3] I think the somewhat different application of the Equal Protection Clause to racial discrimination cases finds justification in the fact that insofar as that clause may embody a particular value in addition to rationality, the historical origins of the Civil War Amendments might attribute to racial equality this special status. See, *e. g., Yick Wo* v. *Hopkins,* 118 U. S. 356; *Shelley* v. *Kraemer,* 334 U. S. 1; *Takahashi* v. *Fish & Game Comm'n,* 334 U. S. 410; *Brown* v. *Board of Education,* 347 U. S. 483; *Evans* v. *Newton,* 382 U. S. 296; cf. *Korematsu* v. *United States,* 323 U. S. 214, 216. See Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1949); Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 33 (1959).

A similar characterization of indigency as a "neutral fact," irrelevant or suspect for purposes of legislative classification, has never been accepted by this Court. See *Edwards* v. *California,* 314 U. S. 160, 184–185 (Jackson, J., concurring). *Griffin* v. *Illinois,* 351 U. S. 12, requiring free trial transcripts for indigent appellants, and *Douglas* v. *California,* 372 U. S. 353, requiring the appointment of counsel for such appellants, cannot fairly be so interpreted for although reference was made indiscriminately to both equal protection and due process the analysis was cast primarily in terms of the latter.

More explicit attempts to infuse "Equal Protection" with specific values have been unavailing. See, *e. g., Patsone* v. *Pennsylvania,* 232 U. S. 138 (alienage); *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379 (sex); *Kotch* v. *Board of River Port Pilot Comm'rs,* 330 U. S. 552, 564 (Rutledge, J., dissenting) (consanguinity).

STEWART, J., in *Lucas* v. *Forty-Fourth General Assembly of Colorado,* 377 U. S. 713, 744, and my own dissenting opinion in *Reynolds* v. *Sims, supra,* at pp. 615–624.

Following *Reynolds* the Court in *Carrington* v. *Rash,* 380 U. S. 89, applied the traditional equal protection standard in striking down a Texas statute disqualifying as voters in state elections certain members of the Armed Forces of the United States.[4] But today in holding unconstitutional state poll taxes and property qualifications for voting and *pro tanto* overruling *Breedlove* v. *Suttles,* 302 U. S. 277, and *Butler* v. *Thompson,* 341 U. S. 937, the Court reverts to the highly subjective judicial approach manifested by *Reynolds.* In substance the Court's analysis of the equal protection issue goes no further than to say that the electoral franchise is "precious" and "fundamental," *ante,* p. 670, and to conclude that "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor," *ante,* p. 668. These are of course captivating phrases, but they are wholly inadequate to satisfy the standard governing adjudication of the equal protection issue: Is there a rational basis for Virginia's poll tax as a voting qualification? I think the answer to that question is undoubtedly "yes." [5]

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[4] So far as presently relevant, my dissent in that case rested not on disagreement with the equal protection standards employed by the Court but only on disagreement with their application in that instance. 380 U. S., at 99–101.

[5] I have no doubt that poll taxes that deny the right to vote on the basis of race or color violate the Fifteenth Amendment and can be struck down by this Court. That question is presented to us in *Butts* v. *Harrison,* No. 655, the companion case decided today. The Virginia poll tax is on its face applicable to all citizens, and there was no allegation that it was discriminatorily enforced. The District Court explicitly found "no racial discrimination . . . in its application as a condition to voting." 240 F. Supp. 270, 271. Appellant in *Butts, supra,* argued first, that the Virginia Constitu-

Property qualifications and poll taxes have been a traditional part of our political structure. In the Colonies the franchise was generally a restricted one.[6] Over the years these and other restrictions were gradually lifted, primarily because popular theories of political representation had changed.[7] Often restrictions were lifted only after wide public debate. The issue of woman suffrage, for example, raised questions of family relationships, of participation in public affairs, of the very nature of the type of society in which Americans wished to live; eventually a consensus was reached, which culminated in the Nineteenth Amendment no more than 45 years ago.

Similarly with property qualifications, it is only by fiat that it can be said, especially in the context of American history, that there can be no rational debate as to their advisability. Most of the early Colonies had them; many of the States have had them during much of their histories; [8] and, whether one agrees or not, arguments have been and still can be made in favor of them. For example, it is certainly a rational argument that pay-

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tional Convention of 1902, which framed the poll-tax provision, was guided by a desire to reduce Negro suffrage, and second, that because of the generally lower economic standard of Negroes as contrasted with whites in Virginia the tax does in fact operate as a significant obstacle to voting by Negroes. The Court does not deal with this Fifteenth Amendment argument, and it suffices for me to say that on the record here I do not believe that the factors alluded to are sufficient to invalidate this $1.50 tax whether under the Fourteenth or Fifteenth Amendment.

[6] See generally Ogden, The Poll Tax in the South 2 (1958); 1 Thorpe, A Constitutional History of the American People, 1776–1850, at 92–98 (1898); Williamson, American Suffrage From Property to Democracy, 1760–1860, cc. 1–4 (1960).

[7] See Porter, A History of Suffrage in the United States 77–111 (1918); Thorpe, *op. cit. supra,* at 97, 401; Williamson, *op. cit. supra,* at 138–181.

[8] See generally Ogden, *op. cit. supra;* Porter, *op. cit. supra.*

ment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay $1.50 or thereabouts a year for the exercise of the franchise. It is also arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens.[9] Nondiscriminatory and fairly applied literacy tests, upheld by this Court in *Lassiter* v. *Northampton Election Board,* 360 U. S. 45, find justification on very similar grounds.

These viewpoints, to be sure, ring hollow on most contemporary ears. Their lack of acceptance today is evidenced by the fact that nearly all of the States, left to their own devices, have eliminated property or poll-tax qualifications; by the cognate fact that Congress and three-quarters of the States quickly ratified the Twenty-Fourth Amendment; and by the fact that rules such as

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[9] At the Constitutional Convention, for example, there was some sentiment to prescribe a freehold qualification for federal elections under Art. IV, § 1. The proposed amendment was defeated, in part because it was thought suffrage qualifications were best left to the States. See II Records of the Federal Convention 201–210 (Farrand ed. 1911). Madison's views were expressed as follows: "Whether the Constitutional qualification ought to be a freehold, would with him depend much on the probable reception such a change would meet with in States where the right was now exercised by every description of people. In several of the States a freehold was now the qualification. Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty." *Id.,* at 203. See also Aristotle, Politics, Bks. III, IV; I Tocqueville, Democracy in America, c. xiii, at 199–202 (Knopf ed. 1948).

the "pauper exclusion" in Virginia law, Va. Const. § 23, Va. Code § 24–18, have never been enforced.[10]

Property and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized. It is of course entirely fitting that legislatures should modify the law to reflect such changes in popular attitudes. However, it is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process. It was not too long ago that Mr. Justice Holmes felt impelled to remind the Court that the Due Process Clause of the Fourteenth Amendment does not enact the *laissez-faire* theory of society, *Lochner* v. *New York*, 198 U. S. 45, 75–76. The times have changed, and perhaps it is appropriate to observe that neither does the Equal Protection Clause of that Amendment rigidly impose upon America an ideology of unrestrained egalitarianism.[11]

I would affirm the decision of the District Court.

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[10] See *Harper* v. *Virginia State Board of Elections*, 240 F. Supp. 270, 271.

[11] Justice Holmes' admonition is particularly appropriate: "Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." 198 U. S., at 75–76.

Syllabus.

COMMISSIONER OF INTERNAL REVENUE *v.* TELLIER ET UX.

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

No. 351. Argued January 27, 1966.—
Decided March 24, 1966.

Respondent securities dealer was tried and found guilty of violating the Securities Act of 1933, the mail fraud statute and of conspiring to violate those statutes. His conviction was affirmed on appeal. He claimed a deduction on his income tax return for legal fees incurred in defending the prosecution. Although the Commissioner conceded that the fees were ordinary and necessary expenses of the respondent's securities business within the meaning of 26 U. S. C. § 162 (a) and therefore deductible under the literal requirements of that section, he disallowed the deduction on the ground of public policy. The Tax Court sustained his position but was reversed by the Court of Appeals. *Held:*

1. The federal income tax is a tax on net income and is not a sanction against wrongdoing. P. 691.

2. Deductions of expenses encompassed by § 162 (a), in the absence of specific legislation, are disallowed only where their allowance would severely and immediately frustrate sharply defined national or state policies proscribing particular forms of conduct. Pp. 693–694.

3. Where, as here, an accused exercises his constitutional right to employ counsel to defend against criminal charges, there is no offense to public policy and deduction of the expenses of his defense is proper. Pp. 694–695.

342 F. 2d 690, affirmed.

Jack S. Levin argued the cause for petitioner. With him on the brief were *Acting Solicitor General Spritzer, Acting Assistant Attorney General Roberts* and *Robert A. Bernstein.*

Michael Kaminsky argued the cause and filed a brief for respondents.

MR. JUSTICE STEWART delivered the opinion of the Court.

The question presented in this case is whether expenses incurred by a taxpayer in the unsuccessful defense of a criminal prosecution may qualify for deduction from taxable income under § 162 (a) of the Internal Revenue Code of 1954, which allows a deduction of "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ." [1] The respondent Walter F. Tellier was engaged in the business of underwriting the public sale of stock offerings and purchasing securities for resale to customers. In 1956 he was brought to trial upon a 36-count indictment that charged him with violating the fraud section of the Securities Act of 1933 [2] and the mail fraud statute,[3] and with conspiring to violate those statutes.[4] He was found guilty on all counts and was sentenced to pay an $18,000 fine and to serve four and a half years in prison. The judgment of conviction was affirmed on appeal.[5] In his unsuccessful defense of this criminal prosecution, the respondent incurred and paid $22,964.20 in legal expenses in 1956. He claimed a deduction for that amount on his federal income tax return for that year. The Commissioner disallowed the deduction and was sustained by the Tax Court. T. C. Memo. 1963–212, 22 CCH Tax Ct. Mem. 1062. The Court of Appeals for the Second Circuit reversed in a unanimous *en banc* decision, 342 F. 2d 690, and we granted certiorari. 382

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[1] "(a) In general.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ." 26 U. S. C. § 162.

[2] 48 Stat. 84, § 17, as amended, 15 U. S. C. § 77q (a).

[3] 18 U. S. C. § 1341.

[4] 18 U. S. C. § 371.

[5] *United States* v. *Tellier,* 255 F. 2d 441 (C. A. 2d Cir.).

U. S. 808. We affirm the judgment of the Court of Appeals.

There can be no serious question that the payments deducted by the respondent were expenses of his securities business under the decisions of this Court, and the Commissioner does not contend otherwise. In *United States* v. *Gilmore,* 372 U. S. 39, we held that "the origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences upon the fortunes of the taxpayer, is the controlling basic test of whether the expense was 'business' or 'personal' " within the meaning of § 162 (a). 372 U. S., at 49. Cf. *Kornhauser* v. *United States,* 276 U. S. 145, 153; *Deputy* v. *du Pont,* 308 U. S. 488, 494, 496. The criminal charges against the respondent found their source in his business activities as a securities dealer. The respondent's legal fees, paid in defense against those charges, therefore clearly qualify under *Gilmore* as "expenses paid or incurred . . . in carrying on any trade or business" within the meaning of § 162 (a).

The Commissioner also concedes that the respondent's legal expenses were "ordinary" and "necessary" expenses within the meaning of § 162 (a). Our decisions have consistently construed the term "necessary" as imposing only the minimal requirement that the expense be "appropriate and helpful" for "the development of the [taxpayer's] business." *Welch* v. *Helvering,* 290 U. S. 111, 113. Cf. *Kornhauser* v. *United States, supra,* at 152; *Lilly* v. *Commissioner,* 343 U. S. 90, 93–94; *Commissioner* v. *Heininger,* 320 U. S. 467, 471; *McCulloch* v. *Maryland,* 4 Wheat. 316, 413–415. The principal function of the term "ordinary" in § 162 (a) is to clarify the distinction, often difficult, between those expenses that are currently deductible and those that are in the nature of capital expenditures, which, if deductible at all,

must be amortized over the useful life of the asset. *Welch* v. *Helvering, supra,* at 113–116.[6] The legal expenses deducted by the respondent were not capital expenditures. They were incurred in his defense against charges of past criminal conduct, not in the acquisition of a capital asset. Our decisions establish that counsel fees comparable to those here involved are ordinary business expenses, even though a "lawsuit affecting the safety of a business may happen once in a lifetime." *Welch* v. *Helvering, supra,* at 114. *Kornhauser* v. *United States, supra,* at 152–153; cf. *Trust of Bingham* v. *Commissioner,* 325 U. S. 365, 376.[7]

It is therefore clear that the respondent's legal fees were deductible under § 162 (a) if the provisions of that section are to be given their normal effect in this case. The Commissioner and the Tax Court determined, however, that even though the expenditures meet the literal requirements of § 162 (a), their deduction must nevertheless be disallowed on the ground of public policy. That view finds considerable support in other administrative and judicial decisions.[8] It finds no support, how-

[6] See Griswold, An Argument Against the Doctrine that Deductions Should Be Narrowly Construed as a Matter of Legislative Grace, 56 Harv. L. Rev. 1142, 1145; Wolfman, Professors and the "Ordinary and Necessary" Business Expense, 112 U. Pa. L. Rev. 1089, 1111–1112.

[7] See Brookes, Litigation Expenses and the Income Tax, 12 Tax L. Rev. 241.

[8] See *Sarah Backer,* 1 B. T. A. 214; *Norvin R. Lindheim,* 2 B. T. A. 229; *Thomas A. Joseph,* 26 T. C. 562; *Burroughs Bldg. Material Co.* v. *Commissioner,* 47 F. 2d 178 (C. A. 2d Cir.); *Commissioner* v. *Schwartz,* 232 F. 2d 94 (C. A. 5th Cir.); *Acker* v. *Commissioner,* 258 F. 2d 568 (C. A. 6th Cir.); *Bell* v. *Commissioner,* 320 F. 2d 953 (C. A. 8th Cir.); *Peckham* v. *Commissioner,* 327 F. 2d 855, 856 (C. A. 4th Cir.); *Port* v. *United States,* 143 Ct. Cl. 334, 163 F. Supp. 645. See also Note, Business Expenses, Disallowance, and Public Policy: Some Problems of Sanctioning with the

ever, in any regulation or statute or in any decision of this Court, and we believe no such "public policy" exception to the plain provisions of § 162 (a) is warranted in the circumstances presented by this case.

We start with the proposition that the federal income tax is a tax on net income, not a sanction against wrongdoing. That principle has been firmly imbedded in the tax statute from the beginning. One familiar facet of the principle is the truism that the statute does not concern itself with the lawfulness of the income that it taxes. Income from a criminal enterprise is taxed at a rate no higher and no lower than income from more conventional sources. "[T]he fact that a business is unlawful [does not] exempt it from paying the taxes that if lawful it would have to pay." *United States* v. *Sullivan,* 274 U. S. 259, 263. See *James* v. *United States,* 366 U. S. 213.

With respect to deductions, the basic rule, with only a few limited and well-defined exceptions, is the same. During the Senate debate in 1913 on the bill that became the first modern income tax law, amendments were rejected that would have limited deductions for losses to those incurred in a "legitimate" or "lawful" trade or business. Senator Williams, who was in charge of the bill, stated on the floor of the Senate that

> "[T]he object of this bill is to tax a man's net income; that is to say, what he has at the end of the year after deducting from his receipts his expenditures or losses. It is not to reform men's moral characters; that is not the object of the bill at all.

Internal Revenue Code, 72 Yale L. J. 108; 4 Mertens, Law of Federal Income Taxation § 25.49 ff. Compare *Longhorn Portland Cement Co.,* 3 T. C. 310; G. C. M. 24377, 1944 Cum. Bull. 93; Lamont, Controversial Aspects of Ordinary and Necessary Business Expense, 42 Taxes 808, 833–834.

> The tax is not levied for the purpose of restraining people from betting on horse races or upon 'futures,' but the tax is framed for the purpose of making a man pay upon his net income, his actual profit during the year. The law does not care where he got it from, so far as the tax is concerned, although the law may very properly care in another way." 50 Cong. Rec. 3849.[9]

The application of this principle is reflected in several decisions of this Court. As recently as *Commissioner* v. *Sullivan,* 356 U. S. 27, we sustained the allowance of a deduction for rent and wages paid by the operators of a gambling enterprise, even though both the business itself and the specific rent and wage payments there in question were illegal under state law. In rejecting the Commissioner's contention that the illegality of the enterprise required disallowance of the deduction, we held that, were we to "enforce as federal policy the rule espoused by the Commissioner in this case, we would come close to making this type of business taxable on the basis of its gross receipts, while all other business would be taxable on the basis of net income. If that choice is to be made, Congress should do it." *Id.,* at 29. In *Lilly* v. *Commissioner,* 343 U. S. 90, the Court upheld deductions claimed by opticians for amounts paid to doctors who prescribed the eyeglasses that the opticians sold, although the Court was careful to disavow "approval of the business ethics or public policy involved in the payments . . . ." 343 U. S., at 97. And in *Commissioner* v. *Heininger,* 320 U. S. 467, a case akin to the one before us, the Court upheld deductions claimed

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[9] In challenging the amendments, Senator Williams also stated: "In other words, you are going to count the man as having money which he has not got, because he has lost it in a way that you do not approve of." 50 Cong. Rec. 3850.

by a dentist for lawyer's fees and other expenses incurred in unsuccessfully defending against an administrative fraud order issued by the Postmaster General.

Deduction of expenses falling within the general definition of § 162 (a) may, to be sure, be disallowed by specific legislation, since deductions "are a matter of grace and Congress can, of course, disallow them as it chooses." *Commissioner* v. *Sullivan,* 356 U. S., at 28.[10] The Court has also given effect to a precise and long-standing Treasury Regulation prohibiting the deduction of a specified category of expenditures; an example is lobbying expenses, whose nondeductibility was supported by considerations not here present. *Textile Mills Corp.* v. *Commissioner,* 314 U. S. 326; *Cammarano* v. *United States,* 358 U. S. 498. But where Congress has been wholly silent, it is only in extremely limited circum-

[10] Specific legislation denying deductions for payments that violate public policy is not unknown. *E. g.,* Internal Revenue Code of 1954, § 162 (c) (disallowance of deduction for payments to officials and employees of foreign countries in circumstances where the payments would be illegal if federal laws were applicable; cf. Treas. Reg. § 1.162–18); § 165 (d) (deduction for wagering losses limited to extent of wagering gains). See also Stabilization Act of 1942, § 5 (a), 56 Stat. 767, 50 U. S. C. App. § 965 (a) (1946 ed.), Defense Production Act of 1950, § 405 (a), 64 Stat. 807, as amended, c. 275, § 104 (i), 65 Stat. 136 (1951), 50 U. S. C. App. § 2105 (a) (1952 ed.), and Defense Production Act of 1950, § 405 (b), 64 Stat. 807, 50 U. S. C. App. § 2105 (b) (1952 ed.) (general authority in President to prescribe extent to which payments violating price and wage regulations should be disregarded by government agencies, including the Internal Revenue Service; see Rev. Rul. 56–180, 1956–1 Cum. Bull. 94). Cf. Treas. Reg. § 1.162–1 (a), which provides that "Penalty payments with respect to Federal taxes, whether on account of negligence, delinquency, or fraud, are not deductible from gross income"; Joint Committe on Internal Revenue Taxation, Staff Study of Income Tax Treatment of Treble Damage Payments under the Antitrust Laws, Nov. 1, 1965, p. 16 (proposal that § 162 be amended to deny deductions for certain fines, penalties, treble-damage payments, bribes, and kickbacks).

stances that the Court has countenanced exceptions to the general principle reflected in the *Sullivan, Lilly* and *Heininger* decisions. Only where the allowance of a deduction would "frustrate sharply defined national or state policies proscribing particular types of conduct" have we upheld its disallowance. *Commissioner* v. *Heininger,* 320 U. S., at 473. Further, the "policies frustrated must be national or state policies evidenced by some *governmental* declaration of them." *Lilly* v. *Commissioner,* 343 U. S., at 97. (Emphasis added.) Finally, the "test of nondeductibility always is the severity and immediacy of the frustration resulting from allowance of the deduction." *Tank Truck Rentals* v. *Commissioner,* 356 U. S. 30, 35. In that case, as in *Hoover Express Co.* v. *United States,* 356 U. S. 38, we upheld the disallowance of deductions claimed by taxpayers for fines and penalties imposed upon them for violating state penal statutes; to allow a deduction in those circumstances would have directly and substantially diluted the actual punishment imposed.

The present case falls far outside that sharply limited and carefully defined category. No public policy is offended when a man faced with serious criminal charges employs a lawyer to help in his defense. That is not "proscribed conduct." It is his constitutional right. *Chandler* v. *Fretag,* 348 U. S. 3. See *Gideon* v. *Wainwright,* 372 U. S. 335. In an adversary system of criminal justice, it is a basic of our public policy that a defendant in a criminal case have counsel to represent him.

Congress has authorized the imposition of severe punishment upon those found guilty of the serious criminal offenses with which the respondent was charged and of which he was convicted. But we can find no warrant for attaching to that punishment an additional financial burden that Congress has neither expressly nor im-

plicitly directed.[11] To deny a deduction for expenses incurred in the unsuccessful defense of a criminal prosecution would impose such a burden in a measure dependent not on the seriousness of the offense or the actual sentence imposed by the court, but on the cost of the defense and the defendant's particular tax bracket. We decline to distort the income tax laws to serve a purpose for which they were neither intended nor designed by Congress.

The judgment is

Affirmed.

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[11] Cf. Paul, The Use of Public Policy by the Commissioner in Disallowing Deductions, 1954 So. Calif. Tax Inst. 715, 730–731: ". . . Section 23 (a)(1)(A) [the predecessor of § 162 (a)] is not an essay in morality, designed to encourage virtue and discourage sin. It 'was not contrived as an arm of the law to enforce State criminal statutes . . . .' Nor was it contrived to implement the various regulatory statutes which Congress has from time to time enacted. The provision is more modestly concerned with 'commercial net income'—a businessman's net accretion in wealth during the taxable year after due allowance for the operating costs of the business. . . . There is no evidence in the Section of an attempt to punish taxpayers . . . when the Commissioner feels that a state or federal statute has been flouted. The statute hardly operates 'in a vacuum,' if it serves its own vital function and leaves other problems to other statutes."

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL–CIO *v.* HOOSIER CARDINAL CORP.

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

No. 387. Argued January 27, 1966.—Decided March 24, 1966.

Petitioner union and respondent company were parties to a collective bargaining agreement which required payment of accumulated vacation pay to qualified employees upon termination of their employment. In June 1957 the company discharged employees covered by the agreement without such payment. An action brought in the Indiana courts to recover the amounts allegedly due was dismissed in 1960 on the ground that the complaint was insufficient under state law. Almost four years later and almost seven years after the employees' discharge, the union brought this action in the Federal District Court under § 301 of the Labor Management Relations Act, 1947. The Act contains no time limitation upon the bringing of an action under § 301. The District Court viewed the action as based partly on the collective bargaining agreement and partly on the oral contract of each employee and held that Indiana in such case would apply its six-year statute of limitations governing contracts not in writing. The complaint was accordingly dismissed as untimely and the Court of Appeals affirmed. *Held:*

1. A union may properly sue under § 301 to recover wages or vacation pay claimed by its members pursuant to a collective bargaining agreement. *Smith* v. *Evening News Assn.*, 371 U. S. 195, 198. Pp. 699–700.

2. The timeliness of a suit under § 301, there being no governing federal provision, is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations. Pp. 701–704.

(a) The fact that Congress did not provide a uniform limitations provision for § 301 suits does not require that the courts invent one. P. 703.

(b) State statutes have repeatedly supplied the periods of limitation for federal causes of action when federal legislation has been silent. Pp. 703–704.

3. The characterization of this suit as one not exclusively based on a written contract, and the application of the Indiana six-year statute of limitations, do not conflict with federal labor policy. Pp. 705–707.

4. The statute of limitations was not tolled in this case by the prior litigation. *Burnett* v. *New York Central R. Co.*, 380 U. S. 424, distinguished. Pp. 707–708.

346 F. 2d 242, affirmed.

Stephen I. Schlossberg argued the cause for petitioner. With him on the briefs were *Joseph L. Rauh, Jr.*, and *John Silard.*

Harry P. Dees argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

Section 301 of the Labor Management Relations Act, 1947, confers jurisdiction upon the federal district courts over suits upon collective bargaining contracts.[1] Nowhere

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[1] We use the term "collective bargaining contracts" for convenience only, and do not intend to suggest that § 301 is limited to such contracts. See *Retail Clerks* v. *Lion Dry Goods*, 369 U. S. 17. Section 301 provides:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, 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.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as

in the Act, however, is there a provision for any time limitation upon the bringing of an action under § 301. The questions presented by this case arise because of the absence of such a provision.

The petitioner union and the respondent company were parties to a collective bargaining contract within the purview of § 301. The contract contained a section governing vacations. One clause in this section dealt with payment of accumulated vacation pay, by providing: "Employees who qualified for a vacation in the previous year and whose employment is terminated for any reason before the vacation is taken will be paid that vacation at time of termination." On June 1, 1957, prior to the expiration of the contract, the company terminated the employment of employees covered by the agreement, but it did not pay them any accumulated vacation pay. Since that date, two lawsuits have been brought to recover amounts allegedly due. The first was a class action in early 1958, brought against the company in an Indiana court, but the court ruled that such

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an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 61 Stat. 156–157, 29 U. S. C. § 185 (1964 ed.).

an action was impermissible under Indiana law. In an attempt to remedy this pleading defect, the former employees assigned their vacation pay claims to a union representative who then filed an amended complaint, but this form of action, too, was held improper under Indiana law. Thereafter, by further amended complaints, the employees sought to reform and reinstitute the class action, but once again the trial court held the complaint insufficient as a matter of state law. The court dismissed the suit in June 1960, and the judgment of dismissal was affirmed on appeal. *Johnson* v. *Hoosier Cardinal Corp.*, 134 Ind. 477, 189 N. E. 2d 592.

Almost four years after the dismissal of that lawsuit by the Indiana trial court, and almost seven years after the employees had left the company, the union filed the present action in the United States District Court for the Southern District of Indiana. On the company's motion, the trial court dismissed the complaint, concluding that the suit was barred by a six-year Indiana statute of limitations. The court regarded this action as based partly upon the written collective bargaining agreement and partly upon the oral employment contract each employee had made, and it held that Indiana would apply to such a hybrid action its six-year statute governing contracts not in writing. Ind. Stat. Ann. § 2–601 (1965 Supp.). 235 F. Supp. 183. The Court of Appeals for the Seventh Circuit affirmed, 346 F. 2d 242, and we granted certiorari, 382 U. S. 808.

We note at the outset that this action was properly brought by the union under § 301. There is no merit to the contention that a union may not sue to recover wages or vacation pay claimed by its members pursuant to the terms of a collective bargaining contract. Such a suit is among those "[s]uits for violation of contracts between an employer and a labor organization" that § 301 was designed to permit. This conclusion is unimpaired

by the fact that each worker's claim may also depend upon the existence of his individual contract of employment. See *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332, 335–336. In *Smith* v. *Evening News Assn.,* 371 U. S. 195, we rejected the view, once held for varying reasons by a majority of this Court, *Association of Westinghouse Salaried Employees* v. *Westinghouse Corp.,* 348 U. S. 437, "that § 301 did not give the . . . courts jurisdiction over a suit brought by a union to enforce employee rights . . . characterized as . . . arising 'from separate hiring contracts between the employer and each employee.'" 371 U. S., at 198. Although the *Smith* case was brought by an individual worker, there is every reason to recognize the union's standing to vindicate employee rights under a contract the union obtained. Such recognition is fully consistent with the language of § 301 (b): "Any . . . labor organization may sue . . . in behalf of the employees whom it represents in the courts of the United States." 61 Stat. 156, 29 U. S. C. § 185 (b) (1964 ed.).[2] And indeed, the union's standing to vindicate employee rights under § 301 implements no more than the established doctrine that the union's role in the collective bargaining process does not end with the making of the contract.[3]

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[2] See also Rule 17 (a) of the Federal Rules of Civil Procedure; *Dowd Box* v. *Courtney,* 368 U. S. 502, 504; *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U. S. 593.

[3] See, *e. g., Conley* v. *Gibson,* 355 U. S. 41, 46; Comment, 28 U. Chi. L. Rev. 707, 716.

That the employees in this case did not assign their claims to the union presents no barrier to the union's standing to sue in their behalf. Such a technical requirement would conflict with one of the widely recognized purposes of Congress in enacting § 301—the elimination of common-law procedural obstacles to suits for breach of collective bargaining agreements. See, *e. g., Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 451. Meltzer, The Supreme

Since this suit was properly brought under § 301, the question of its timeliness is squarely presented. It is clearly a federal question, for in § 301 suits the applicable law is "federal law, which the courts must fashion from the policy of our national labor laws." *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 456. Relying upon that statement and upon the coordinate principle that "incompatible doctrines of local law must give way to principles of federal labor law," *Teamsters Local* v. *Lucas Flour Co.,* 369 U. S. 95, 102, the union contends that this suit cannot be barred by a statute of limitations enacted by a State. We are urged instead to devise a uniform time limitation to close the statutory gap left by Congress. But the teaching of our cases does not require so bald a form of judicial innovation. *Lincoln Mills* instructs that, in fashioning federal law, the "range of judicial inventiveness will be determined by the nature of the problem." 353 U. S., at 457. We do not question that there are problems so vital to the implementation of federal labor policy that they will command a high degree of inventiveness from the courts. The problem presented here, however, is not of that nature.

It is true that if state limitations provisions govern § 301 suits, these suits will lack a uniform standard of timeliness. It is also true that the subject matter of § 301 is "peculiarly one that calls for uniform law." *Teamsters Local* v. *Lucas Flour Co., supra,* at 103. Our cases have defined the need for uniformity, however, in terms that are largely inapplicable here:

> "The possibility that individual contract terms might have different meanings under [two systems of law] would inevitably exert a disruptive influence upon both the negotiation and administration of col-

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Court, Congress, and State Jurisdiction Over Labor Relations: II, 59 Col. L. Rev. 269.

lective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.

". . . The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy." *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95, 103–104.

The need for uniformity, then, is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it. For the most part, statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy. Thus, although a uniform limitations provision for § 301 suits might well

constitute a desirable statutory addition, there is no justification for the drastic sort of judicial legislation that is urged upon us.[4] See *Smith* v. *Evening News Assn., supra,* at 203 (BLACK, J., dissenting).

That Congress did not provide a uniform limitations provision for § 301 suits is not an argument for judicially creating one, unless we ignore the context of this legislative omission. It is clear that Congress gave attention to limitations problems in the Labor Management Relations Act, 1947; it enacted a six months' provision to govern unfair labor practice proceedings, 61 Stat. 146, 29 U. S. C. § 160 (b) (1964 ed.), and it did so only after appreciable controversy.[5] In this context, and against the background of the relationship between Congress and the courts on the question of limitations provisions, it cannot be fairly inferred that when Congress left § 301 without a uniform time limitation, it did so in the expectation that the courts would invent one. As early as 1830, this Court held that state statutes of limitations govern the timeliness of federal causes of action unless

[4] Our cases have spoken of the federal law applicable to § 301 suits as "substantive," see, *e. g., Textile Workers* v. *Lincoln Mills,* 353 U. S., at 456, and the need for uniformity in the "substantive principles" that govern these suits. See *Teamsters Local* v. *Lucas Flour Co.,* 369 U. S., at 103. In the view we take of the problem presented here, we need not decide whether statutes of limitations are "substantive" or "procedural." See *Guaranty Trust Co.* v. *York,* 326 U. S. 99; *Burnett* v. *New York Central R. Co.,* 380 U. S. 424, 427, note 2. Nor need we rigidly classify them as "primary" or "remedial." To the extent that these terms are useful, we need only notice that lack of uniformity in limitations provisions is unlikely to have substantial effect upon the private definition or effectuation of "substantive" or "primary" rights in the collective bargaining process. See Wellington, Labor and the Federal System, 26 U. Chi. L. Rev. 542, 556–559.

[5] Compare, *e. g.,* the remarks of Senator Wagner, 93 Cong. Rec. 3323, and those of Senator Murray, 93 Cong. Rec. 4030, with the remarks of Senator Smith, 93 Cong. Rec. 4283.

Congress has specifically provided otherwise. *McCluny* v. *Silliman,* 3 Pet. 270, 277. In 1895, the question was re-examined in another context, but the conclusion remained firm. *Campbell* v. *Haverhill,* 155 U. S. 610. Since that time, state statutes have repeatedly supplied the periods of limitations for federal causes of action when federal legislation has been silent on the question.[6] *E. g., McClaine* v. *Rankin,* 197 U. S. 154, *Cope* v. *Anderson,* 331 U. S. 461 (National Bank Act); *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390 (Sherman Act); *O'Sullivan* v. *Felix,* 233 U. S. 318 (Civil Rights Act of 1870); *Englander Motors, Inc.* v. *Ford Motor Co.,* 293 F. 2d 802 (C. A. 6th Cir.) (Clayton Act); but see *Holmberg* v. *Armbrecht,* 327 U. S. 392 (Federal Farm Loan Act). Yet when Congress has disagreed with such an interpretation of its silence, it has spoken to overturn it by enacting a uniform period of limitations. *E. g.,* 69 Stat. 283, 15 U. S. C. § 15b (1964 ed.) (Clayton Act); 35 U. S. C. § 286 (Patent Act). See also *Herget* v. *Central Bank Co.,* 324 U. S. 4. Against this background, we cannot take the omission in the present statute as a license to judicially devise a uniform time limitation for § 301 suits.

Accordingly, since no federal provision governs, we hold that the timeliness of a § 301 suit, such as the

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[6] In *McAllister* v. *Magnolia Petroleum Co.,* 357 U. S. 221, this Court held that, "where an action for unseaworthiness is combined with an action under the Jones Act a court cannot apply to the former a shorter period of limitations than Congress has prescribed for the latter." 357 U. S., at 224. The *McAllister* case represents no departure from the tradition discussed in the text. The Court's decision rested on the peculiar configuration of the federal maritime remedies. A seaman suing for both unseaworthiness and Jones Act negligence must do so in a single proceeding. *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316. The Court had no occasion in *McAllister* to consider whether a state period longer than that provided in the Jones Act could be applied. 357 U. S., at 227 (BRENNAN, J., concurring).

present one, is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations.[7] This leaves two subsidiary questions to be decided. Which of Indiana's limitations provisions governs? [8] Does any tolling principle preserve the timeliness of this action?

The union argues that if the timeliness of this action is to be determined by reference to Indiana statutes, federal law precludes reference to the Indiana six-year provision governing contracts not in writing. Reference must be made instead, it is urged, to the Indiana 20-year provision governing written contracts. Ind. Stat. Ann. § 2–602 (1965 Supp.). This contention rests on the view that under federal law this § 301 suit must be re-

[7] The present suit is essentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreement. Such an action closely resembles an action for breach of contract cognizable at common law. Whether other § 301 suits different from the present one might call for the application of other rules on timeliness, we are not required to decide, and we indicate no view whatsoever on that question. See, *e. g.*, *Holmberg* v. *Armbrecht*, 327 U. S. 392; *Moviecolor Limited* v. *Eastman Kodak Co.*, 288 F. 2d 80 (C. A. 2d Cir.); 2 Moore Federal Practice ¶ 3.07[1]–[3], at 740–764 (2d ed. 1965); Hill, State Procedural Law in Federal Nondiversity Litigation, 69 Harv. L. Rev. 66, 111–114.

[8] The record indicates that Indiana is both the forum State and the State in which all operative events occurred. Neither party has suggested that the limitations provision of another State is relevant. There is therefore no occasion to consider whether such a choice of law should be made in accord with the principle of *Klaxon Co.* v. *Stentor Mfg. Co.*, 313 U. S. 487, or by operation of a different federal conflict of laws rule. See *Richards* v. *United States*, 369 U. S. 1; *De Sylva* v. *Ballentine*, 351 U. S. 570; *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156; *McKenzie* v. *Irving Trust Co.*, 323 U. S. 365; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447. See also discussion in Hart & Wechsler, The Federal Courts and the Federal System 696 *et seq.*

garded as exclusively bottomed upon the written collective bargaining agreement. We agree that the characterization of this action for the purpose of selecting the appropriate state limitations provision is ultimately a question of federal law. *Textile Workers* v. *Lincoln Mills, supra; McClaine* v. *Rankin, supra.* But there is no reason to reject the characterization that state law would impose unless that characterization is unreasonable or otherwise inconsistent with national labor policy. Cf. *Reconstruction Finance Corp.* v. *Beaver County,* 328 U. S. 204, 210; *De Sylva* v. *Ballentine,* 351 U. S. 570, 580–582.

Applying this principle, we cannot agree that federal law requires that this action be regarded as exclusively based upon a written contract. For purposes of § 301 jurisdiction, we have rejected the view that a suit such as this is based solely upon the separate hiring contracts, frequently oral, between the employer and each employee. *Smith* v. *Evening News Assn., supra.* It does not follow, however, that the separate contracts of employment may not be taken into account in characterizing the nature of a specific § 301 suit for the purpose of selecting the appropriate state limitations provision. Indeed, as the present case indicates, consideration of the separate contracts for that purpose is entirely acceptable. The petitioner seeks damages based upon an alleged breach of the vacation pay clause in a written collective bargaining agreement. Proof of the breach and of the measure of damages, however, both depend upon proof of the existence and duration of separate employment contracts between the employer and each of the aggrieved employees. Hence, this § 301 suit may fairly be characterized as one not exclusively based upon a written contract.

Moreover, the characterization that Indiana law imposes upon this action does not lead to any conflict with

federal labor policy. Indeed, to the extent that a policy is manifest in the Labor Management Relations Act, it supports acceptance of the characterization adopted here. The six months' provision governing unfair labor practice proceedings, 61 Stat. 146, 29 U. S. C. § 160 (b), suggests that relatively rapid disposition of labor disputes is a goal of federal labor law. Since state statutes of limitations governing contracts not exclusively in writing are generally shorter than those applicable to wholly written agreements, their applicability to § 301 actions comports with that goal. There may, of course, be § 301 actions that can only be characterized fairly as based exclusively upon a written agreement. But since many § 301 actions for wages or other individual benefits will concern employment contracts of the sort involved here, there is no reason to inhibit the achievement of an identifiable goal of labor policy by precluding application of the generally shorter limitations provisions.[9]

Accordingly, we accept the District Court's application of the six-year Indiana statute of limitations to this action. Cf. *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 204–205; *Steele* v. *General Mills*, 329 U. S. 433, 438. Thus, since this federal lawsuit was not filed until almost seven years after the cause of action accrued, the cause

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[9] Other questions would be raised if this case presented a state law characterization of a § 301 suit that reasonably described the nature of the cause of action, but required application of an unusually short or long limitations period. See, *e. g.*, N. M. Stat. § 59–3–4 (1953) (an action for wages "must be commenced within sixty [60] days from the date of discharge. . . ."). See *Campbell* v. *Haverhill*, 155 U. S. 610, 615; *Caldwell* v. *Alabama Dry Dock & Shipbuilding Co.*, 161 F. 2d 83 (C. A. 5th Cir.); Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797, 805–806.

is barred by the six-year statute unless that statute was somehow tolled by reason of the particularized circumstances of this case.[10]

The contention that some tolling principle saves the life of this action was raised for the first time in this Court. In any event, we find the contention without merit. In *Burnett* v. *New York Central R. Co.*, 380 U. S. 424, we held that the bringing of a timely action under the Federal Employers' Liability Act in a state court, even though venue was improper, served to toll the statute of limitations contained in that Act. The primary underpinning of *Burnett*, however, is wholly lacking here. As the Court noted in that case, a tolling principle was necessary to implement the national policy of a uniform time bar clearly expressed by Congress when it enacted the FELA limitations provision. 380 U. S., at 434. Section 301 of the Labor Management Relations Act establishes no such policy of uniformity expressed in a national limitations provision. Moreover, unlike the plaintiff in *Burnett* who could no longer bring a timely federal action after the state court dismissed his complaint, the union here had a full three years to bring this lawsuit in federal court after the dismissal of the state court action.[11] Under these circumstances, we have no difficulty in concluding that this cause of action expired in June 1963, six years after it arose.

Affirmed.

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[10] Neither party has suggested that the cause of action "accrued" on any date other than June 1, 1957, when the company terminated the employees' jobs. Cf. *Rawlings* v. *Ray*, 312 U. S. 96; *Cope* v. *Anderson*, 331 U. S. 461; *Moviecolor Limited* v. *Eastman Kodak Co.*, 288 F. 2d 80, 83 (C. A. 2d Cir.).

[11] It should be noted also that Indiana has a saving statute, Ind. Ann. Stat. § 2–608 (1946 Repl. Vol.), but the union has never contended that it preserves the timeliness of this suit.

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

Certain principles are undisputed in this case. The period of limitations for § 301 suits is to be determined by federal law; and, since Congress has made no express provision for any time limitation, this Court must fashion the governing rule. By adopting the statutes of the several States, the Court creates 50 or more different statutes of limitations [1] rather than fashioning a uniform rule after consideration of relevant federal and state statutes.

The Court justifies its decision in part by reliance on cases decided under the Rules of Decisions Act, 28 U. S. C. § 1652 (1964 ed.), which interpreted "the silence of Congress . . . to mean that it is federal policy to adopt the local law of limitation." *Holmberg* v. *Armbrecht,* 327 U. S. 392, 395; see, *e. g., Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390, 397; *Campbell* v. *Haverhill,* 155 U. S. 610; *McCluny* v. *Silliman,* 3 Pet. 270, 277. But the cases also establish that the silence of Congress is not to be read as automatically putting an imprimatur on state law. Rather, state law is applied only because it supplements and fulfills federal policy, and the ultimate question is what federal policy requires. See *Board of County Comm'rs* v. *United States,* 308 U. S. 343, 350–352; *Holmberg* v. *Armbrecht,* 327 U. S. 392, 394–395; *Association of Westinghouse Salaried Employees* v. *Westinghouse Corp.,* 348 U. S. 437, 463 (Reed, J., concurring).

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[1] The Court's approach adopts (and thereby creates as federal law) at least one limitations statute for each State and Territory. In many States it adopts a multitude of limitations provisions, each applicable to a particular type of § 301 suit. The Court's opinion suggests, for example, that had the present suit been "exclusively based upon a written contract," *ante,* at p. 706, the Indiana 20-year, rather than the six-year, statute would have governed.

More specifically, it is quite clear that with respect to § 301 suits congressional silence extends not just to the question of limitations but encompasses the entirety of the governing legal principles. Rather than inferring from congressional silence that state law was to govern, *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, held that the federal courts were to "fashion from the policy of our national labor laws" general federal law applicable to suits on collective bargaining agreements. *Id.,* at 456. Although *Lincoln Mills* recognized that "state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy," *id.,* at 457, it did not intimate in any way that federal policy would be furthered by the adoption of 50 different state rules. To the contrary, subsequent decisions have recognized that "[c]omprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*" and that, "[m]ore important, the subject matter of § 301 (a) 'is peculiarly one that calls for uniform law.'" *Teamsters Local* v. *Lucas Flour Co.,* 369 U. S. 95, 103. There is, therefore, no sound basis for saying that Congress by its silence on the limitations matter intended the state laws to apply or for adopting diverse state laws simply because of a reluctance to supply what Congress omitted. The courts *are* expected to develop the law of labor contracts, and this case represents only another task in this process.

The Court reasons, however, that to devise a uniform time limitation would be too "bald a form of judicial innovation." *Ante,* at p. 701. Cases defining a need for uniformity in § 301 suits are said to be limited to matters concerning which the possible application of varying systems of law " 'would inevitably exert a disruptive influence upon both the negotiation and administration of

collective agreements.'" *Ante,* at pp. 701–702. Since, according to the majority, the lack of a uniform statute of limitations would generally not have that effect,[2] the Court concludes that although such a uniform provision "might well constitute a desirable statutory addition, there is no justification for the drastic sort of judicial legislation that is urged upon us." *Ante,* at pp. 702–703.

The Court is undoubtedly correct in stating that a uniform limitations period would be desirable. Suppose, for example, that the collective bargaining contract in dispute was one made in Detroit for a multi-state unit of truck drivers and that, as is true in this case, 100 of the covered employees were discharged without payment of accumulated vacation pay. Suppose further that some of the employees were hired in Chicago and discharged in Indiana while others were hired in St. Louis, Cleveland, and Terre Haute and were discharged in Illinois, Michigan, and Iowa (in whatever combinations are preferred). Suppose, finally, that some sue in Indiana, some in other States, some in federal court, and some in state court. Simple justice dictates in such a situation

[2] However, limitations questions will have an impact on the negotiation and administration of the collective agreement in many instances—for example, if the parties decide to limit by contract the period for bringing suit. The laws of the several States vary with respect to the enforceability of such contractual limitations periods, particularly when it is asserted that the agreed period is unreasonable, see Williston on Contracts § 183, at 711, n. 10 (Jaeger 3d ed. 1957); Note, 63 Harv. L. Rev. 1177, 1181–1182 (1950). It may be assumed that, under the test advanced by the majority, uniform federal law will be fashioned to determine their validity, just as, at least in some circumstances, federal law will determine when the cause of action arose, see *Cope* v. *Anderson,* 331 U. S. 461; *Rawlings* v. *Ray,* 312 U. S. 96, and whether the running of limitations was tolled by fraudulent concealment, see *Holmberg* v. *Armbrecht,* 327 U. S. 392; *Moviecolor Limited* v. *Eastman Kodak Co.,* 288 F. 2d 80 (C. A. 2d Cir. 1961).

that the right of employees in different States to assert their federal claim should be equally available. Clearly there is no sense or justice in referring to 50 or more different statutes of limitations so that one employee may be barred after one year while another employee may sue any time within six years. Nor is there any reason why an employer operating under the contract in one State should be bothered with stale claims already barred as against other employers in other States.

Moreover, the Court's decision creates unnecessary complexities and opportunities for vexatious litigation, some of which are reflected in the Court's opinion. Thus the Court notes that in a situation involving multi-state contacts, such as the example given above, a federal court hearing the case would be required to decide whether to apply a federal, or the forum State's, conflict of laws rules to select the State of governing law. If this Court ultimately holds that a federal conflict of laws rule is to govern in federal court suits, the additional question will be presented of whether the federal conflict of laws rule must also be applied by state courts or whether they may continue to apply their own conflict of laws rule. Whatever conflict of laws rule, state or federal, is selected, there will remain the difficult task of applying that rule to find the State whose limitations statute is to control. In cases not involving multi-state contacts, the court may have to choose between two or more state statutes; here the choice is between the limitations period for suits on written contracts and the period for suits on oral contracts. Under today's decision, this choice is to be governed by the State's characterization of the federal action (or a federal court's Delphic opinion of what that characterization would be), "unless that characterization is unreasonable or otherwise inconsistent with national labor policy." *Ante*, at p. 706. The gov-

erning state limitations statute, having finally been determined, is to be applied unless the period is "unusually short or long." [3] *Ante,* at p. 707, n. 9. The problems we have indicated are merely illustrative of the complex questions that must be decided under the Court's approach before it can be determined which of several competing state statutes is to be applied and whether such application is reasonable when tested by the federal labor policy; undoubtedly the fertile imagination of counsel will conceive additional intricacies. The desirability of a single, uniform, federal statute to further justice and to avoid such litigation-creating complexities was of course recognized by Congress in passing the statutes, to which the majority refers, that overruled in particular areas past refusals of this Court to fashion such a uniform rule.

The case for the Court's decision thus ultimately comes down to the proposition that fashioning a uniform federal statute would involve too bald an exercise of judicial innovation. This is an argument I have difficulty in fathoming. Courts have not always been reluctant to "create" statutes of limitations, the common-law doctrine of prescription by which judgments are presumed to have been paid after the lapse of 20 years, see *Gaines* v. *Miller,* 111 U. S. 395, 399; *McElmoyle* v. *Cohen,* 13 Pet. 312, 327, being just one example. In equity they have applied the doctrine of laches, see *Holmberg* v. *Armbrecht,* 327 U. S. 392. But here there is no dispute concerning whether a statute of limitations is to be fashioned—the choice is between one statute or 50. If the Court is to develop the substantive law of labor contracts,

[3] Unfortunately the Court provides no enlightenment concerning where we are to look for a limitations period should the state statute be held unreasonable. Perhaps in extremis even the Court's approach will require the kind of innovation it now rejects.

which it has undertaken to do with the blessing of Congress, it seems odd that the Court should balk at establishing a single limitations period, drawn from any of the sources available to it, including the relevant federal and state statutes. I undertake no such canvass here,[4] but think the Court should do so. I therefore dissent.

[4] Nor do I intimate any opinion concerning the tolling question mooted in the Court's opinion.

Syllabus.

UNITED MINE WORKERS OF AMERICA *v.* GIBBS.

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

No. 243. Argued January 20, 1966.—Decided March 28, 1966.

A coal company closed a mine in Tennessee and laid off miners belonging to one of petitioner's local unions. Thereafter the company, through a subsidiary, attempted to open a new mine nearby with members of a rival union. Respondent was hired as mine superintendent and given a contract to truck coal to the nearest rail loading point. On August 15 and 16, 1960, armed members of petitioner's local forcibly prevented the opening of the mine, threatened respondent, and assaulted an organizer for the rival union. Petitioner's area representative was away at a union board meeting when he learned of the violence. He returned late on August 16 with instructions to establish a limited picket line, prevent further violence, and to see that neighboring mines were not struck. There was no further violence at the mine site; a picket line was maintained for nine months; and no further effort was made to open the mine. Respondent lost his job as superintendent, never performed his haulage contract, and allegedly lost other trucking contracts and mine leases because of a concerted union plan against him. Suing only the international union, he sought recovery under § 303 of the Labor Management Relations Act and the common law of Tennessee. Jurisdiction was premised on allegations of secondary boycotts under § 303; and the state law claim, for which jurisdiction was based on the doctrine of pendent jurisdiction, asserted an unlawful conspiracy and boycott to interfere with respondent's contracts of employment and haulage. The jury found that petitioner had violated both § 303 and state law and respondent was awarded actual and punitive damages. On motion, the trial court set aside the damages award with respect to the haulage contract on the ground that damage was not proved. It also held that union pressure on respondent's employer to discharge him would constitute only a primary dispute with the employer, not cognizable under § 303. Interference with employment was cognizable as a state claim and a remitted award was sustained thereon. The Court of Appeals affirmed. *Held:*

1. The District Court properly entertained jurisdiction of the claim based on state law. Pp. 721–729.

(a) The state law claim, based in part on violence and intimidation, was not pre-empted by § 303. P. 721.

(b) Pendent jurisdiction, in the sense of judicial power, exists whenever there is a substantial federal claim and the relationship between it and the asserted state claims permits the conclusion that the entire action before the court comprises one "case." P. 725.

(c) Pendent jurisdiction is a doctrine of discretion, justified by judicial economy, convenience and fairness to litigants. P. 726.

(d) The District Court did not exceed its discretion in exercising jurisdiction over the state law claim. Pp. 727–729.

2. State law remedies against violence and threats of violence arising in labor disputes have been sustained against the challenge of pre-emption by federal labor legislation, but the scope of such remedies is confined to the direct consequences of such conduct. Pp. 729–731.

3. Although petitioner concedes that violence which would justify application of such limited state tort law occurred during the first two days of the strike, it appeared that neither the pleadings, arguments of counsel, nor the instructions to the jury adequately defined the area within which damages could be awarded under state law, where the tort claimed, essentially a "conspiracy" to interfere with respondent's contractual relations, was not itself so limited. Pp. 732–735.

4. Since petitioner was not clearly proved to have participated in or authorized the two days' violence, nor to have ratified it or built its picketing campaign upon the fear of the violence engendered, the special proof requirements of § 6 of the Norris-LaGuardia Act were not satisfied, and petitioner cannot be held liable to respondent under state law. Pp. 735–742.

(a) While the Labor Management Relations Act expressly provides that for purposes of that Act, including § 303, the union's responsibility for acts of its members and officers is to be measured by ordinary agency standards rather than § 6's more stringent standard of "clear proof," it does not displace § 6 for other purposes and § 6 plainly applies to federal court hearings of state tort claims arising out of labor disputes. Pp. 736–737.

(b) The "clear proof" language of § 6 is similar to "clear, unequivocal, and convincing proof," used elsewhere. Although under this standard the plaintiff in a civil suit does not have to satisfy the criminal standard of reasonable doubt, he is required to persuade by a substantial margin and to come forward with more than a bare preponderance of the evidence. P. 737.

(c) Respondent did not present clear proof that petitioner authorized or participated in the violence, or that it ratified the violence which had occurred, and accordingly cannot recover from petitioner. Pp. 738–742.

343 F. 2d 609, reversed.

Willard P. Owens argued the cause for petitioner. With him on the brief were *E. H. Rayson* and *R. R. Kramer.*

Clarence Walker argued the cause for respondent. With him on the brief was *William Ables, Jr.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondent Paul Gibbs was awarded compensatory and punitive damages in this action against petitioner United Mine Workers of America (UMW) for alleged violations of § 303 of the Labor Management Relations Act, 1947, 61 Stat. 158, as amended,[1] and of the common law of

[1] Section 303 of the Labor Management Relations Act, 1947 provides:

"(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158 (b)(4) of this title.

"(b) Whoever shall be injured in his business or property by reason [of] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit." 29 U. S. C. § 187 (1964 ed.).

Section 158 (b)(4) of Title 29 U. S. C. (1964 ed.), § 8 (b)(4) of the National Labor Relations Act, as amended, 73 Stat. 542, provides, in relevant part, that:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry

Tennessee. The case grew out of the rivalry between the United Mine Workers and the Southern Labor Union over representation of workers in the southern Appalachian coal fields. Tennessee Consolidated Coal Company, not a party here, laid off 100 miners of the UMW's Local 5881 when it closed one of its mines in southern Tennessee during the spring of 1960. Late that summer, Grundy Company, a wholly owned subsidiary of Consolidated, hired respondent as mine superintendent to attempt to open a new mine on Consolidated's property at nearby Gray's Creek through use of members of the Southern Labor Union. As part of the arrangement, Grundy also gave respondent a contract to haul the mine's coal to the nearest railroad loading point.

On August 15 and 16, 1960, armed members of Local 5881 forcibly prevented the opening of the mine, threatening respondent and beating an organizer for the rival union.[2] The members of the local believed Consolidated

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affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

. . . . . .

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . ."

[2] These events were also the subject of two proceedings before the National Labor Relations Board. In one, the Board found that Consolidated had unlawfully assisted the Southern Labor Union in violation of § 8 (a) (2) of the National Labor Relations Act, as

had promised them the jobs at the new mine; they insisted that if anyone would do the work, they would. At this time, no representative of the UMW, their international union, was present. George Gilbert, the UMW's field representative for the area including Local 5881, was away at Middlesboro, Kentucky, attending an Executive Board meeting when the members of the local discovered Grundy's plan; [3] he did not return to the area until late in the day of August 16. There was uncontradicted testimony that he first learned of the violence while at the meeting, and returned with explicit instructions from his international union superiors to establish a limited picket line, to prevent any further violence, and to see to it that the strike did not spread to neighboring mines. There was no further violence at the mine site; a picket line was maintained there for nine months; and no further attempts were made to open the mine during that period.[4]

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amended, 49 Stat. 452, 29 U. S. C. § 158 (a)(2) (1964 ed.), *Tennessee Consolidated Coal Co.*, 131 N. L. R. B. 536, enforcement denied *sub nom. Labor Board* v. *Tennessee Consolidated Coal Co.*, 307 F. 2d 374 (C. A. 6th Cir. 1962). In the other, it found that Local 5881 had engaged in coercive picketing in violation of § 8 (b)(1)(A), 61 Stat. 141, 29 U. S. C. § 158 (b)(1)(A) (1964 ed.), *Local 5881, UMWA*, 130 N. L. R. B. 1181. The International itself was not charged in this proceeding, and the Board's consideration focused entirely on the events of August 16.

[3] The only testimony suggesting that Gilbert might have been at the mine site on August 15–16 was Gibbs' statement that "Well, everything happened so fast there, I'm thinking that I seen Mr. Gilbert drive up there, but where he went, I don't know." Whether such testimony could ever be sufficient to establish presence we need not decide, since respondent effectively conceded in the Sixth Circuit and here that Gilbert was in Middlesboro when the violence occurred.

[4] Immediately after the Board's order in the proceedings against it, note 2, *supra*, Consolidated reopened the mine it had closed during the spring of 1960, and hired the men of Local 5881. Later, and while this litigation was awaiting trial, that mine was closed

Respondent lost his job as superintendent, and never entered into performance of his haulage contract. He testified that he soon began to lose other trucking contracts and mine leases he held in nearby areas. Claiming these effects to be the result of a concerted union plan against him, he sought recovery not against Local 5881 or its members, but only against petitioner, the international union. The suit was brought in the United States District Court for the Eastern District of Tennessee, and jurisdiction was premised on allegations of secondary boycotts under § 303. The state law claim, for which jurisdiction was based upon the doctrine of pendent jurisdiction, asserted "an unlawful conspiracy and an unlawful boycott aimed at him and [Grundy] to maliciously, wantonly and willfully interfere with his contract of employment and with his contract of haulage." [5]

The trial judge refused to submit to the jury the claims of pressure intended to cause mining firms other than Grundy to cease doing business with Gibbs; he found those claims unsupported by the evidence. The jury's verdict was that the UMW had violated both § 303 and state law. Gibbs was awarded $60,000 as damages under the employment contract and $14,500 under the haulage contract; he was also awarded $100,000 punitive damages. On motion, the trial court set aside the award of damages with respect to the haulage contract on the ground that damage was unproved. It also held that union pressure on Grundy to discharge respondent as supervisor would constitute only a primary dispute with Grundy, as respondent's employer, and hence was not cognizable as a claim under § 303. Interference with the

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as the result of an accident. At this point, the fall of 1962, the Gray's Creek mine was opened using members of Local 5881.

[5] See *Dukes* v. *Brotherhood of Painters, Local No. 437,* 191 Tenn. 495, 235 S. W. 2d 7 (1950); *Brumley* v. *Chattanooga Speedway & Motordrome Co.,* 138 Tenn. 534, 198 S. W. 775 (1917); *Dale* v. *Temple Co.,* 186 Tenn. 69, 208 S. W. 2d 344 (1948).

employment relationship was cognizable as a state claim, however, and a remitted award was sustained on the state law claim.[6] 220 F. Supp. 871. The Court of Appeals for the Sixth Circuit affirmed. 343 F. 2d 609. We granted certiorari. 382 U. S. 809. We reverse.

I.

A threshold question is whether the District Court properly entertained jurisdiction of the claim based on Tennessee law. There was no need to decide a like question in *Teamsters Union* v. *Morton,* 377 U. S. 252, since the pertinent state claim there was based on peaceful secondary activities and we held that state law based on such activities had been pre-empted by § 303. But here respondent's claim is based in part on proofs of violence and intimidation. "[W]e have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *United Automobile Workers* v. *Russell,* 356 U. S. 634; *United Construction Workers* v. *Laburnum Corp.,* 347 U. S. 656. . . . State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 247.

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[6] The questions had been submitted to the jury on a special verdict form. The suggested remittitur from $60,000 to $30,000 for damages on the employment contract and from $100,000 to $45,000 punitive damages was accepted by respondent. In view of our disposition, we do not reach petitioner's contentions that the verdict must be set aside in toto for prejudicial summation by respondent's counsel, or because the actual damages awarded substantially exceeded the proof, and the punitive damage award may have rested in part on the award of actual damages for interference with the haulage contract, which was vacated as unproved.

The fact that state remedies were not entirely preempted does not, however, answer the question whether the state claim was properly adjudicated in the District Court absent diversity jurisdiction. The Court held in *Hurn* v. *Oursler,* 289 U. S. 238, that state law claims are appropriate for federal court determination if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law. The Court distinguished permissible from nonpermissible exercises of federal judicial power over state law claims by contrasting "a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground;* in the latter it may not do so upon the non-federal *cause of action.*" 289 U. S., at 246. The question is into which category the present action fell.

Hurn was decided in 1933, before the unification of law and equity by the Federal Rules of Civil Procedure. At the time, the meaning of "cause of action" was a subject of serious dispute; [7] the phrase might "mean one thing for one purpose and something different for an-

[7] See Clark on Code Pleading 75 *et seq.* (1928); Clark, The Code Cause of Action, 33 Yale L. J. 817 (1924); McCaskill, Actions and Causes of Actions, 34 Yale L. J. 614 (1925); McCaskill, One Form of Civil Action, But What Procedure, for the Federal Courts, 30 Ill. L. Rev. 415 (1935); Gavit, A "Pragmatic Definition" of the "Cause of Action"? 82 U. Pa. L. Rev. 129 (1933); Clark, The Cause of Action, *id.,* at 354 (1934); Gavit, The Cause of Action—a Reply, *id.,* at 695 (1934).

other." *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 67–68.[8] The Court in *Hurn* identified what it meant by the term by citation of *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, a case in which "cause of action" had been used to identify the operative scope of the doctrine of *res judicata*. In that case the Court had noted that " 'the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time.' " 274 U. S., at 320. It stated its holding in the following language, quoted in part in the *Hurn* opinion:

> "Upon principle, it is perfectly plain that the respondent [a seaman suing for an injury sustained while working aboard ship] suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.
>
> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means,

[8] See also *American Fire & Cas. Co.* v. *Finn*, 341 U. S. 6, 12; *Musher Foundation, Inc.* v. *Alba Trading Co.*, 127 F. 2d 9, 12 (C. A. 2d Cir. 1942) (dissenting opinion of Clark, J.).

> and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear.' " *Id.*, at 321.

Had the Court found a jurisdictional bar to reaching the state claim in *Hurn,* we assume that the doctrine of *res judicata* would not have been applicable in any subsequent state suit. But the citation of *Baltimore S. S. Co.* shows that the Court found that the weighty policies of judicial economy and fairness to parties reflected in *res judicata* doctrine were in themselves strong counsel for the adoption of a rule which would permit federal courts to dispose of the state as well as the federal claims.

With the adoption of the Federal Rules of Civil Procedure and the unified form of action, Fed. Rule Civ. Proc. 2, much of the controversy over "cause of action" abated. The phrase remained as the keystone of the *Hurn* test, however, and, as commentators have noted,[9] has been the source of considerable confusion. Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.[10] Yet because the *Hurn* question involves issues of jurisdiction as well as convenience, there has been some tendency to limit its application to cases in which the state and federal claims are, as in *Hurn,* "little more than the equivalent of different epithets to characterize the same group of circumstances." 289 U. S., at 246.[11]

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[9] Shulman & Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L. J. 393, 397–410 (1936); Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 232 (1948); Barron & Holtzoff, Federal Practice and Procedure § 23 (1965 Supp.).

[10] See, *e. g.,* Fed. Rules Civ. Proc. 2, 18–20, 42.

[11] *E. g., Musher Foundation* v. *Alba Trading Co., supra;* Note, The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts, 62 Col. L. Rev. 1018, 1029–1030 (1962).

This limited approach is unnecessarily grudging. Pendent jurisdiction, in the sense of judicial *power,* exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ," U. S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." [12] The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.[13]

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[12] The question whether joined state and federal claims constitute one "case" for jurisdictional purposes is to be distinguished from the often equally difficult inquiry whether any "case" at all is presented, *Gully* v. *First National Bank,* 299 U. S. 109, although the issue whether a claim for relief qualifies as a case "arising under . . . the Laws of the United States" and the issue whether federal and state claims constitute one "case" for pendent jurisdiction purposes may often appear together, see *Dann* v. *Studebaker-Packard Corp.,* 288 F. 2d 201, 211–215 (C. A. 6th Cir. 1961); *Borak* v. *J. I. Case Co.,* 317 F. 2d 838, 847–848 (C. A. 7th Cir. 1963), aff'd on other grounds, 377 U. S. 426.

[13] Cf. *Armstrong Co.* v. *Nu-Enamel Corp.,* 305 U. S. 315, 325. Note, Problems of Parallel State and Federal Remedies, 71 Harv. L. Rev. 513, 514 (1958). While it is commonplace that the Federal Rules of Civil Procedure do not expand the jurisdiction of federal courts, they do embody "the whole tendency of our decisions . . . to require a plaintiff to try his . . . whole case at one time," *Baltimore S. S. Co.* v. *Phillips, supra,* and to that extent emphasize the basis of pendent jurisdiction.

That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right.[14] Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.[15] Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.[16] Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and

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[14] *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.,* 183 F. 2d 497 (C. A. 1st Cir. 1950); *Moynahan* v. *Pari-Mutuel Employees Guild,* 317 F. 2d 209, 211–212 (C. A. 9th Cir. 1963); *op. cit. supra,* notes 9 and 11.

[15] Some have seen this consideration as the principal argument against exercise of pendent jurisdiction. Thus, before *Erie,* it was remarked that "the limitations [on pendent jurisdiction] are in the wise discretion of the courts to be fixed in individual cases by the exercise of that statesmanship which is required of any arbiter of the relations of states to nation in a federal system." Shulman & Jaegerman, *supra,* note 9, at 408. In his oft-cited concurrence in *Strachman* v. *Palmer,* 177 F. 2d 427, 431 (C. A. 1st Cir. 1949), Judge Magruder counseled that "[f]ederal courts should not be overeager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation," at 433. See also Wechsler, *supra,* note 9, at 232–233; Note, 74 Harv. L. Rev. 1660, 1661 (1961); Note, *supra,* note 11, at 1043–1044.

[16] Note, *supra,* note 11, at 1025–1026; *Wham-O-Mfg. Co.* v. *Paradise Mfg. Co.,* 327 F. 2d 748, 752–754 (C. A. 9th Cir. 1964).

left for resolution to state tribunals. There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong. In the present case, for example, the allowable scope of the state claim implicates the federal doctrine of pre-emption; while this interrelationship does not create statutory federal question jurisdiction, *Louisville & N. R. Co.* v. *Mottley,* 211 U. S. 149, its existence is relevant to the exercise of discretion. Finally, there may be reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, that would justify separating state and federal claims for trial, Fed. Rule Civ. Proc. 42 (b). If so, jurisdiction should ordinarily be refused.

The question of power will ordinarily be resolved on the pleadings. But the issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation. Pretrial procedures or even the trial itself may reveal a substantial hegemony of state law claims, or likelihood of jury confusion, which could not have been anticipated at the pleading stage. Although it will of course be appropriate to take account in this circumstance of the already completed course of the litigation, dismissal of the state claim might even then be merited. For example, it may appear that the plaintiff was well aware of the nature of his proofs and the relative importance of his claims; recognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case. Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed.

We are not prepared to say that in the present case the District Court exceeded its discretion in proceeding to judgment on the state claim. We may assume for purposes of decision that the District Court was correct in its holding that the claim of pressure on Grundy to terminate the employment contract was outside the purview of § 303. Even so, the § 303 claims based on secondary pressures on Grundy relative to the haulage contract and on other coal operators generally were substantial. Although § 303 limited recovery to compensatory damages based on secondary pressures, *Teamsters Union* v. *Morton, supra,* and state law allowed both compensatory and punitive damages, and allowed such damages as to both secondary and primary activity, the state and federal claims arose from the same nucleus of operative fact and reflected alternative remedies. Indeed, the verdict sheet sent in to the jury authorized only one award of damages, so that recovery could not be given separately on the federal and state claims.

It is true that the § 303 claims ultimately failed and that the only recovery allowed respondent was on the state claim. We cannot confidently say, however, that the federal issues were so remote or played such a minor role at the trial that in effect the state claim only was tried. Although the District Court dismissed as unproved the § 303 claims that petitioner's secondary activities included attempts to induce coal operators other than Grundy to cease doing business with respondent, the court submitted the § 303 claims relating to Grundy to the jury. The jury returned verdicts against petitioner on those § 303 claims, and it was only on petitioner's motion for a directed verdict and a judgment *n. o. v.* that the verdicts on those claims were set aside. The District Judge considered the claim as to the haulage

contract proved as to liability, and held it failed only for lack of proof of damages. Although there was some risk of confusing the jury in joining the state and federal claims—especially since, as will be developed, differing standards of proof of UMW involvement applied—the possibility of confusion could be lessened by employing a special verdict form, as the District Court did. Moreover, the question whether the permissible scope of the state claim was limited by the doctrine of pre-emption afforded a special reason for the exercise of pendent jurisdiction; the federal courts are particularly appropriate bodies for the application of pre-emption principles. We thus conclude that although it may be that the District Court might, in its sound discretion, have dismissed the state claim, the circumstances show no error in refusing to do so.

II.

This Court has consistently recognized the right of States to deal with violence and threats of violence appearing in labor disputes, sustaining a variety of remedial measures against the contention that state law was pre-empted by the passage of federal labor legislation. *Allen-Bradley Local* v. *Wisconsin Board,* 315 U. S. 740; *United Construction Workers* v. *Laburnum Construction Corp.,* 347 U. S. 656; *United Automobile Workers* v. *Wisconsin Board,* 351 U. S. 266; *Youngdahl* v. *Rainfair, Inc.,* 355 U. S. 131; *United Automobile Workers* v. *Russell,* 356 U. S. 634. Petitioner concedes the principle, but argues that the permissible scope of state remedies in this area is strictly confined to the direct consequences of such conduct, and does not include consequences resulting from associated peaceful picketing or other union activity. We agree.

Our opinions on this subject, frequently announced over weighty arguments in dissent that state remedies

were being given too broad scope, have approved only remedies carefully limited to the protection of the compelling state interest in the maintenance of domestic peace. Thus, in *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, we read our prior decisions as only allowing "the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order," *id.,* at 247, and noted that in *Laburnum*

> "damages were restricted to the 'damages directly and proximately caused by wrongful conduct chargeable to the defendants . . .' as defined by the traditional law of torts. . . . Thus there is nothing in the measure of damages to indicate that state power was exerted to compensate for anything more than the direct consequences of the violent conduct." *Id.,* 248, n. 6, at 249.

In *Russell,* we specifically observed that the jury had been charged that to award damages it must find a proximate relation between the violence and threats of force and violence complained of, on the one hand, and the loss of wages allegedly suffered, on the other. 356 U. S., at 638, n. 3. In the two *Wisconsin Board* cases it was noted that the State's administrative-injunctive relief was limited to prohibition against continuation of the unlawful picketing, not all picketing. 315 U. S., at 748; 351 U. S., at 269–270, n. 3. And in *Youngdahl,* the Court held that a state court injunction which would have prohibited all picketing must be modified to permit peaceful picketing of the premises. We said, "[t]hough the state court was within its discretionary power in enjoining future acts of violence, intimidation and threats of violence by the strikers and the union, yet it is equally clear that such court entered the pre-empted domain

of the National Labor Relations Board insofar as it enjoined peaceful picketing . . . ." 355 U. S., at 139.[17]

It is true that in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, the Court approved sweeping state injunctive relief barring any future picketing in a labor dispute, whether peaceful or not. That case, however, was decided only on a constitutional claim of freedom of speech. We did not consider the impact of federal labor policy on state regulatory power. Moreover, as we recognized in *Youngdahl, supra,* at 139, the case was decided in the context of a strike marked by extreme and repeated acts of violence—"a pattern of violence . . . which would inevitably reappear in the event picketing were later resumed." The Court in *Meadowmoor* had stated the question presented as "whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed," 312 U. S., at 292, and had reasoned that

> "acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful." *Id.,* at 294.

Such special facts, if they appeared in an action for damages after picketing marred by violence had occurred,

[17] In *Teamsters Union* v. *Morton, supra,* a similar analysis was applied to permit recovery under § 303 of damages suffered during a strike characterized by proscribed secondary activity only to the extent that the damages claimed were the proximate result of such activity; damages for associated primary strike activity could not be recovered.

might support the conclusion that all damages resulting from the picketing were proximately caused by its violent component or by the fear which that violence engendered.[18] Where the consequences of peaceful and violent conduct are separable, however, it is clear that recovery may be had only for the latter.

In the present case, petitioner concedes that violence which would justify application of state tort law within these narrow bounds occurred during the first two days of the strike. It is a separate issue, however, whether the pleadings, the arguments of counsel to the jury, or the instructions to the jury adequately defined the compass within which damages could be awarded under state law. The tort claimed was, in essence, a "conspiracy" to interfere with Gibbs' contractual relations. The tort of "conspiracy" is poorly defined, and highly susceptible to judicial expansion; its relatively brief history is colored by use as a weapon against the developing labor movement.[19] Indeed, a reading of the record in this case gives the impression that the notion of "conspiracy" was employed here to expand the application of state law sub-

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[18] It would of course be relevant if the Board had already intervened and as here, note 2, *supra,* issued an order which permitted the continuance of peaceful picketing activity.

[19] On the flexibility of "conspiracy" as a tort, see *Original Ballet Russe, Ltd.* v. *Ballet Theatre, Inc.,* 133 F. 2d 187, 189 (C. A. 2d Cir. 1943); *Riley* v. *Dun & Bradstreet, Inc.,* 195 F. 2d 812 (C. A. 6th Cir. 1952); Charlesworth, Conspiracy as a Ground of Liability in Tort, 36 L. Q. Rev. 38 (1920); Burdick, Conspiracy as a Crime, and as a Tort, 7 Col. L. Rev. 229 (1907); Burdick, The Tort of Conspiracy, 8 Col. L. Rev. 117 (1908). The anti-labor uses of the doctrine are well illustrated in Sayre, Labor and the Courts, 39 Yale L. J. 682, 684–687 (1930). Similar dangers are presented by the tort of malicious interference with contract, *id.,* at 691–695, a doctrine equally young which in its origins required a showing of interference by force, threats, or fraud, but does so no more, Sayre, Inducing Breach of Contract, 36 Harv. L. Rev. 663 (1923); Comment, 56 Nw. U. L. Rev. 391 (1961).

stantially beyond the limits to be observed in showing direct union involvement in violence.

Thus, respondent's complaint alleged "an unlawful conspiracy and an unlawful boycott . . . to maliciously, wantonly and willfully interfere with his contract of employment and with his contract of haulage." No limitation to interference *by violence* appears. Similarly, counsel in arguing to the jury asserted, not that the conspiracy in which the union had allegedly participated and from which its liability could be inferred was a conspiracy of violence but that it was a conspiracy to impose the UMW and the UMW's standard contract on the coal fields of Tennessee.[20] Under the state law, it would not have been relevant that the union had not actually authorized, participated in or ratified the particular violence involved or even the general use of violence. It would only be necessary to show a conspiracy in which the union had a part, and to show also that those who engaged in the violence were members of the conspiracy and their acts were related to the conspiracy's purpose.[21]

The instructions to the jury also appear not to have kept the conspiracy concept within any proper bounds. The charge instructed the jury separately on the § 303 and conspiracy claims, characterizing each as predicated on an assertion that there had been "unlawful" picketing action, and distinguishing one from the other on the basis that in the conspiracy claim "the lawfulness of the means rather than the lawfulness of the object or the pur-

[20] Respondent's attorney argued in summation:

". . . and here is the conspiracy. Mr. Pass [an official of petitioner's] testified, we want that contract all over this nation. That contract or better. I don't guess at that, there is his testimony. There is no deviation from that contract, Mr. Turnblazer so says, unless it is approved in Washington. They impose a nationwide contract all over this nation, all over. I don't care whether it is in Canada or West Virginia or California or Tennessee."

[21] Note 5, *supra*.

pose of the picketing . . . is controlling." But in charging the conspiracy claim, the court stressed that the "unlawfulness" of the picketing, rather than violence as such, would be controlling. Thus, in characterizing respondent's claim of a conspiracy intentionally to interfere with his contractual relations with Grundy, the trial judge said respondent asserted the interference to be "wrongful in that it was accomplished by unlawful means, including violence and threats of violence." Turning to the question of the international union's responsibility, he said this depended on a showing that it "was a party to a conspiracy pursuant to which the interference was committed." He defined conspiracy as

> "an agreement between two or more . . . to do an unlawful thing, or to do a lawful thing by unlawful means. . . . It is not essential to the existence of a conspiracy that the agreement between the conspirators be formally made between the parties at any one time, if, for example, two persons agreed to pursue an unlawful purpose or pursue a lawful purpose by unlawful means, then later a third person with knowledge of the existence of the conspiracy assents to it either impliedly or expressly and participates in it, then all three are conspirators in the same conspiracy. . . . [A]ll that is required is that each party to the conspiracy know of the existence of the conspiracy and that each agrees to assist in some manner in the furtherance of the unlawful purpose . . . or any unlawful means of accomplishing an unlawful purpose."

The trial judge then charged, in accordance with the Tennessee common law on conspiracy,[22] that the union, if a member of a conspiracy, would be liable for all acts "done in concert . . . with the common purpose, and to effect

[22] *Ibid.*

a common design," whether or not it had authorized, participated in, or ratified the particular acts. The jury was told it might award "only such damages as . . . he has sustained as a proximate and direct result of the action of the defendant," and that "[n]o award of damages can be made . . . on the basis of losses sustained . . . as a result of lawful activity upon the part of the defendant or its agents." Such instructions do not focus the jury's attention upon violence or threats of violence as the essential predicate of any recovery it might award.

III.

Even assuming the conspiracy concept could be and was kept within limits proper to the application of state tort law under the pre-emption doctrine, reversal is nevertheless required here for failure to meet the special proof requirements imposed by § 6 of the Norris-LaGuardia Act: [23]

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

Petitioner vigorously contends that § 6 applied to the state claims in this case; that, on this record, it cannot be charged with having participated in or authorized the violence of August 15–16; and that its acts once it learned of the violence fell short of what would be necessary to show either ratification of the violence or any intent to build its picketing campaign upon the fears the violence engendered. We agree.

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[23] 47 Stat. 71, 29 U. S. C. § 106 (1964 ed.).

We held in *Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 403, that

> "whether § 6 should be called a rule of evidence or one that changes the substantive law of agency . . . its purpose and effect was to relieve organizations . . . and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization, without clear proof that the organization or member charged with responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration."

Shortly thereafter, Congress passed the Labor Management Relations Act, which expressly provides that for the purposes of that statute, including § 303, the responsibility of a union for the acts of its members and officers is to be measured by reference to ordinary doctrines of agency, rather than the more stringent standards of § 6.[24] Yet although the legislative history indicates that Congress was well aware of the *Carpenters* decision,[25] it did not repeal § 6 outright, but left it applicable to cases not arising under the new Act. This selectivity is not surprising, for on state claims, though not on § 303 claims, punitive damages may be recovered. The driving force behind § 6 [26] and the opposition to § 303, even in its limited form,[27] was the fear that unions might be destroyed

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[24] National Labor Relations Act, as amended, § 2 (13), 61 Stat. 139, 29 U. S. C. § 152 (13) (1964 ed.); Labor Management Relations Act, 1947, §§ 301 (e), 303 (b), 61 Stat. 157, 159, 29 U. S. C. §§ 185 (e), 187 (b) (1964 ed.).

[25] See, *e. g.*, S. Rep. No. 105, 80th Cong., 1st Sess., p. 21.

[26] The fullest statement of the basis for § 6 appears in S. Rep. No. 163, 72d Cong., 1st Sess., pp. 19–21.

[27] The present § 303 was introduced on the floor of the Senate by Senator Taft, in response to a more severe proposal which would

if they could be held liable for damage done by acts beyond their practical control. Plainly, § 6 applies to federal court adjudications of state tort claims arising out of labor disputes, whether or not they are associated with claims under § 303 to which the section does not apply.[28]

Although the statute does not define "clear proof," its history and rationale suggest that Congress meant at least to signify a meaning like that commonly accorded such similar phrases as "clear, unequivocal, and convincing proof." Under this standard, the plaintiff in a civil case is not required to satisfy the criminal standard of reasonable doubt on the issue of participation, authorization or ratification; neither may he prevail by meeting the ordinary civil burden of persuasion. He is required to persuade by a substantial margin, to come forward with "more than a bare preponderance of the evidence to prevail." *Schneiderman* v. *United States,* 320 U. S. 118, 125. In our view, that burden was not met.[29]

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have permitted injunctive relief as well as damages against secondary activity. 93 Cong. Rec. 4769–4770, 4833–4847, 4858–4875 (1947). The tenor of the opposition may be seen in those pages, and also at 93 Cong. Rec. 4765–4766 (remarks of Senator Thomas); 93 Cong. Rec. 6451–6452 (remarks of Senator Morse); 93 Cong. Rec. 6520–6521 (remarks of Senator Pepper).

[28] The argument might be made that if there were "clear proof" that the local union was responsible, the responsibility of the international union *vis-à-vis* its local would be governed by a less demanding standard than that applicable for determining the responsibility of a labor organization or its officers on the basis of the acts of "individual officers, members, or agents" of the organization. Since the local was not a party here, we have no occasion to assess this issue. Liability of the international union is premised on the acts of Gilbert and the UMW's other agents, or not at all.

[29] In charging the jury, the trial judge first instructed the jury at length that the plaintiff's burden was to prove his case by a preponderance of the evidence, and that "if the plaintiff carries the burden of proof by a preponderance of the evidence, however slight that preponderance might be, he has done all that is required of

At the outset, it is clear that the requisite showing was not made as to possible union authorization of or participation in the violence of August 15 and 16. Although it is undoubtedly true that the officers and members of Local 5881 were present in force at the mine site on those days, neither the Local nor they are parties to this suit. Mr. Gilbert, the UMW representative, had left the area for a business meeting before the series of events culminating in the violence, and immediately upon his return, the violence subsided. The Sixth Circuit conceded that "[t]he proofs were sketchy as to defendant's responsibility for the [first two days' violence]." This view accurately reflects the state of the record. Petitioner was not even aware of Grundy's plan to open the Gray's Creek mine until after the violence had occurred.

The remaining issue is whether there was clear proof that the union ratified the violence which had occurred. Preliminarily, we note that it would be inconsistent with the fabric of national labor policy to infer ratification from the mere fact that petitioner involved itself in the dispute after the violence had occurred, or from the fact that it carried on some normal union functions, such as provision of strike relief. A union would ordinarily

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him and is entitled to a verdict." In connection with substantive discussion of the state claim, he then remarked:

"Before the defendant may be held responsible for the acts of its agents in entering into a conspiracy during the course of a labor dispute, there must be clear proof that the particular conspiracy charged or the act generally of that nature had been expressly authorized or necessarily followed from a granted authority by the defendant, or that such conspiracy was subsequently ratified by the defendant after actual knowledge thereof."

The phrase "clear proof," referred to just this once, was never explained. The possibility is strong that the jury either did not understand the phrase or completely overlooked it in the context of the lengthy charge given. No challenge is directly made to the charge, however, and it does not appear whether an objection was entered. Accordingly, we do not rest judgment on this point.

undertake these tasks during the course of a lawful strike. National labor policy requires that national unions be encouraged to exercise a restraining influence on explosive strike situations; and when they seek to do so, they should not for these activities be made to risk liability for such harm as may already have been done. The fact that ripples of the earlier violence may still be felt should not be permitted, and under § 6 is not permitted, to impose such liability. Because the dispute which sparked the violence will often continue, the union will feel a responsibility to take up the dispute as well as to curb its excesses. There can be no rigid requirement that a union affirmatively disavow such unlawful acts as may previously have occurred. Cf. *ILGWU* v. *Labor Board,* 237 F. 2d 545. What is required is proof, either that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts which were in themselves actionable under state law or intentionally drew upon the previous violence for their force.

The record here is persuasive that the petitioner did what it could to stop or curtail the violence. There was repeated and uncontradicted testimony that when news of the violence reached the meeting that Gilbert was attending, he was given firm instructions to return to the scene, to assume control of the strike, to suppress violence, to limit the size of the picket line, and to assure that no other area mines were affected.[30] He

[30] Other international union personnel were also later sent, perhaps in part because the union wanted to put its best foot forward in the NLRB proceedings, note 2, *supra,* which ensued. One such person testified,

". . . I explained to them that the labor board was there investigating and that certainly any mass picketing would only cause them a great deal of trouble, and instructed them that they should limit the number of their pickets and under no circumstances have any violence or any threats of violence to any person coming into or near that area."

succeeded. Although the day after his return two Consolidated officers were harassed by a large and unruly mob in a nearby town, this incident was unrelated to respondent, and was not repeated. There was no further violence at the mine site, and the number of pickets was reduced to a very few. Other mines in the immediate area, including two worked on lease by Gibbs, continued to operate, although strenuous effort was required to accomplish this; one union official testified, "I thought I was going to get whipped two or three times [by members of the Local who opposed this policy]." [31]

To be sure, there was testimony that Gilbert and, through him, the international union were not pleased with respondent's role in the abortive venture to open the Gray's Creek mines with members of the Southern Labor Union. A company officer testified that when the mines finally opened respondent was not hired, because "Had I hired Mr. Paul Gibbs none of these mines would be open today." Respondent testified that Gilbert had told him, shortly after assuming control of the strike, "I want you to keep your damn hands off of that Gray's Creek area over there, and tell that Southern Labor Union that we don't intend for you to work that mine." To another, Gilbert is alleged to have said, "Hell, we can't let that

[31] About six days after the violence, an earthmoving equipment salesman driving by the entrance to the mine site stopped to ask how he might get to another mine. Gilbert was present among the picketers, and gave him instructions. Gilbert told the salesman that he "couldn't get through" the road chosen, and should approach by another route; he said the salesman should tell any union men he met that he had spoken to Gilbert. A sinister cast can be put on this incident, but it shows clearly only that Gilbert was in control of the strike and that operations unrelated to Gray's Creek were not being interfered with. It is significant that the salesman did not claim to have been stopped by force or threatened in any way; it appears he did no more than seek directions, and received no more in return.

go on . . . Paul was trying to bring this other union in there, and [Gilbert said] he ain't going to get by with it." A third witness reported remarks of a similar tenor. Respondent testified that fear for his own safety caused him not to visit his mine leases after the events of August 15 and 16. His foreman testified to minor acts of violence at the mine site, never connected to any person or persons.

The relevant question, however, is whether Gilbert or other UMW representatives were clearly shown to have endorsed violence or threats of violence as a means of settling the dispute. The Sixth Circuit's answer was that they had. Its view of the record gave it

> "the impression that the threat of violence remained throughout the succeeding days and months. The night and day picketing that followed its spectacular beginning was but a guaranty and warning that like treatment would be accorded further attempts to open the Gray's Creek area. The aura of violence remained to enhance the effectiveness of the picketing. Certainly there is a threat of violence when the man who has just knocked me down my front steps continues to stand guard at my front door." 343 F. 2d, at 616.

An "impression" is too ephemeral a product to be the result of "clear proof." As we have said, the mere fact of continued picketing at the mine site is not properly relied upon to show ratification. But even accepting the passage as a holding that "clear proof" of UMW involvement is present, we do not so read the record.

If there was a remaining threat of violence here, it was a threat which arose from the context of the dispute, and not from the manner in which the international union was shown to have handled it. This dispute began when unemployed miners in the Appalachian hills dis-

covered that jobs they believed had been promised to them were being given to others behind their backs. In considering the *vicarious* liability of the international union, accommodation must be made for that fact. The record here clearly bears the construction that the international union exerted pressure to assure that respondent would lose his present jobs and obtain no more. But the record fails to rebut petitioner's contention that it had been unwilling to see its ends accomplished through violence, and indeed had sought to control the excesses which had occurred. Since the record establishes only peaceful activities in this regard on the part of petitioner, respondent was limited to his § 303 remedy. *Teamsters Union* v. *Morton, supra.* Although our result would undoubtedly be firmer if the petitioner had assured respondent that, having assumed control of the strike, it would prevent further violence, in the circumstances of this case the crucial fact of petitioner's participation in or ratification of the violence that occurred was not proved to the degree of certainty required by § 6.

Reversed.

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

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

I agree with and join in Part I of the Court's opinion relating to pendent jurisdiction. As to Part II, I refrain from joining the Court's speculations about the uses to which it may put the pre-emption doctrine in similar future cases. The holding in Part III that the Norris-LaGuardia Act requires reversal here seems to me correct, but my interpretation of the statute is different and somewhat narrower than that of the Court.

The statutory requirement for union liability in this case is "clear proof of actual participation in, or actual

authorization of . . . [the unlawful acts], or of ratification of such acts after actual knowledge thereof." [1] The Court construes this provision as fixing a new test of the quantum of proof, somewhere between ordinary civil and criminal standards. I do not think the admittedly vague legislative history imports this reading, and I believe it introduces a revealing inconsistency since the new test could not be applied to criminal cases, concededly governed by the same statutory language, without standing the statute on its head by having it *reduce* present quantum-of-proof requirements in criminal cases, that is, proof "beyond a reasonable doubt." The best reading I can give the statute, absent more light than has been shed upon it in this case, is one directing it against a particular type of inferential proof of authority or ratification unacceptable to those who framed the law. For me, the gist of the statute is that in the usual instance a union's carrying on of its normal strike functions and its failure to take affirmative action to dispel misconduct are not in themselves proof of authorization or ratification of the wrongdoing.[2]

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[1] Norris-LaGuardia Act, § 6, 47 Stat. 71, 29 U. S. C. § 106 (1964 ed.). The section is quoted in full at p. 735, *ante*.

[2] The principal legislative document, S. Rep. No. 163, 72 Cong., 1st Sess., pp. 19–21, is not very illuminating but it does at the end of its discussion of the section make reference to Frankfurter & Greene, The Labor Injunction 74–75 (1930). At these pages, to illustrate rulings on union responsibility that are deemed improper, that book states: " 'Authorization' has been found as a fact where the unlawful acts 'have been on such a large scale, and in point of time and place so connected with the admitted conduct of the strike, that it is impossible on the record here to view them in any other light than as done in furtherance of a common purpose and as part of a common plan'; where the union has failed to discipline the wrong-doer; where the union has granted strike benefits." (Footnotes omitted.) See also *id.*, at 220–221, n. 42; *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 418–419 and n. 2 (Frankfurter, J., dissenting).

In the present case, apart from a few quite ambiguous episodes, there was nothing to bring the violence home to the union except, as the Sixth Circuit stressed (see p. 741, *ante*), that the union continued through its picketing the threat that the earlier violence would be renewed and did not repudiate the violence or promise to oppose its renewal. Whatever arguments could be made for imposing liability in such a situation, I think it approximates what the statute was designed to forbid. On this basis, I concur in the reversal.

Syllabus.

UNITED STATES *v.* GUEST ET AL.

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

No. 65. Argued November 9, 1965.—
Decided March 28, 1966.

Appellees, six private individuals, were indicted under 18 U. S. C. § 241 for conspiring to deprive Negro citizens in the vicinity of Athens, Georgia, of the free exercise and enjoyment of rights secured to them by the Constitution and laws of the United States, viz., the right to use state facilities without discrimination on the basis of race, the right freely to engage in interstate travel, and the right to equal enjoyment of privately owned places of public accommodation, now guaranteed by Title II of the Civil Rights Act of 1964. The indictment specified various means by which the objects of the conspiracy would be achieved, including causing the arrest of Negroes by means of false reports of their criminal acts. The District Court dismissed the indictment on the ground that it did not involve rights which are attributes of national citizenship, to which it deemed § 241 solely applicable. The court also held the public-accommodation allegation legally inadequate for failure to allege discriminatory motivation which the court thought essential to charge an interference with a right secured by Title II, and because the enforcement remedies in Title II were deemed exclusive. The United States appealed directly to this Court under the Criminal Appeals Act. *Held:*

1. This Court has no jurisdiction under the Criminal Appeals Act to review the invalidation of that portion of the indictment concerning interference with the right to use public accommodations, the District Court's ruling with respect thereto being based, at least alternatively, not on a construction of a statute but on what the court conceived to be a pleading defect. Pp. 749–752.

2. The allegation in the indictment of state involvement in the conspiracy charged under § 241 was sufficient to charge a violation of rights protected by the Fourteenth Amendment. Pp. 753–757.

(a) Section 241 includes within its coverage Fourteenth Amendment rights whether arising under the Equal Protection

Clause, as in this case, or under the Due Process Clause, as in *United States* v. *Price, post,* p. 787. P. 753.

(b) As construed to protect Fourteenth Amendment rights § 241 is not unconstitutionally vague since by virtue of its being a conspiracy statute it operates only against an offender acting with specific intent to infringe the right in question (*Screws* v. *United States,* 325 U. S. 91) and the right to equal use of public facilities described in the indictment has been made definite by decisions of this Court. Pp. 753–754.

(c) The State's involvement need be neither exclusive nor direct in order to create rights under the Equal Protection Clause. Pp. 755–756.

(d) The allegation concerning the arrest of Negroes by means of false reports was sufficiently broad to cover a charge of active connivance by state agents or other official discriminatory conduct constituting a denial of rights protected by the Equal Protection Clause. Pp. 756–757.

3. Section 241 reaches conspiracies specifically directed against the exercise of the constitutional right to travel freely from State to State and to use highways and other instrumentalities for that purpose; the District Court therefore erred in dismissing the branch of the indictment relating to that right. Pp. 757–760.

246 F. Supp. 475, reversed and remanded.

Solicitor General Marshall argued the cause for the United States. With him on the brief were *Assistant Attorney General Doar, Louis F. Claiborne* and *David Rubin.*

Charles J. Bloch, by appointment of the Court, 380 U. S. 969, argued the cause and filed a brief for appellee Lackey.

James E. Hudson argued the cause and filed a brief for appellees Guest et al.

Mr. Justice Stewart delivered the opinion of the Court.

The six defendants in this case were indicted by a United States grand jury in the Middle District of

Georgia for criminal conspiracy in violation of 18 U. S. C. § 241 (1964 ed.). That section provides in relevant part:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;
>
> . . . . . .
>
> "They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

In five numbered paragraphs, the indictment alleged a single conspiracy by the defendants to deprive Negro citizens of the free exercise and enjoyment of several specified rights secured by the Constitution and laws of the United States.[1] The defendants moved to dismiss

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[1] The indictment, filed on October 16, 1964, was as follows:

"THE GRAND JURY CHARGES:

"Commencing on or about January 1, 1964, and continuing to the date of this indictment, HERBERT GUEST, JAMES SPERGEON LACKEY, CECIL WILLIAM MYERS, DENVER WILLIS PHILLIPS, JOSEPH HOWARD SIMS, and GEORGE HAMPTON TURNER, did, within the Middle District of Georgia, Athens Division, conspire together, with each other, and with other persons to the Grand Jury unknown, to injure, oppress, threaten, and intimidate Negro citizens of the United States in the vicinity of Athens, Georgia, in the free exercise and enjoyment by said Negro citizens of the following rights and privileges secured to them by the Constitution and laws of the United States:

"1. The right to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of motion picture theaters, restaurants, and other places of public accommodation;

"2. The right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia,

the indictment on the ground that it did not charge an offense under the laws of the United States. The District Court sustained the motion and dismissed the indictment as to all defendants and all numbered paragraphs of the indictment. 246 F. Supp. 475.

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owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof;

"3. The right to the full and equal use on the same terms as white citizens of the public streets and highways in the vicinity of Athens, Georgia;

"4. The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia;

"5. Other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia.

"It was a part of the plan and purpose of the conspiracy that its objects be achieved by various means, including the following:

"1. By shooting Negroes;

"2. By beating Negroes;

"3. By killing Negroes;

"4. By damaging and destroying property of Negroes;

"5. By pursuing Negroes in automobiles and threatening them with guns;

"6. By making telephone calls to Negroes to threaten their lives, property, and persons, and by making such threats in person;

"7. By going in disguise on the highway and on the premises of other persons;

"8. By causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts; and

"9. By burning crosses at night in public view.

"All in violation of Section 241, Title 18, United States Code."

The only additional indication in the record concerning the factual details of the conduct with which the defendants were charged is the statement of the District Court that: "It is common knowledge that two of the defendants, Sims and Myers, have already been prosecuted in the Superior Court of Madison County, Georgia for the murder of Lemuel A. Penn and by a jury found not guilty." 246 F. Supp. 475, 487.

The United States appealed directly to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731.[2] We postponed decision of the question of our jurisdiction to the hearing on the merits. 381 U. S. 932. It is now apparent that this Court does not have jurisdiction to decide one of the issues sought to be raised on this direct appeal. As to the other issues, however, our appellate jurisdiction is clear, and for the reasons that follow, we reverse the judgment of the District Court. As in *United States* v. *Price, post,* p. 787, decided today, we deal here with issues of statutory construction, not with issues of constitutional power.

I.

The first numbered paragraph of the indictment, reflecting a portion of the language of § 201 (a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a (a) (1964 ed.), alleged that the defendants conspired to injure, oppress, threaten, and intimidate Negro citizens in the free exercise and enjoyment of:

> "The right to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of motion picture theaters, restaurants, and other places of public accommodation." [3]

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[2] This appeal concerns only the first four numbered paragraphs of the indictment. The Government conceded in the District Court that the fifth paragraph added nothing to the indictment, and no question is raised here as to the dismissal of that paragraph.

[3] Section 201 (a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a (a) (1964 ed.), provides:

"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 criteria for coverage of motion picture theaters by the Act are stated in §§ 201 (b)(3) and 201 (c)(3), 42 U. S. C. §§ 2000a

The District Court held that this paragraph of the indictment failed to state an offense against rights secured by the Constitution or laws of the United States. The court found a fatal flaw in the failure of the paragraph to include an allegation that the acts of the defendants were motivated by racial discrimination, an allegation the court thought essential to charge an interference with rights secured by Title II of the Civil Rights Act of 1964.[4] The court went on to say that, in any event, 18 U. S. C. § 241 is not an available sanction to protect rights secured by that title because § 207 (b) of the 1964 Act, 42 U. S. C. § 2000a–6 (b) (1964 ed.), specifies that the remedies provided in Title II itself are

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(b)(3) and 2000a (c)(3) (1964 ed.); the criteria for coverage of restaurants are stated in §§ 201 (b)(2) and 201 (c)(2), 42 U. S. C. §§ 2000a (b)(2) and 2000a (c)(2) (1964 ed.). No issue is raised here as to the failure of the indictment to allege specifically that the Act is applicable to the places of public accommodation described in this paragraph of the indictment.

[4] The District Court said: "The Government contends that the rights enumerated in paragraph 1 stem from Title 2 of the Civil Rights Act of 1964, and thus automatically come within the purview of § 241. The Government conceded on oral argument that paragraph one would add nothing to the indictment absent the Act. It is not clear how the rights mentioned in paragraph one can be said to come from the Act because § 201 (a), upon which the draftsman doubtless relied, lists the essential element 'without discrimination or segregation on the ground of race, color, religion, or national origin.' This element is omitted from paragraph one of the indictment, and does not appear in the charging part of the indictment. The Supreme Court said in Cruikshank, supra, 92 U. S. at page 556, where deprivation of right to vote was involved,

" 'We may suspect that "race" was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offense and cannot be supplied by implication. Everything essential must be charged positively, not inferentially. The defect here is not in form, but in substance.' " 246 F. Supp. 475, 484.

to be the exclusive means of enforcing the rights the title secures.[5]

A direct appeal to this Court is available to the United States under the Criminal Appeals Act, 18 U. S. C. § 3731, from "a decision or judgment . . . dismissing any indictment . . . or any count thereof, where such decision or judgment is based upon the . . . construction of the statute upon which the indictment . . . is founded." In the present case, however, the District Court's judgment as to the first paragraph of the indictment was based, at least alternatively, upon its determination that this paragraph was defective as a matter of pleading. Settled principles of review under the Criminal Appeals Act therefore preclude our review of the District Court's judgment on this branch of the indictment. In *United States* v. *Borden Co.*, 308 U. S. 188, Chief Justice Hughes, speaking for a unanimous Court, set out these principles with characteristic clarity:

> "The established principles governing our review are these: (1) Appeal does not lie from a judgment which rests on the mere deficiencies of the indict-

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[5] Section 207 (b) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a–6 (b) (1964 ed.), states:

"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."

Relying on this provision and its legislative history, the District Court said: "It seems crystal clear that the Congress in enacting the Civil Rights Act of 1964 did not intend to subject anyone to any possible criminal penalties except those specifically provided for in the Act itself." 246 F. Supp., at 485.

ment as a pleading, as distinguished from a construction of the statute which underlies the indictment. (2) Nor will an appeal lie in a case where the District Court has considered the construction of the statute but has also rested its decision upon the independent ground of a defect in pleading which is not subject to our examination. In that case we cannot disturb the judgment and the question of construction becomes abstract. (3) This Court must accept the construction given to the indictment by the District Court as that is a matter we are not authorized to review. . . ." 308 U. S., at 193.

See also *United States* v. *Swift & Co.*, 318 U. S. 442, 444.

The result is not changed by the circumstance that we have jurisdiction over this appeal as to the other paragraphs of the indictment. *United States* v. *Borden, supra,* involved an indictment comparable to the present one for the purposes of jurisdiction under the Criminal Appeals Act. In *Borden,* the District Court had held all four counts of the indictment invalid as a matter of construction of the Sherman Act, but had also held the third count defective as a matter of pleading. The Court accepted jurisdiction on direct appeal as to the first, second, and fourth counts of the indictment, but it dismissed the appeal as to the third count for want of jurisdiction. "The Government's appeal does not open the whole case." 308 U. S. 188, 193.

It is hardly necessary to add that our ruling as to the Court's lack of jurisdiction now to review this aspect of the case implies no opinion whatsoever as to the correctness either of the District Court's appraisal of this paragraph of the indictment as a matter of pleading or of the court's view of the preclusive effect of § 207 (b) of the Civil Rights Act of 1964.

II.

The second numbered paragraph of the indictment alleged that the defendants conspired to injure, oppress, threaten, and intimidate Negro citizens of the United States in the free exercise and enjoyment of:

> "The right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof."

Correctly characterizing this paragraph as embracing rights protected by the Equal Protection Clause of the Fourteenth Amendment, the District Court held as a matter of statutory construction that 18 U. S. C. § 241 does not encompass any Fourteenth Amendment rights, and further held as a matter of constitutional law that "any broader construction of § 241 . . . would render it void for indefiniteness." 246 F. Supp., at 486. In so holding, the District Court was in error, as our opinion in *United States* v. *Price, post,* p. 787, decided today, makes abundantly clear.

To be sure, *Price* involves rights under the Due Process Clause, whereas the present case involves rights under the Equal Protection Clause. But no possible reason suggests itself for concluding that § 241—if it protects Fourteenth Amendment rights—protects rights secured by the one Clause but not those secured by the other. We have made clear in *Price* that when § 241 speaks of "any right or privilege secured . . . by the Constitution or laws of the United States," it means precisely that.

Moreover, inclusion of Fourteenth Amendment rights within the compass of 18 U. S. C. § 241 does not render the statute unconstitutionally vague. Since the gravamen of the offense is conspiracy, the requirement that the offender must act with a specific intent to inter-

fere with the federal rights in question is satisfied. *Screws* v. *United States,* 325 U. S. 91; *United States* v. *Williams,* 341 U. S. 70, 93–95 (dissenting opinion). And the rights under the Equal Protection Clause described by this paragraph of the indictment have been so firmly and precisely established by a consistent line of decisions in this Court,[6] that the lack of specification of these rights in the language of § 241 itself can raise no serious constitutional question on the ground of vagueness or indefiniteness.

Unlike the indictment in *Price,* however, the indictment in the present case names no person alleged to have acted in any way under the color of state law. The argument is therefore made that, since there exist no Equal Protection Clause rights against wholly private action, the judgment of the District Court on this branch of the case must be affirmed. On its face, the argument is unexceptionable. The Equal Protection Clause speaks to the State or to those acting under the color of its authority.[7]

In this connection, we emphasize that § 241 by its clear language incorporates no more than the Equal Protection Clause itself; the statute does not purport to give substantive, as opposed to remedial, implementation to

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[6] See, *e. g., Brown* v. *Board of Education,* 347 U. S. 483 (schools); *New Orleans City Park Improvement Assn.* v. *Detiege,* 358 U. S. 54, *Wright* v. *Georgia,* 373 U. S. 284, *Watson* v. *Memphis,* 373 U. S. 526, *City of New Orleans* v. *Barthe,* 376 U. S. 189 (parks and playgrounds); *Holmes* v. *City of Atlanta,* 350 U. S. 879 (golf course); *Mayor and City Council of Baltimore City* v. *Dawson,* 350 U. S. 877 (beach); *Muir* v. *Louisville Park Theatrical Assn.,* 347 U. S. 971 (auditorium); *Johnson* v. *Virginia,* 373 U. S. 61 (courthouse); *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (parking garage); *Turner* v. *City of Memphis,* 369 U. S. 350 (airport).

[7] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

any rights secured by that Clause.[8] Since we therefore deal here only with the bare terms of the Equal Protection Clause itself, nothing said in this opinion goes to the question of what kinds of other and broader legislation Congress might constitutionally enact under § 5 of the Fourteenth Amendment to implement that Clause or any other provision of the Amendment.[9]

It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority. The Equal Protection Clause "does not . . . add any thing to the rights which one citizen has under the Constitution against another." *United States* v. *Cruikshank,* 92 U. S. 542, 554–555. As MR. JUSTICE DOUGLAS more recently put it, "The Fourteenth Amendment protects the individual against *state action,* not against wrongs done by *individuals.*" *United States* v. *Williams,* 341 U. S. 70, 92 (dissenting opinion). This has been the view of the Court from the beginning. *United States* v. *Cruikshank, supra; United States* v. *Harris,* 106 U. S. 629; *Civil Rights Cases,* 109 U. S. 3; *Hodges* v. *United States,* 203 U. S. 1; *United States* v. *Powell,* 212 U. S. 564. It remains the Court's view today. See, *e. g., Evans* v. *Newton,* 382 U. S. 296; *United States* v. *Price, post,* p. 787.

This is not to say, however, that the involvement of the State need be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative

[8] See p. 747, *supra.*

[9] Thus, contrary to the suggestion in MR. JUSTICE BRENNAN'S separate opinion, nothing said in this opinion has the slightest bearing on the validity or construction of Title III or Title IV of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000b, 2000c (1964 ed.).

forces leading to the constitutional violation. See, *e. g.*, *Shelley* v. *Kraemer,* 334 U. S. 1; *Pennsylvania* v. *Board of Trusts,* 353 U. S. 230; *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715; *Peterson* v. *City of Greenville,* 373 U. S. 244; *Lombard* v. *Louisiana,* 373 U. S. 267; *Griffin* v. *Maryland,* 378 U. S. 130; *Robinson* v. *Florida,* 378 U. S. 153; *Evans* v. *Newton, supra.*

This case, however, requires no determination of the threshold level that state action must attain in order to create rights under the Equal Protection Clause. This is so because, contrary to the argument of the litigants, the indictment in fact contains an express allegation of state involvement sufficient at least to require the denial of a motion to dismiss. One of the means of accomplishing the object of the conspiracy, according to the indictment, was "By causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts." [10] In *Bell* v. *Maryland,* 378 U. S. 226, three members of the Court expressed the view that a private businessman's invocation of state police and judicial action to carry out his own policy of racial discrimination was sufficient to create Equal Protection Clause rights in those against whom the racial discrimination was directed.[11] Three other members of the Court strongly disagreed with that view,[12] and three expressed no opinion on the question. The allegation of the extent of official involvement in the present case is not clear. It may charge no more than co-operative private and state action similar to that involved in *Bell,* but it may go considerably further. For example, the allegation is broad enough to cover a charge of active connivance by agents of the State in the making of the "false reports," or other conduct amount-

[10] See note 1, *supra.*

[11] 378 U. S. 226, at 242 (separate opinion of Mr. Justice Douglas); *id.,* at 286 (separate opinion of Mr. Justice Goldberg).

[12] *Id.,* at 318 (dissenting opinion of Mr. Justice Black).

ing to official discrimination clearly sufficient to constitute denial of rights protected by the Equal Protection Clause. Although it is possible that a bill of particulars, or the proof if the case goes to trial, would disclose no co-operative action of that kind by officials of the State, the allegation is enough to prevent dismissal of this branch of the indictment.

III.

The fourth numbered paragraph of the indictment alleged that the defendants conspired to injure, oppress, threaten, and intimidate Negro citizens of the United States in the free exercise and enjoyment of:

> "The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia." [13]

The District Court was in error in dismissing the indictment as to this paragraph. The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. In *Crandall* v. *Nevada,* 6 Wall. 35, invali-

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[13] The third numbered paragraph alleged that the defendants conspired to injure, oppress, threaten, and intimidate Negro citizens of the United States in the free exercise and enjoyment of:

"The right to the full and equal use on the same terms as white citizens of the public streets and highways in the vicinity of Athens, Georgia."

Insofar as the third paragraph refers to the use of local public facilities, it is covered by the discussion of the second numbered paragraph of the indictment in Part II of this opinion. Insofar as the third paragraph refers to the use of streets or highways in interstate commerce, it is covered by the present discussion of the fourth numbered paragraph of the indictment.

dating a Nevada tax on every person leaving the State by common carrier, the Court took as its guide the statement of Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 492:

> "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

See 6 Wall., at 48–49.

Although the Articles of Confederation provided that "the people of each State shall have free ingress and regress to and from any other State," [14] that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.[15] In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution. See *Williams* v. *Fears*, 179 U. S. 270, 274; *Twining* v. *New Jersey*, 211 U. S. 78, 97; *Edwards* v. *California*, 314 U. S. 160, 177 (concurring opinion), 181 (concurring opinion); *New York* v. *O'Neill*, 359 U. S. 1, 6–8; 12–16 (dissenting opinion).

In *Edwards* v. *California*, 314 U. S. 160, invalidating a California law which impeded the free interstate passage of the indigent, the Court based its reaffirmation of the federal right of interstate travel upon the Commerce Clause. This ground of decision was consistent with precedents firmly establishing that the federal com-

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[14] Art. IV, Articles of Confederation.

[15] See Chafee, Three Human Rights in the Constitution of 1787, at 185 (1956).

merce power surely encompasses the movement in interstate commerce of persons as well as commodities. *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 203; *Covington & Cincinnati Bridge Co.* v. *Kentucky,* 154 U. S. 204, 218–219; *Hoke* v. *United States,* 227 U. S. 308, 320; *United States* v. *Hill,* 248 U. S. 420, 423. It is also well settled in our decisions that the federal commerce power authorizes Congress to legislate for the protection of individuals from violations of civil rights that impinge on their free movement in interstate commerce. *Mitchell* v. *United States,* 313 U. S. 80; *Henderson* v. *United States,* 339 U. S. 816; *Boynton* v. *Virginia,* 364 U. S. 454; *Atlanta Motel* v. *United States,* 379 U. S. 241; *Katzenbach* v. *McClung,* 379 U. S. 294.

Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further.[16] All have agreed that the right exists. Its explicit recognition as one of the federal rights protected by what is now 18 U. S. C. § 241 goes back at least as far as 1904. *United States* v. *Moore,* 129 F. 630, 633. We reaffirm it now.[17]

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[16] The District Court relied heavily on *United States* v. *Wheeler,* 254 U. S. 281, in dismissing this branch of the indictment. That case involved an alleged conspiracy to compel residents of Arizona to move out of that State. The right of interstate travel was, therefore, not directly involved. Whatever continuing validity *Wheeler* may have as restricted to its own facts, the dicta in the *Wheeler* opinion relied on by the District Court in the present case have been discredited in subsequent decisions. Cf. *Edwards* v. *California,* 314 U. S. 160, 177, 180 (DOUGLAS, J., concurring); *United States* v. *Williams,* 341 U. S. 70, 80.

[17] As emphasized in MR. JUSTICE HARLAN'S separate opinion, § 241 protects only against interference with rights secured by other federal laws or by the Constitution itself. The right to interstate travel is a right that the Constitution itself guarantees, as the cases cited in the text make clear. Although these cases in fact involved governmental interference with the right of free interstate travel,

This does not mean, of course, that every criminal conspiracy affecting an individual's right of free interstate passage is within the sanction of 18 U. S. C. § 241. A specific intent to interfere with the federal right must be proved, and at a trial the defendants are entitled to a jury instruction phrased in those terms. *Screws* v. *United States,* 325 U. S. 91, 106–107. Thus, for example, a conspiracy to rob an interstate traveler would not, of itself, violate § 241. But if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought. Accordingly, it was error to grant the motion to dismiss on this branch of the indictment.

For these reasons, the judgment of the District Court is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

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their reasoning fully supports the conclusion that the constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private. In this connection, it is important to reiterate that the right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment.

We are not concerned here with the extent to which interstate travel may be regulated or controlled by the exercise of a State's police power acting within the confines of the Fourteenth Amendment. See *Edwards* v. *California,* 314 U. S. 160, 184 (concurring opinion); *New York* v. *O'Neill,* 359 U. S. 1, 6–8. Nor is there any issue here as to the permissible extent of federal interference with the right within the confines of the Due Process Clause of the Fifth Amendment. Cf. *Zemel* v. *Rusk,* 381 U. S. 1; *Aptheker* v. *Secretary of State,* 378 U. S. 500; *Kent* v. *Dulles,* 357 U. S. 116.

MR. JUSTICE CLARK, with whom MR. JUSTICE BLACK and MR. JUSTICE FORTAS join, concurring.

I join the opinion of the Court in this case but believe it worthwhile to comment on its Part II in which the Court discusses that portion of the indictment charging the appellees with conspiring to injure, oppress, threaten and intimidate Negro citizens of the United States in the free exercise and enjoyment of:

> "The right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof."

The appellees contend that the indictment is invalid since 18 U. S. C. § 241, under which it was returned, protects only against interference with the exercise of the right to equal utilization of state facilities, which is not a right "secured" by the Fourteenth Amendment in the absence of state action. With respect to this contention the Court upholds the indictment on the ground that it alleges the conspiracy was accomplished, in part, "[b]y causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts." The Court reasons that this allegation of the indictment might well cover active connivance by agents of the State in the making of these false reports or in carrying on other conduct amounting to official discrimination. By so construing the indictment, it finds the language sufficient to cover a denial of rights protected by the Equal Protection Clause. The Court thus removes from the case any necessity for a "determination of the threshold level that state action must attain in order to create rights under the Equal Protection Clause." A study of the language in the indictment clearly shows

that the Court's construction is not a capricious one, and I therefore agree with that construction, as well as the conclusion that follows.

The Court carves out of its opinion the question of the power of Congress, under § 5 of the Fourteenth Amendment, to enact legislation implementing the Equal Protection Clause or any other provision of the Fourteenth Amendment. The Court's interpretation of the indictment clearly avoids the question whether Congress, by appropriate legislation, has the power to punish private conspiracies that interfere with Fourteenth Amendment rights, such as the right to utilize public facilities. My Brother BRENNAN, however, says that the Court's disposition constitutes an acceptance of appellees' aforesaid contention as to § 241. Some of his language further suggests that the Court indicates *sub silentio* that Congress does not have the power to outlaw such conspiracies. Although the Court specifically rejects any such connotation, *ante,* p. 755, it is, I believe, both appropriate and necessary under the circumstances here to say that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.

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

I join Parts I and II [1] of the Court's opinion, but I cannot subscribe to Part III in its full sweep. To the extent that it is there held that 18 U. S. C. § 241 (1964 ed.) reaches conspiracies, embracing only the action of

[1] The action of three of the Justices who join the Court's opinion in nonetheless cursorily pronouncing themselves on the far-reaching constitutional questions deliberately not reached in Part II seems to me, to say the very least, extraordinary.

private persons, to obstruct or otherwise interfere with the right of citizens freely to engage in interstate travel, I am constrained to dissent. On the other hand, I agree that § 241 does embrace state interference with such interstate travel, and I therefore consider that this aspect of the indictment is sustainable on the reasoning of Part II of the Court's opinion.

This right to travel must be found in the Constitution itself. This is so because § 241 covers only conspiracies to interfere with any citizen in the "free exercise or enjoyment" of a right or privilege "secured to him by the Constitution or laws of the United States," and no "right to travel" can be found in § 241 or in any other law of the United States. My disagreement with this phase of the Court's opinion lies in this: While past cases do indeed establish that there is a constitutional "right to travel" between States free from unreasonable *governmental* interference, today's decision is the first to hold that such movement is also protected against *private* interference, and, depending on the constitutional source of the right, I think it either unwise or impermissible so to read the Constitution.

Preliminarily, nothing in the Constitution expressly secures the right to travel. In contrast the Articles of Confederation provided in Art. IV:

> "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively . . . ."

This right to "free ingress and regress" was eliminated from the draft of the Constitution without discussion even though the main objective of the Convention was to create a stronger union. It has been assumed that the clause was dropped because it was so obviously an essential part of our federal structure that it was necessarily subsumed under more general clauses of the Constitution. See *United States* v. *Wheeler*, 254 U. S. 281, 294. I propose to examine the several asserted constitutional bases for the right to travel, and the scope of its protection in relation to each source.

I.

Because of the close proximity of the right of ingress and regress to the Privileges and Immunities Clause of the Articles of Confederation it has long been declared that the right is a privilege and immunity of national citizenship under the Constitution. In the influential opinion of Mr. Justice Washington on circuit, *Corfield* v. *Coryell*, 4 Wash. C. C. 371 (1825), the court addressed itself to the question—"what are the privileges and immunities of citizens in the several states?" *Id.*, at 380. *Corfield* was concerned with a New Jersey statute restricting to state citizens the right to rake for oysters, a statute which the court upheld. In analyzing the Privileges and Immunities Clause of the Constitution, Art. IV, § 2, the court stated that it confined "these expressions to those privileges and immunities which are, in their nature, *fundamental*," and listed among them "The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . . ." *Id.*, at 380–381.

The dictum in *Corfield* was given general approval in the first opinion of this Court to deal directly with the right of free movement, *Crandall* v. *Nevada*, 6 Wall. 35,

which struck down a Nevada statute taxing persons leaving the State. It is first noteworthy that in his concurring opinion Mr. Justice Clifford asserted that he would hold the statute void exclusively on commerce grounds for he was clear "that the State legislature cannot impose any such burden upon commerce among the several States." 6 Wall., at 49. The majority opinion of Mr. Justice Miller, however, eschewed reliance on the Commerce Clause and the Import-Export Clause and looked rather to the nature of the federal union:

> "The people of these United States constitute one nation. . . . This government has necessarily a capital established by law . . . . That government has a right to call to this point any or all of its citizens to aid in its service . . . . The government, also, has its offices of secondary importance in all other parts of the country. On the sea-coasts and on the rivers it has its ports of entry. In the interior it has its land offices, its revenue offices, and its sub-treasuries. In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established." 6 Wall., at 43–44.

Accompanying this need of the Federal Government, the Court found a correlative right of the citizen to move unimpeded throughout the land:

> "He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are

conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it." 6 Wall., at 44.

The focus of that opinion, very clearly, was thus on impediments by the States on free movement by citizens. This is emphasized subsequently when Mr. Justice Miller asserts that this approach is "neither novel nor unsupported by authority," because it is, fundamentally, a question of the exercise of a State's taxing power to obstruct the functions of the Federal Government: "[T]he right of the States in this mode to impede or embarrass the constitutional operations of that government, or the rights which its citizens hold under it, has been uniformly denied." 6 Wall., at 44–45.

Later cases, alluding to privileges and immunities, have in dicta included the right to free movement. See *Paul* v. *Virginia,* 8 Wall. 168, 180; *Williams* v. *Fears,* 179 U. S. 270, 274; *Twining* v. *New Jersey,* 211 U. S. 78.

Although the right to travel thus has respectable precedent to support its status as a privilege and immunity of national citizenship, it is important to note that those cases all dealt with the right of travel simply as affected by oppressive *state* action. Only one prior case in this Court, *United States* v. *Wheeler,* 254 U. S. 281, was argued precisely in terms of a right to free movement as against interference by private individuals. There the Government alleged a conspiracy under the predecessor of § 241 against the perpetrators of the notorious Bisbee Deportations.[2] The case was argued straightforwardly in terms of whether the right to free ingress and

[2] For a discussion of the deportations, see The President's Mediation Comm'n, Report on the Bisbee Deportations (November 6, 1917).

egress, admitted by both parties to be a right of national citizenship, was constitutionally guaranteed against private conspiracies. The Brief for the Defendants in Error, whose counsel was Charles Evans Hughes, later Chief Justice of the United States, gives as one of its main points: "So far as there is a right pertaining to Federal citizenship to have free ingress or egress with respect to the several States, the right is essentially one of protection against the action of the States themselves and of those acting under their authority." Brief, at p. i. The Court, with one dissent, accepted this interpretation of the right of unrestricted interstate movement, observing that *Crandall* v. *Nevada, supra,* was inapplicable because, *inter alia,* it dealt with state action. 254 U. S., at 299. More recent cases discussing or applying the right to interstate travel have always been in the context of oppressive state action. See, *e. g., Edwards* v. *California,* 314 U. S. 160, and other cases discussed, *infra.*[3]

It is accordingly apparent that the right to unimpeded interstate travel, regarded as a privilege and immunity of national citizenship, was historically seen as a method of breaking down state provincialism, and facilitating the creation of a true federal union. In the one case in which a private conspiracy to obstruct such movement was heretofore presented to this Court, the predecessor of the very statute we apply today was held not to encompass such a right.

II.

A second possible constitutional basis for the right to move among the States without interference is the Commerce Clause. When Mr. Justice Washington articulated

[3] The Court's reliance on *United States* v. *Moore,* 129 F. 630, is misplaced. That case held only that it was not a privilege or immunity to organize labor unions. The reference to "the right to pass from one state to any other" was purely incidental dictum.

the right in *Corfield,* it was in the context of a state statute impeding economic activity by outsiders, and he cast his statement in economic terms. 4 Wash. C. C., at 380–381. The two concurring Justices in *Crandall* v. *Nevada, supra,* rested solely on the commerce argument, indicating again the close connection between freedom of commerce and travel as principles of our federal union. In *Edwards* v. *California,* 314 U. S. 160, the Court held squarely that the right to unimpeded movement of persons is guaranteed against oppressive state legislation by the Commerce Clause, and declared unconstitutional a California statute restricting the entry of indigents into that State.

Application of the Commerce Clause to this area has the advantage of supplying a longer tradition of case law and more refined principles of adjudication. States do have rights of taxation and quarantine, see *Edwards* v. *California,* 314 U. S., at 184 (concurring opinion), which must be weighed against the general right of free movement, and Commerce Clause adjudication has traditionally been the means of reconciling these interests. Yet this approach to the right to travel, like that found in the privileges and immunities cases, is concerned with the interrelation of state and federal power, not—with an exception to be dealt with in a moment—with private interference.

The case of *In re Debs,* 158 U. S. 564, may be thought to raise some doubts as to this proposition. There the United States sought to enjoin Debs and members of his union from continuing to obstruct—by means of a strike—interstate commerce and the passage of the mails. The Court held that Congress and the Executive could certainly act to keep the channels of interstate commerce open, and that a court of equity had no less power to enjoin what amounted to a public nuisance. It might

be argued that to the extent *Debs* permits the Federal Government to obtain an injunction against the private conspiracy alleged in the present indictment,[4] the criminal statute should be applicable as well on the ground that the governmental interest in both cases is the same, namely to vindicate the underlying policy of the Commerce Clause. However, § 241 is not directed toward the vindication of governmental interests; it requires a private right under federal law. No such right can be found in *Debs,* which stands simply for the proposition that the Commerce Clause gives the Federal Government standing to sue on a basis similar to that of private individuals under nuisance law. The substantive rights of private persons to enjoin such impediments, of course, devolve from state not federal law; any seemingly inconsistent discussion in *Debs* would appear substantially vitiated by *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

I cannot find in any of this past case law any solid support for a conclusion that the Commerce Clause embraces a right to be free from private interference. And the Court's opinion here makes no such suggestion.

III.

One other possible source for the right to travel should be mentioned. Professor Chafee, in his thoughtful study, "Freedom of Movement," [5] finds both the privileges and immunities approach and the Commerce Clause approach unsatisfactory. After a thorough review of the history

[4] It is not even clear that an equity court would enjoin a conspiracy of the kind alleged here, for traditionally equity will not enjoin a crime. See Developments in the Law—Injunctions, 78 Harv. L. Rev. 994, 1013–1018 (1965).

[5] In Three Human Rights in the Constitution of 1787, at 162 (1956).

and cases dealing with the question he concludes that this "valuable human right," *id.*, at 209, is best seen in due process terms:

> "Already in several decisions the Court has used the Due Process Clause to safeguard the right of the members of any race to reside where they please inside a state, regardless of ordinances and injunctions. Why is not this clause equally available to assure the right to live in any state one desires? And unreasonable restraints by the national government on mobility can be upset by the Due Process Clause in the Fifth Amendment . . . . Thus the 'liberty' of all human beings which cannot be taken away without due process of law includes liberty of speech, press, assembly, religion, and also liberty of movement." *Id.*, at 192–193.

This due process approach to the right to unimpeded movement has been endorsed by this Court. In *Kent* v. *Dulles*, 357 U. S. 116, the Court asserted that "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment," *id.*, at 125, citing *Crandall* v. *Nevada*, *supra*, and *Edwards* v. *California*, *supra*. It is true that the holding in that case turned essentially on statutory grounds. However, in *Aptheker* v. *Secretary of State*, 378 U. S. 500, the Court, applying this constitutional doctrine, struck down a federal statute forbidding members of Communist organizations to obtain passports. Both the majority and dissenting opinions affirmed the principle that the right to travel is an aspect of the liberty guaranteed by the Due Process Clause.

Viewing the right to travel in due process terms, of course, would clearly make it inapplicable to the present case, for due process speaks only to governmental action.

IV.

This survey of the various bases for grounding the "right to travel" is conclusive only to the extent of showing that there has never been an acknowledged constitutional right to be free from private interference, and that the right in question has traditionally been seen and applied, whatever the constitutional underpinning asserted, only against governmental impediments. The right involved being as nebulous as it is, however, it is necessary to consider it in terms of policy as well as precedent.

As a general proposition it seems to me very dubious that the Constitution was intended to create certain rights of private individuals as against other private individuals. The Constitutional Convention was called to establish a nation, not to reform the common law. Even the Bill of Rights, designed to protect personal liberties, was directed at rights against governmental authority, not other individuals. It is true that there is a very narrow range of rights against individuals which have been read into the Constitution. In *Ex parte Yarbrough,* 110 U. S. 651, the Court held that implicit in the Constitution is the right of citizens to be free of private interference in federal elections. *United States* v. *Classic,* 313 U. S. 299, extended this coverage to primaries. *Logan* v. *United States,* 144 U. S. 263, applied the predecessor of § 241 to a conspiracy to injure someone in the custody of a United States marshal; the case has been read as dealing with a privilege and immunity of citizenship, but it would seem to have depended as well on extrapolations from statutory provisions providing for supervision of prisoners. The Court in *In re Quarles,* 158 U. S. 532, extending *Logan, supra,* declared that there was a right of federal citizenship to inform federal officials of violations of federal law. See also *United*

States v. *Cruikshank*, 92 U. S. 542, 552, which announced in dicta a federal right to assemble to petition the Congress for a redress of grievances.

Whatever the validity of these cases on their own terms, they are hardly persuasive authorities for adding to the collection of privileges and immunities the right to be free of private impediments to travel. The cases just discussed are narrow, and are essentially concerned with the vindication of important relationships with the Federal Government—voting in federal elections, involvement in federal law enforcement, communicating with the Federal Government. The present case stands on a considerably different footing.

It is arguable that the same considerations which led the Court on numerous occasions to find a right of free movement against oppressive state action now justify a similar result with respect to private impediments. *Crandall* v. *Nevada, supra,* spoke of the need to travel to the capital, to serve and consult with the offices of government. A basic reason for the formation of this Nation was to facilitate commercial intercourse; intellectual, cultural, scientific, social, and political interests are likewise served by free movement. Surely these interests can be impeded by private vigilantes as well as by state action. Although this argument is not without force, I do not think it is particularly persuasive. There is a difference in power between States and private groups so great that analogies between the two tend to be misleading. If the State obstructs free intercourse of goods, people, or ideas, the bonds of the union are threatened; if a private group effectively stops such communication, there is at most a temporary breakdown of law and order, to be remedied by the exercise of state authority or by appropriate federal legislation.

To decline to find a constitutional right of the nature asserted here does not render the Federal Government

helpless. As to interstate commerce by railroads, federal law already provides remedies for "undue or unreasonable prejudice," 24 Stat. 380, as amended, 49 U. S. C. § 3 (1) (1964 ed.), which has been held to apply to racial discrimination. *Henderson* v. *United States,* 339 U. S. 816. A similar statute applies to motor carriers, 49 Stat. 558, as amended, 49 U. S. C. § 316 (d) (1964 ed.), and to air carriers, 72 Stat. 760, 49 U. S. C. § 1374 (b) (1964 ed.). See *Boynton* v. *Virginia,* 364 U. S. 454; *Fitzgerald* v. *Pan American World Airways,* 229 F. 2d 499. The Civil Rights Act of 1964, 78 Stat. 243, deals with other types of obstructions to interstate commerce. Indeed, under the Court's present holding, it is arguable that any conspiracy to discriminate in public accommodations having the effect of impeding interstate commerce could be reached under § 241, unaided by Title II of the Civil Rights Act of 1964. Because Congress has wide authority to legislate in this area, it seems unnecessary—if prudential grounds are of any relevance, see *Baker* v. *Carr,* 369 U. S. 186, 258–259 (CLARK, J., concurring)—to strain to find a dubious constitutional right.

V.

If I have succeeded in showing anything in this constitutional exercise, it is that until today there was no federal right to be free from private interference with interstate transit, and very little reason for creating one. Although the Court has ostensibly only "discovered" this private right in the Constitution and then applied § 241 mechanically to punish those who conspire to threaten it, it should be recognized that what the Court has in effect done is to use this all-encompassing criminal statute to fashion federal common-law crimes, forbidden to the federal judiciary since the 1812 decision in *United States* v. *Hudson,* 7 Cranch 32. My Brother DOUGLAS, dissenting in *United States* v. *Classic, supra,*

noted well the dangers of the indiscriminate application of the predecessor of § 241: "It is not enough for us to find in the vague penumbra of a statute some offense about which Congress could have legislated, and then to particularize it as a crime because it is highly offensive." 313 U. S., at 331–332.

I do not gainsay that the immunities and commerce provisions of the Constitution leave the way open for the finding of this "private" constitutional right, since they do not speak solely in terms of governmental action. Nevertheless, I think it wrong to sustain a criminal indictment on such an uncertain ground. To do so subjects § 241 to serious challenge on the score of vagueness and serves in effect to place this Court in the position of making criminal law under the name of constitutional interpretation. It is difficult to subdue misgivings about the potentialities of this decision.

I would sustain this aspect of the indictment only on the premise that it sufficiently alleges state interference with interstate travel, and on no other ground.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, concurring in part and dissenting in part.

I join Part I of the Court's opinion. I reach the same result as the Court on that branch of the indictment discussed in Part III of its opinion but for other reasons. See footnote 3, *infra*. And I agree with so much of Part II as construes 18 U. S. C. § 241 (1964 ed.) to encompass conspiracies to injure, oppress, threaten or intimidate citizens in the free exercise or enjoyment of Fourteenth Amendment rights and holds that, as so construed, § 241 is not void for indefiniteness. I do not agree, however, with the remainder of Part II which holds, as I read the opinion, that a conspiracy to interfere with the exercise of the right to equal utilization of

state facilities is not, within the meaning of § 241, a conspiracy to interfere with the exercise of a "right . . . secured . . . by the Constitution" unless discriminatory conduct by state officers is involved in the alleged conspiracy.

I.

The second numbered paragraph of the indictment charges that the defendants conspired to injure, oppress, threaten, and intimidate Negro citizens in the free exercise and enjoyment of "[t]he right to the equal utilization, without discrimination upon the basis of race, of public facilities . . . owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof." Appellees contend that as a matter of statutory construction § 241 does not reach such a conspiracy. They argue that a private conspiracy to interfere with the exercise of the right to equal utilization of the state facilities described in that paragraph is not, within the meaning of § 241, a conspiracy to interfere with the exercise of a right "secured" by the Fourteenth Amendment because "there exist no Equal Protection Clause rights against wholly private action."

The Court deals with this contention by seizing upon an allegation in the indictment concerning one of the means employed by the defendants to achieve the object of the conspiracy. The indictment alleges that the object of the conspiracy was to be achieved, in part, "[b]y causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts . . . ." The Court reads this allegation as "broad enough to cover a charge of active connivance by agents of the State in the making of the 'false reports,' or other conduct amounting to official discrimination clearly sufficient to constitute denial of rights protected by the Equal Protection Clause," and the Court holds that this allegation, so construed, is sufficient to "prevent dismissal of this

branch of the indictment." [1] I understand this to mean that, no matter how compelling the proof that private conspirators murdered, assaulted, or intimidated Negroes in order to prevent their use of state facilities, the prosecution under the second numbered paragraph must fail in the absence of proof of active connivance of law enforcement officers with the private conspirators in causing the false arrests.

Hence, while the order dismissing the second numbered paragraph of the indictment is reversed, severe limitations on the prosecution of that branch of the indictment are implicitly imposed. These limitations could only stem from an acceptance of appellees' contention that, because there exist no Equal Protection Clause rights against wholly private action, a conspiracy of private persons to interfere with the right to equal utilization of state facilities described in the second numbered paragraph is not a conspiracy to interfere with a "right . . . secured . . . by the Constitution" within the meaning of § 241. In other words, in the Court's

[1] As I read the indictment, the allegation regarding the false arrests relates to all the other paragraphs and not merely, as the Court suggests, to the second numbered paragraph of the indictment. See n. 1 in the Court's opinion. Hence, assuming that, as maintained by the Court, the allegation could be construed to encompass discriminatory conduct by state law enforcement officers, it would be a sufficient basis for preventing the dismissal of each of the other paragraphs of the indictment. The right to be free from discriminatory conduct by law enforcement officers while using privately owned places of public accommodation (paragraph one) or while traveling from State to State (paragraphs three and four), or while doing anything else, is unquestionably secured by the Equal Protection Clause. It would therefore be unnecessary to decide whether the right to travel from State to State is itself a right secured by the Constitution or whether paragraph one is defective either because of the absence of an allegation of a racial discriminatory motive or because of the exclusive remedy provision of the Civil Rights Act of 1964, § 207 (b), 78 Stat. 246, 42 U. S. C. § 2000a–6 (b) (1964 ed.).

view the only right referred to in the second numbered paragraph that is, for purposes of § 241, "secured . . . by the Constitution" is a right to be free—when seeking access to state facilities—from discriminatory conduct by state officers or by persons acting in concert with state officers.[2]

I cannot agree with that construction of § 241. I am of the opinion that a conspiracy to interfere with the right to equal utilization of state facilities described in the second numbered paragraph of the indictment is a conspiracy to interfere with a "right . . . secured . . . by the Constitution" within the meaning of § 241—without regard to whether state officers participated in the alleged conspiracy. I believe that § 241 reaches such a private conspiracy, not because the Fourteenth Amendment of its own force prohibits such a conspiracy, but because § 241, as an exercise of congressional power under § 5 of that Amendment, prohibits *all* conspiracies to interfere with the exercise of a "right . . . secured . . . by the Constitution" and because the right to equal utilization of state facilities is a "right . . . secured . . . by the Constitution" within the meaning of that phrase as used in § 241.[3]

My difference with the Court stems from its construction of the term "secured" as used in § 241 in the phrase a "right . . . secured . . . by the Constitution or laws

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[2] I see no basis for a reading more consistent with my own view in the isolated statement in the Court's opinion that "the rights under the Equal Protection Clause described by this paragraph [two] of the indictment have been . . . firmly and precisely established by a consistent line of decisions in this Court . . . ."

[3] Similarly, I believe that § 241 reaches a private conspiracy to interfere with the right to travel from State to State. I therefore need not reach the question whether the Constitution of its own force prohibits private interferences with that right; for I construe § 241 to prohibit such interferences, and as so construed I am of the opinion that § 241 is a valid exercise of congressional power.

of the United States." The Court tacitly construes the term "secured" so as to restrict the coverage of § 241 to those rights that are "fully protected" by the Constitution or another federal law. Unless private interferences with the exercise of the right in question are prohibited by the Constitution itself or another federal law, the right cannot, in the Court's view, be deemed "secured . . . by the Constitution or laws of the United States" so as to make § 241 applicable to a private conspiracy to interfere with the exercise of that right. The Court then premises that neither the Fourteenth Amendment nor any other federal law [4] prohibits private interferences with the exercise of the right to equal utilization of state facilities.

In my view, however, a right can be deemed "secured . . . by the Constitution or laws of the United States," within the meaning of § 241, even though only governmental interferences with the exercise of the right are prohibited by the Constitution itself (or another fed-

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[4] This premise is questionable. Title III of the Civil Rights Act of 1964, 78 Stat. 246, 42 U. S. C. § 2000b (1964 ed.), authorizes the Attorney General on complaint from an individual that he is "being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision," to commence a civil action "for such relief as may be appropriate" and against such parties as are "necessary to the grant of effective relief." Arguably this would authorize relief against private parties not acting in concert with state officers. (This title of the Act does not have an exclusive remedy similar to § 207 (b) of Title II, 42 U. S. C. § 2000a–6 (b).)

The Court affirmatively disclaims any intention to deal with Title III of the Civil Rights Act of 1964 in connection with the second numbered paragraph of the indictment. But, as the District Judge observed in his opinion, the Government maintained that the right described in that paragraph was "secured" by the Fourteenth Amendment and, "additionally," by Title III of the Civil Rights Act of 1964. 246 F. Supp., at 484. That position was not effectively abandoned in this Court.

eral law). The term "secured" means "created by, arising under or dependent upon," *Logan* v. *United States,* 144 U. S. 263, 293, rather than "fully protected." A right is "secured . . . by the Constitution" within the meaning of § 241 if it emanates from the Constitution, if it finds its source in the Constitution. Section 241 must thus be viewed, in this context, as an exercise of congressional power to amplify prohibitions of the Constitution addressed, as is invariably the case, to government officers; contrary to the view of the Court, I think we are dealing here with a statute that seeks to implement the Constitution, not with the "bare terms" of the Constitution. Section 241 is not confined to protecting rights against private conspiracies that the Constitution or another federal law also protects against private interferences. No such duplicative function was envisioned in its enactment. See Appendix in *United States* v. *Price, post,* p. 807. Nor has this Court construed § 241 in such a restrictive manner in other contexts. Many of the rights that have been held to be encompassed within § 241 are not additionally the subject of protection of specific federal legislation or of any provision of the Constitution addressed to private individuals. For example, the prohibitions and remedies of § 241 have been declared to apply, without regard to whether the alleged violator was a government officer, to interferences with the right to vote in a federal election, *Ex parte Yarbrough,* 110 U. S. 651, or primary, *United States* v. *Classic,* 313 U. S. 299; the right to discuss public affairs or petition for redress of grievances, *United States* v. *Cruikshank,* 92 U. S. 542, 552, cf. *Hague* v. *CIO,* 307 U. S. 496, 512–513 (opinion of Roberts, J.); *Collins* v. *Hardyman,* 341 U. S. 651, 663 (dissenting opinion); the right to be protected against violence while in the lawful custody of a federal officer, *Logan* v. *United States,* 144 U. S. 263; and the right to inform of violations of

federal law, *In re Quarles and Butler,* 158 U. S. 532. The full import of our decision in *United States* v. *Price, post,* p. 787, at pp. 796–807, regarding § 241 is to treat the rights purportedly arising from the Fourteenth Amendment in parity with those rights just enumerated, arising from other constitutional provisions. The reach of § 241 should not vary with the particular constitutional provision that is the source of the right. For purposes of applying § 241 to a private conspiracy, the standard used to determine whether, for example, the right to discuss public affairs or the right to vote in a federal election is a "right . . . secured . . . by the Constitution" is the very same standard to be used to determine whether the right to equal utilization of state facilities is a "right . . . secured . . . by the Constitution."

For me, the right to use state facilities without discrimination on the basis of race is, within the meaning of § 241, a right created by, arising under and dependent upon the Fourteenth Amendment and hence is a right "secured" by that Amendment. It finds its source in that Amendment. As recognized in *Strauder* v. *West Virginia,* 100 U. S. 303, 310, "The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights . . . ." The Fourteenth Amendment commands the State to provide the members of all races with equal access to the public facilities it owns or manages, and the right of a citizen to use those facilities without discrimination on the basis of race is a basic corollary of this command. Cf. *Brewer* v. *Hoxie School District No. 46,* 238 F. 2d 91 (C. A. 8th Cir. 1956). Whatever may be the status of the right to equal utilization of *privately owned facilities,* see generally *Bell* v. *Maryland,* 378 U. S. 226, it must be emphasized that we

are here concerned with the right to equal utilization of *public facilities owned or operated by or on behalf of the State*. To deny the existence of this right or its constitutional stature is to deny the history of the last decade, or to ignore the role of federal power, predicated on the Fourteenth Amendment, in obtaining nondiscriminatory access to such facilities. It is to do violence to the common understanding, an understanding that found expression in Titles III and IV of the Civil Rights Act of 1964, 78 Stat. 246, 42 U. S. C. §§ 2000b, 2000c (1964 ed.), dealing with state facilities. Those provisions reflect the view that the Fourteenth Amendment creates the right to equal utilization of state facilities. Congress did not preface those titles with a provision comparable to that in Title II [5] explicitly creating the right to equal utilization of certain privately owned facilities. Congress rightly assumed that a specific legislative declaration of the right was unnecessary, that the right arose from the Fourteenth Amendment itself.

In reversing the District Court's dismissal of the second numbered paragraph, I would therefore hold that proof at the trial of the conspiracy charged to the defendants in that paragraph will establish a violation of § 241 without regard to whether there is also proof that state law enforcement officers actively connived in causing the arrests of Negroes by means of false reports.

II.

My view as to the scope of § 241 requires that I reach the question of constitutional power—whether § 241 or legislation indubitably designed to punish entirely pri-

[5] "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." 42 U. S. C. § 2000a (a) (1964 ed.).

vate conspiracies to interfere with the exercise of Fourteenth Amendment rights constitutes a permissible exercise of the power granted to Congress by § 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of" the Amendment.

A majority of the members of the Court [6] expresses the view today that § 5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy. Although the Fourteenth Amendment itself, according to established doctrine, "speaks to the State or to those acting under the color of its authority," legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, § 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection. It made that determination in enacting § 241, see the Appendix in *United States* v. *Price, post,* p. 807, and, therefore § 241 is constitutional legislation as applied to reach the private conspiracy alleged in the second numbered paragraph of the indictment.

I acknowledge that some of the decisions of this Court, most notably an aspect of the *Civil Rights Cases,* 109 U. S. 3, 11, have declared that Congress' power under

[6] The majority consists of the Justices joining my Brother CLARK's opinion and the Justices joining this opinion. The opinion of MR. JUSTICE STEWART construes § 241 as applied to the second numbered paragraph to require proof of active participation by state officers in the alleged conspiracy and that opinion does not purport to deal with this question.

§ 5 is confined to the adoption of "appropriate legislation for correcting the effects of . . . prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous." I do not accept—and a majority of the Court today rejects—this interpretation of § 5. It reduces the legislative power to enforce the provisions of the Amendment to that of the judiciary;[7] and it attributes a far too limited objective to the Amendment's sponsors.[8] Moreover, the language of § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment are virtually the same, and we recently held in *South Carolina* v. *Katzenbach, ante,* p. 301, at 326, that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." The classic formulation of that test by Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316, 421, was there adopted:

> "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,

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[7] Congress, not the judiciary, was viewed as the more likely agency to implement fully the guarantees of equality, and thus it could be presumed the primary purpose of the Amendment was to augment the power of Congress, not the judiciary. See James, The Framing of the Fourteenth Amendment 184 (1956); Harris, The Quest for Equality 53–54 (1960); Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 Yale L. J. 1353, 1356 (1964).

[8] As the first Mr. Justice Harlan said in dissent in the *Civil Rights Cases,* 109 U. S., at 54: "It was perfectly well known that the great danger to the equal enjoyment by citizens of their rights, as citizens, was to be apprehended not altogether from unfriendly State legislation, but from the hostile action of corporations and individuals in the States. And it is to be presumed that it was intended, by that section [§ 5], to clothe Congress with power and authority to meet that danger." See *United States* v. *Price, post,* p. 787, at 803–806, and Appendix.

> which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

It seems to me that this is also the standard that defines the scope of congressional authority under § 5 of the Fourteenth Amendment. Indeed, *South Carolina* v. *Katzenbach* approvingly refers to *Ex parte Virginia,* 100 U. S. 339, 345–346, a case involving the exercise of the congressional power under § 5 of the Fourteenth Amendment, as adopting the *McCulloch* v. *Maryland* formulation for "each of the Civil War Amendments."

Viewed in its proper perspective, § 5 of the Fourteenth Amendment appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens. No one would deny that Congress could enact legislation directing state officials to provide Negroes with equal access to state schools, parks and other facilities owned or operated by the State. Nor could it be denied that Congress has the power to punish state officers who, in excess of their authority and in violation of state law, conspire to threaten, harass and murder Negroes for attempting to use these facilities.[9] And I can find no principle of federalism nor word of the Constitution that denies Congress power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals—not state officers themselves and not acting in concert with state officers—who engage in the same brutal conduct for the same misguided purpose.[10]

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[9] *United States* v. *Price, post,* p. 787. See *Screws* v. *United States,* 325 U. S. 91; *Williams* v. *United States,* 341 U. S. 97; *Monroe* v. *Pape,* 365 U. S. 167.

[10] Cf. *Atlanta Motel* v. *United States,* 379 U. S. 241, 258, applying the settled principle expressed in *United States* v. *Darby,* 312 U. S. 100, 118, that the power of Congress over interstate commerce "ex-

III.

Section 241 is certainly not model legislation for punishing private conspiracies to interfere with the exercise of the right of equal utilization of state facilities. It deals in only general language "with Federal rights and with all Federal rights" and protects them "in the lump," *United States* v. *Mosley,* 238 U. S. 383, 387; it protects in most general terms "any right or privilege secured . . . by the Constitution or laws of the United States." Congress has left it to the courts to mark the bounds of those words, to determine on a case-by-case basis whether the right purportedly threatened is a federal right. That determination may occur after the conduct charged has taken place or it may not have been anticipated in prior decisions; "a penumbra of rights may be involved, which none can know until decision has been made and infraction may occur before it is had." [11] Reliance on such wording plainly brings § 241 close to the danger line of being void for vagueness.

But, as the Court holds, a stringent scienter requirement saves § 241 from condemnation as a criminal statute failing to provide adequate notice of the proscribed conduct.[12] The gravamen of the offense is conspiracy, and therefore, like a statute making certain conduct criminal

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tends 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 . . . ."

[11] Mr. Justice Rutledge in *Screws* v. *United States,* 325 U. S., at 130.

[12] *Ante,* pp. 753–754. See generally, *Boyce Motor Lines, Inc.* v. *United States,* 342 U. S. 337, 342; *American Communications Assn.* v. *Douds,* 339 U. S. 382, 412–413; *United States* v. *Ragen,* 314 U. S. 513, 524; *Gorin* v. *United States,* 312 U. S. 19, 27–28; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 501–503; *Omaechevarria* v. *Idaho,* 246 U. S. 343, 348.

only if it is done "willfully," § 241 requires proof of a specific intent for conviction. We have construed § 241 to require proof that the persons charged conspired to act in defiance, or in reckless disregard, of an announced rule making the federal right specific and definite. *United States* v. *Williams*, 341 U. S. 70, 93–95 (opinion of DOUGLAS, J.); *Screws* v. *United States*, 325 U. S. 91, 101–107 (opinion of DOUGLAS, J.) (involving the predecessor to 18 U. S. C. § 242). Since this case reaches us on the pleadings, there is no occasion to decide now whether the Government will be able on trial to sustain the burden of proving the requisite specific intent *vis-à-vis* the right to travel freely from State to State or the right to equal utilization of state facilities. Compare *James* v. *United States*, 366 U. S. 213, 221–222 (opinion of WARREN, C. J.). In any event, we may well agree that the necessity to discharge that burden can imperil the effectiveness of § 241 where, as is often the case, the pertinent constitutional right must be implied from a grant of congressional power or a prohibition upon the exercise of governmental power. But since the limitation on the statute's effectiveness derives from Congress' failure to define—with any measure of specificity—the rights encompassed, the remedy is for Congress to write a law without this defect. To paraphrase my Brother DOUGLAS' observation in *Screws* v. *United States*, 325 U. S., at 105, addressed to a companion statute with the same shortcoming, if Congress desires to give the statute more definite scope, it may find ways of doing so.

Syllabus.

UNITED STATES v. PRICE ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

Nos. 59 and 60. Argued November 9, 1965.—
Decided March 28, 1966.

Appellees are three Mississippi law enforcement officials and 15 private individuals who are alleged to have conspired to deprive three individuals of their rights under the Fourteenth Amendment. The alleged conspiracy involved releasing the victims from jail at night; intercepting, assaulting and killing them; and disposing of their bodies. Its purpose was to "punish" the victims summarily. Two indictments were returned. One charged all appellees with a conspiracy under 18 U. S. C. § 371 to violate 18 U. S. C. § 242, which makes it a misdemeanor willfully and under color of law to subject any person to the deprivation of any rights secured or protected by the Constitution. The indictment also charged all appellees with substantive violations of § 242. The District Court sustained the conspiracy count against a motion to dismiss, and sustained the substantive counts as to the three official defendants. It dismissed the substantive counts as to the 15 private defendants on the ground that although the indictment alleged that they had acted "under color" of law, it did not allege that they were acting as officers of the State. This dismissal is here on direct appeal as No. 60. The other indictment charged all appellees with a conspiracy in violation of 18 U. S. C. § 241, making it a felony to conspire to interfere with a citizen in the free exercise or enjoyment of any right secured or protected by the Constitution or laws of the United States. The District Court dismissed this indictment as to all appellees on the ground that § 241 does not include rights protected by the Fourteenth Amendment. This dismissal is here on direct appeal as No. 59. *Held:*

1. The District Court erred in dismissing the indictment in No. 60 insofar as it charged the private defendants with substantive violations of § 242. Pp. 794–796.

(a) "To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." Pp. 794–795.

(b) The dismissal of the indictment in No. 60 as to the private persons resulted from the District Court's erroneous construction of the "under color" of law requirement of § 242 as making the statute inapplicable to nonofficials, not upon a construction of the indictment as a pleading; hence the dismissal is reviewable on direct appeal. Pp. 795–796.

2. Section 241 includes within its protection rights secured or protected by the Fourteenth Amendment, and the District Court accordingly erred in dismissing the indictment in No. 59. Pp. 796–807.

(a) The District Court incorrectly assumed that *United States* v. *Williams*, 341 U. S. 70, authoritatively determined the inapplicability of § 241 to deprivations of Fourteenth Amendment rights. The Justices who reached that issue in *Williams* divided equally on the question. That case "thus left the proper construction of § 241, as regards its applicability to protect Fourteenth Amendment rights, an open question." Pp. 797–798.

(b) "There is no doubt that the indictment in No. 59 sets forth a conspiracy within the ambit of the Fourteenth Amendment. Like the indictment in No. 60 . . . it alleges that the defendants acted 'under color of law' and that the conspiracy included action by the State through its law enforcement officers to punish the alleged victims without due process of law in violation of the Fourteenth Amendment's direct admonition to the States." Pp. 799–800.

(c) The wording of § 241 suggests no limitation of its coverage to exclude Fourteenth Amendment rights. "The language of § 241 is plain and unlimited. . . . [I]ts language embraces *all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States." P. 800.

(d) The legislative history of § 241 supports the view that it was intended to encompass Fourteenth Amendment rights within its protection. Pp. 800–806.

Reversed and remanded.

Solicitor General Marshall argued the cause for the United States. With him on the brief were *Assistant Attorney General Doar, Louis F. Claiborne* and *Gerald P. Choppin.*

H. C. Mike Watkins argued the cause for appellees. With him on the brief were *Dennis Goldman, Laurel G. Weir* and *Herman Alford.*

MR. JUSTICE FORTAS delivered the opinion of the Court.

These are direct appeals from the dismissal in part of two indictments returned by the United States Grand Jury for the Southern District of Mississippi. The indictments allege assaults by the accused persons upon the rights of the asserted victims to due process of law under the Fourteenth Amendment. The indictment in No. 59 charges 18 persons [1] with violations of 18 U. S. C. § 241 (1964 ed.). In No. 60, the same 18 persons are charged with offenses based upon 18 U. S. C. § 242 (1964 ed.). These are among the so-called civil rights statutes which have come to us from Reconstruction days, the period in our history which also produced the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.

The sole question presented in these appeals is whether the specified statutes make criminal the conduct for which the individuals were indicted. It is an issue of construction, not of constitutional power. We have no doubt of "the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment." *United States* v. *Williams,* 341 U. S. 70, 72.[2]

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[1] One of the defendants charged in the two indictments, James E. Jordan, is not a party to the present appeal. His case was transferred under Rule 20, Fed. Rules Crim. Proc., to the United States District Court for the Middle District of Georgia.

[2] Cf. Mr. Justice Holmes in *United States* v. *Mosley,* 238 U. S. 383, 386 (a federal voting rights case under an earlier version of § 241): "It is not open to question that this statute is constitutional . . . ." The source of congressional power in this case is, of

The events upon which the charges are based, as alleged in the indictments, are as follows: On June 21, 1964, Cecil Ray Price, the Deputy Sheriff of Neshoba County, Mississippi, detained Michael Henry Schwerner, James Earl Chaney and Andrew Goodman in the Neshoba County jail located in Philadelphia, Mississippi. He released them in the dark of that night. He then proceeded by automobile on Highway 19 to intercept his erstwhile wards. He removed the three men from their automobile, placed them in an official automobile of the Neshoba County Sheriff's office, and transported them to a place on an unpaved road.

These acts, it is alleged, were part of a plan and conspiracy whereby the three men were intercepted by the 18 defendants, including Deputy Sheriff Price, Sheriff Rainey and Patrolman Willis of the Philadelphia, Mississippi, Police Department. The purpose and intent of the release from custody and the interception, according to the charge, were to "punish" the three men. The defendants, it is alleged, "did wilfully assault, shoot and kill" each of the three. And, the charge continues, the bodies of the three victims were transported by one of the defendants from the rendezvous on the unpaved road to the vicinity of the construction site of an earthen dam approximately five miles southwest of Philadelphia, Mississippi.

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course, § 5 of the Fourteenth Amendment, which reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

There are three "Williams" cases arising from the same events. The first, with no bearing on the present appeal is *United States* v. *Williams*, 341 U. S. 58, involving a prosecution for perjury. The second, *United States* v. *Williams*, 341 U. S. 70, was a prosecution for violation of § 241; it will be referred to hereinafter as *Williams* I. The third, *Williams* v. *United States*, 341 U. S. 97, was a prosecution for violation of § 242; it will be referred to as *Williams* II.

These are federal and not state indictments. They do not charge as crimes the alleged assaults or murders. The indictments are framed to fit the stated federal statutes, and the question before us is whether the attempt of the draftsman for the Grand Jury in Mississippi has been successful: whether the indictments charge offenses against the various defendants which may be prosecuted under the designated federal statutes.

We shall deal first with the indictment in No. 60, based on § 242 of the Criminal Code, and then with the indictment in No. 59, under § 241. We do this for ease of exposition and because § 242 was enacted by the Congress about four years prior to § 241.[3] Section 242 was enacted in 1866; § 241 in 1870.

I. No. 60.

Section 242 defines a misdemeanor, punishable by fine of not more than $1,000 or imprisonment for not more than one year, or both. So far as here significant, it provides punishment for "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . ."

The indictment in No. 60 contains four counts, each of which names as defendants the three officials and 15 nonofficial persons. The First Count charges, on the basis of allegations substantially as set forth above, that all of the defendants conspired "to wilfully subject" Schwerner, Chaney and Goodman "to the deprivation

[3] In the interest of clarity, we shall use the present designation of the statutes throughout this discussion. Reference is made to the Appendix to Mr. Justice Frankfurter's opinion in *Williams* I, 341 U. S., at 83, which contains a table showing major changes in the statutes through the years.

of their right, privilege and immunity secured and protected by the Fourteenth Amendment to the Constitution of the United States not to be summarily punished without due process of law by persons acting under color of the laws of the State of Mississippi." This is said to constitute a conspiracy to violate § 242, and therefore an offense under 18 U. S. C. § 371 (1964 ed.). The latter section, the general conspiracy statute, makes it a crime to conspire to commit any offense against the United States. The penalty for violation is the same as for direct violation of § 242—that is, it is a misdemeanor.[4]

On a motion to dismiss, the District Court sustained this First Count as to all defendants. As to the sheriff, deputy sheriff and patrolman, the court recognized that each was clearly alleged to have been acting "under color of law" as required by § 242.[5] As to the private persons, the District Court held that "[I]t is immaterial to the conspiracy that these private individuals were not acting under color of law" because the count charges that they were conspiring with persons who were so acting. See *United States* v. *Rabinowich,* 238 U. S. 78, 87.

The court necessarily was satisfied that the indictment, in alleging the arrest, detention, release, interception and killing of Schwerner, Chaney and Goodman, adequately stated as the purpose of the conspiracy, a violation of § 242, and that this section could be violated by "wilfully subject[ing the victims] . . . to the deprivation of their right, privilege and immunity" under the Due Process Clause of the Fourteenth Amendment.

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[4] "If . . . the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." 18 U. S. C. § 371 (1964 ed.).

[5] This is settled by our decisions in *Screws* v. *United States,* 325 U. S. 91, 107–113, and *Williams* II, 341 U. S., at 99–100.

No appeal was taken by the defendants from the decision of the trial court with respect to the First Count and it is not before us for adjudication.

The Second, Third and Fourth Counts of the indictment in No. 60 charge all of the defendants, not with conspiracy, but with substantive violations of § 242. Each of these counts charges that the defendants, acting "under color of the laws of the State of Mississippi," "did wilfully assault, shoot and kill" Schwerner, Chaney and Goodman, respectively, "for the purpose and with the intent" of punishing each of the three and that the defendants "did thereby wilfully deprive" each "of rights, privileges and immunities secured and protected by the Constitution and the laws of the United States"—namely, due process of law.

The District Court held these counts of the indictment valid as to the sheriff, deputy sheriff and patrolman. But it dismissed them as against the nonofficial defendants because the counts do not charge that the latter were "officers in fact, or de facto in anything allegedly done by them 'under color of law.' "

We note that by sustaining these counts against the three officers, the court again necessarily concluded that an offense under § 242 is properly stated by allegations of willful deprivation, under color of law, of life and liberty without due process of law. We agree. No other result would be permissible under the decisions of this Court. *Screws* v. *United States,* 325 U. S. 91; *Williams* II.[6]

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[6] ". . . where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court." *Williams* II, 341 U. S., at 101.

But we cannot agree that the Second, Third or Fourth Counts may be dismissed as against the nonofficial defendants. Section 242 applies only where a person indicted has acted "under color" of law. Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.[7]

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[7] "Under color" of law means the same thing in § 242 that it does in the civil counterpart of § 242, 42 U. S. C. § 1983 (1964 ed.). *Monroe* v. *Pape*, 365 U. S. 167, 185 (majority opinion), 212 (Frankfurter, J., dissenting). In cases under § 1983, "under color" of law has consistently been treated as the same thing as the "state action" required under the Fourteenth Amendment. See, *e. g.*, *Smith* v. *Allwright*, 321 U. S. 649; *Terry* v. *Adams*, 345 U. S. 461; *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (C. A. 4th Cir.), cert. denied, 376 U. S. 938; *Smith* v. *Holiday Inns*, 336 F. 2d 630 (C. A. 6th Cir.); *Hampton* v. *City of Jacksonville*, 304 F. 2d 320 (C. A. 5th Cir.), cert. denied, 371 U. S. 911; *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (C. A. 5th Cir.); *Kerr* v. *Enoch Pratt Free Library*, 149 F. 2d 212 (C. A. 4th Cir.), cert. denied, 326 U. S. 721.

The contrary view in a § 242 context was expressed by the dissenters in *Screws*, 325 U. S., at 147–149, and was rejected then, later in *Williams* II, and finally—in a § 1983 case—in *Monroe* v. *Pape*, *supra*. Cf. *Peterson* v. *City of Greenville*, 373 U. S. 244, 250 (separate opinion of HARLAN, J.). Recent decisions of this Court which have given form to the "state action" doctrine make it clear that the indictments in this case allege conduct on the part of the "private" defendants which constitutes "state action," and hence action "under color" of law within § 242. In *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, we held that there is "state action" whenever the "State has so far insinuated itself into a position of interdependence [with the otherwise 'private' person whose conduct is said to violate the Fourteenth Amendment] . . . that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth

In the present case, according to the indictment, the brutal joint adventure was made possible by state detention and calculated release of the prisoners by an officer of the State. This action, clearly attributable to the State, was part of the monstrous design described by the indictment. State officers participated in every phase of the alleged venture: the release from jail, the interception, assault and murder. It was a joint activity, from start to finish. Those who took advantage of participation by state officers in accomplishment of the foul purpose alleged must suffer the consequences of that participation. In effect, if the allegations are true, they were participants in official lawlessness, acting in willful concert with state officers and hence under color of law.

Appellees urge that the decision of the District Court was based upon a construction of the indictment to the effect that it did not charge the private individuals with acting "under color" of law. Consequently, they urge us to affirm in No. 60. In any event, they submit, since the trial court's decision was based on the inadequacy of the indictment and not on construction of the statute, we have no jurisdiction to review it on direct appeal. *United States* v. *Swift & Co.*, 318 U. S. 442. We do not agree. Each count of the indictment specifically alleges that all of the defendants were acting "under color of the laws of the State of Mississippi." The fault lies not in the indictment, but in the District Court's view that the statute requires that each offender be an official or that

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Amendment." 365 U. S., at 725. Cf. *Pennsylvania* v. *Board of Trusts*, 353 U. S. 230; *Evans* v. *Newton*, 382 U. S. 296; *Peterson* v. *City of Greenville*, 373 U. S. 244; *Lombard* v. *Louisiana*, 373 U. S. 267; *Robinson* v. *Florida*, 378 U. S. 153; *Griffin* v. *Maryland*, 378 U. S. 130; *American Communications Assn.* v. *Douds*, 339 U. S. 382, 401; *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451; *Smith* v. *Allwright*, 321 U. S. 649; *Terry* v. *Adams*, 345 U. S. 461; *Williams* II, 341 U. S., at 99–100.

he act in an official capacity. We have jurisdiction to consider this statutory question on direct appeal and, as we have shown, the trial court's determination of it is in error. Since each of the private individuals is indictable as a principal acting under color of law, we need not consider whether he might be held to answer as an "aider or abettor" under 18 U. S. C. § 2 (1964 ed.), despite omission to include such a charge in the indictment.

Accordingly, we reverse the dismissal of the Second, Third and Fourth Counts of the indictment in No. 60 and remand for trial.

II. No. 59.

No. 59 charges each of the 18 defendants with a felony—a violation of § 241. This indictment is in one count. It charges that the defendants "conspired together . . . to injure, oppress, threaten and intimidate" Schwerner, Chaney and Goodman "in the free exercise and enjoyment of the right and privilege secured to them by the Fourteenth Amendment to the Constitution of the United States not to be deprived of life or liberty without due process of law by persons acting under color of the laws of Mississippi." The indictment alleges that it was the purpose of the conspiracy that Deputy Sheriff Price would release Schwerner, Chaney and Goodman from custody in the Neshoba County jail at such time that Price and the other 17 defendants "could and would intercept" them "and threaten, assault, shoot and kill them." The penalty under § 241 is a fine of not more than $5,000, or imprisonment for not more than 10 years, or both.

Section 241 is a conspiracy statute. It reads as follows:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the

United States, or because of his having so exercised the same; or

"If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

"They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

The District Court dismissed the indictment as to all defendants. In effect, although § 241 includes rights or privileges secured by the Constitution or laws of the United States without qualification or limitation, the court held that it does not include rights protected by the Fourteenth Amendment.

It will be recalled that in No. 60 the District Court held that § 242 included the denial of Fourteenth Amendment rights—the same right to due process involved in the indictment under § 241. Both include rights or privileges secured by the Constitution or laws of the United States. Neither is qualified or limited. Each includes, presumably, *all* of the Constitution and laws of the United States. To the reader of the two sections, versed only in the English language, it may seem bewildering that the two sections could be so differently read.

But the District Court purported to read the statutes with the gloss of *Williams* I. In that case, the only case in which this Court has squarely confronted the point at issue, the Court did in fact sustain dismissal of an indictment under § 241. But it did not, as the District Court incorrectly assumed, hold that § 241 is inapplicable to Fourteenth Amendment rights. The Court divided equally on the issue. Four Justices, in an opinion by Mr. Justice Frankfurter, were of the view that § 241 "only covers conduct which interferes with rights arising from the substantive powers of the Federal Government"—rights "which Congress can beyond doubt

constitutionally secure against interference by private individuals." 341 U. S., at 73, 77. Four other Justices, in an opinion by MR. JUSTICE DOUGLAS, found no support for Mr. Justice Frankfurter's view in the language of the section, its legislative history, or its judicial interpretation up to that time. They read the statute as plainly covering conspiracies to injure others in the exercise of Fourteenth Amendment rights. They could see no obstacle to using it to punish deprivations of such rights. Dismissal of the indictment was affirmed because MR. JUSTICE BLACK voted with those who joined Mr. Justice Frankfurter. He did so, however, for an entirely different reason—that the prosecution was barred by *res judicata*—and he expressed no view on the issue whether "§ 241, as applied, is too vague and uncertain in scope to be consistent with the Fifth Amendment." *Williams* I thus left the proper construction of § 241, as regards its applicability to protect Fourteenth Amendment rights, an open question.

In view of the detailed opinions in *Williams* I, it would be supererogation to track the arguments in all of their intricacy. On the basis of an extensive re-examination of the question, we conclude that the District Court erred; that § 241 must be read as it is written—to reach conspiracies "to injure . . . any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . ."; that this language includes rights or privileges protected by the Fourteenth Amendment; that whatever the ultimate coverage of the section may be, it extends to conspiracies otherwise within the scope of the section, participated in by officials alone or in collaboration with private persons; and that the indictment in No. 59 properly charges such a conspiracy in violation of § 241. We shall confine ourselves to a review of the major considerations which induce our conclusion.

1. There is no doubt that the indictment in No. 59 sets forth a conspiracy within the ambit of the Fourteenth Amendment. Like the indictment in No. 60, *supra,* it alleges that the defendants acted "under color of law" and that the conspiracy included action by the State through its law enforcement officers to punish the alleged victims without due process of law in violation of the Fourteenth Amendment's direct admonition to the States.

The indictment specifically alleges that the sheriff, deputy sheriff and a patrolman participated in the conspiracy; that it was a part of the "plan and purpose of the conspiracy" that Deputy Sheriff Price, "while having [the three victims] . . . in his custody in the Neshoba County Jail . . . would release them from custody at such time that he [and others of the defendants] . . . could and would intercept [the three victims] . . . and threaten, assault, shoot and kill them."

This is an allegation of state action which, beyond dispute, brings the conspiracy within the ambit of the Fourteenth Amendment. It is an allegation of official, state participation in murder, accomplished by and through its officers with the participation of others. It is an allegation that the State, without the semblance of due process of law as required of it by the Fourteenth Amendment, used its sovereign power and office to release the victims from jail so that they were not charged and tried as required by law, but instead could be intercepted and killed. If the Fourteenth Amendment forbids denial of counsel, it clearly denounces denial of any trial at all.

As we have consistently held "The Fourteenth Amendment protects the individual against *state action,* not against wrongs done by *individuals.*" *Williams* I, 341 U. S., at 92 (opinion of DOUGLAS, J.). In the present case, the participation by law enforcement officers, as

alleged in the indictment, is clearly state action, as we have discussed, and it is therefore within the scope of the Fourteenth Amendment.

2. The argument, however, of Mr. Justice Frankfurter's opinion in *Williams* I, upon which the District Court rests its decision, cuts beneath this. It does not deny that the accused conduct is within the scope of the Fourteenth Amendment, but it contends that in enacting § 241, the Congress intended to include only the rights and privileges conferred on the citizen by reason of the "substantive" powers of the Federal Government—that is, by reason of federal power operating directly upon the citizen and not merely by means of prohibitions of state action. As the Court of Appeals for the Fifth Circuit in *Williams* I, relied upon in the opinion below, put it, "the Congress had in mind the federal rights and privileges which appertain to citizens as such and not the general rights extended to all persons by the . . . Fourteenth Amendment." 179 F. 2d 644, 648. We do not agree.

The language of § 241 is plain and unlimited. As we have discussed, its language embraces *all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States. There is no indication in the language that the sweep of the section is confined to rights that are conferred by or "flow from" the Federal Government, as distinguished from those secured or confirmed or guaranteed by the Constitution. We agree with the observation of Mr. Justice Holmes in *United States* v. *Mosley,* 238 U. S. 383, 387–388, that

> "The source of this section in the doings of the Ku Klux and the like is obvious and acts of violence obviously were in the mind of Congress. Naturally Congress put forth all its powers. . . . [T]his sec-

> tion dealt with Federal rights and with all Federal rights, and protected them in the lump . . . . [It should not be construed so] as to deprive citizens of the United States of the general protection which on its face § 19 [now § 241] most reasonably affords." [8]

We believe, with Mr. Justice Holmes, that the history of the events from which § 241 emerged illuminates the purpose and means of the statute with an unmistakable light. We think that history leaves no doubt that, if we are to give § 241 the scope that its origins dictate, we must accord it a sweep as broad as its language. We are not at liberty to seek ingenious analytical instruments for excluding from its general language the Due Process Clause of the Fourteenth Amendment—particularly since the violent denial of legal process was one of the reasons motivating enactment of the section.[9]

Section 241 was enacted as part of what came to be known as the Enforcement Act of 1870, 16 Stat. 140.[10] The Act was passed on May 31, 1870, only a few months

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[8] See also Mr. Justice Rutledge, concurring in result, in *Screws* v. *United States*, 325 U. S. 91, 120.

[9] It would be strange, indeed, were this Court to revert to a construction of the Fourteenth Amendment which would once again narrow its historical purpose—which remains vital and pertinent to today's problems. As is well known, for many years after Reconstruction, the Fourteenth Amendment was almost a dead letter as far as the civil rights of Negroes were concerned. Its sole office was to impede state regulation of railroads or other corporations. Despite subsequent statements to the contrary, nothing in the records of the congressional debates or the Joint Committee on Reconstruction indicates any uncertainty that its objective was the protection of civil rights. See Stampp, The Era of Reconstruction, 1865–1877, 136–137 (1965).

[10] The official title is "An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes."

after ratification of the Fifteenth Amendment. In addition to the new § 241, it included a re-enactment of a provision of the Civil Rights Act of 1866 which is now § 242. The intended breadth of § 241 is emphasized by contrast with the narrowness of § 242 as it then was.[11] Section 242 forbade the deprivation, "under color of any law," of "any right secured or protected by this act." The rights protected by the Act were narrow and specific: "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens [and to] be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other." Act of May 31, 1870, § 16, 16 Stat. 144, re-enacting with minor changes Act of April 9, 1866, § 1, 14 Stat. 27. Between 1866 and 1870 there was much agitated criticism in the Congress and in the Nation because of the continued denial of rights to Negroes, sometimes accompanied by violent assaults. In response to the demands for more stringent legislation Congress enacted the Enforcement Act of 1870. Congress had before it and re-enacted § 242 which was explicitly limited as we have described. At the same time, it included § 241 in the Act using broad language to cover not just the rights enumerated in § 242, but all rights and privileges under the Constitution and laws of the United States.

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[11] The substantial difference in coverage of the two sections as they were in the Act of 1870 precludes the argument that § 241 should be narrowly construed to exclude Fourteenth Amendment rights because otherwise it would have been duplicative of § 242 taken in conjunction with the general conspiracy statute, 18 U. S. C. § 371. If, as we hold, § 241 was intended to cover all Fourteenth Amendment rights, it was far broader in 1870 than was § 242. For other reasons for rejecting the duplication argument, see the opinion of Mr. Justice Douglas in *Williams* I, 341 U. S., at 88, n. 2.

It was not until the statutory revision of 1874 that the specific enumeration of protected rights was eliminated from § 242. The section was then broadened to include as wide a range of rights as § 241 already did: "any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States." The substantial change thus effected was made with the customary stout assertions of the codifiers that they had merely clarified and reorganized without changing substance.[12] Section 241 was left essentially unchanged, and neither in the 1874 revision nor in any subsequent re-enactment has there been the slightest indication of a congressional intent to narrow or limit the original broad scope of § 241. It is clear, therefore, that § 241, from original enactment through subsequent codifications, was intended to deal, as Mr. Justice Holmes put it, with conspiracies to interfere with "Federal rights and with all Federal rights." We find no basis whatsoever for a judgment of Solomon which would give to the statute less than its words command.[13]

The purpose and scope of the 1866 and 1870 enactments must be viewed against the events and passions of the time.[14] The Civil War had ended in April 1865. Relations between Negroes and whites were increasingly turbulent.[15] Congress had taken control of the entire

[12] See 14 Stat. 74; 17 Stat. 579; S. Misc. Doc. No. 101, 40th Cong., 2d Sess.; H. Misc. Doc. No. 31, 40th Cong., 3d Sess.; S. Misc. Doc. No. 3, 42d Cong., 2d Sess.; 2 Cong. Rec. 646, 648, 1029, 1210, 1461.

[13] The opinion of Mr. Justice Douglas in *Williams* I, 341 U. S., at 88, disposes of the argument that the words of § 241 themselves suggest the narrow meaning which the opinion of Mr. Justice Frankfurter found in the section.

[14] See generally, Stampp, The Era of Reconstruction, 1865–1877 (1965); Nevins, The Emergence of Modern America, 1865–1878 (1927).

[15] See H. R. Rep. No. 16, 39th Cong., 2d Sess., p. 12 *et seq.*

governmental process in former Confederate States. It had declared the governments in 10 "unreconstructed" States to be illegal and had set up federal military administrations in their place. Congress refused to seat representatives from these States until they had adopted constitutions guaranteeing Negro suffrage, and had ratified the Fourteenth Amendment. Constitutional conventions were called in 1868. Six of the 10 States fulfilled Congress' requirements in 1868, the other four by 1870.

For a few years "radical" Republicans dominated the governments of the Southern States and Negroes played a substantial political role. But countermeasures were swift and violent. The Ku Klux Klan was organized by southern whites in 1866 and a similar organization appeared with the romantic title of the Knights of the White Camellia. In 1868 a wave of murders and assaults was launched including assassinations designed to keep Negroes from the polls.[16] The States themselves were helpless, despite the resort by some of them to extreme measures such as making it legal to hunt down and shoot any disguised man.[17]

Within the Congress pressures mounted in the period between the end of the war and 1870 for drastic measures. A few months after the ratification of the Thirteenth Amendment on December 6, 1865, Congress, on April 9, 1866, enacted the Civil Rights Act of 1866, which, as we have described, included § 242 in its originally narrow form. On June 13, 1866, the Fourteenth Amendment was proposed, and it was ratified in July 1868. In February 1869 the Fifteenth Amendment was proposed,

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[16] Cf. Nevins, *op. cit. supra,* at 351.

[17] See, *id.,* at 352; Morison, Oxford History of the American People 722–723 (1965).

and it was ratified in February 1870. On May 31, 1870, the Enforcement Act of 1870 was enacted.

In this context, it is hardly conceivable that Congress intended § 241 to apply only to a narrow and relatively unimportant category of rights.[18] We cannot doubt that the purpose and effect of § 241 was to reach assaults upon rights under the entire Constitution, including the Thirteenth, Fourteenth and Fifteenth Amendments, and not merely under part of it.

This is fully attested by the only statement explanatory of § 241 in the recorded congressional proceedings relative to its enactment. We refer to the speech of Senator Pool of North Carolina who introduced the provisions as an amendment to the Enforcement Act of 1870. The Senator's remarks are printed in full in the Appendix to this opinion.[19] He urged that the section was needed in order to punish invasions of the newly adopted Fourteenth and Fifteenth Amendments to the Constitution. He acknowledged that the States as such were beyond the reach of the punitive process, and that the legislation must therefore operate upon individuals. He made it clear that "It matters not whether those individuals be officers or whether they are acting upon their own responsibility." We find no evidence whatever that Senator Pool intended that § 241 should not cover violations

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[18] See, for example, *United States* v. *Waddell*, 112 U. S. 76 (right to perfect a homestead claim); *United States* v. *Classic*, 313 U. S. 299 (right to vote in federal elections); *Logan* v. *United States*, 144 U. S. 263 (right to be secure from unauthorized violence while in federal custody); *In re Quarles*, 158 U. S. 532 (right to inform of violations of federal law). Cf. also *United States* v. *Cruikshank*, 92 U. S. 542, 552; *Hague* v. *CIO*, 307 U. S. 496, 512–513 (opinion of Roberts, J.); *Collins* v. *Hardyman*, 341 U. S. 651, 660.

[19] We include these remarks only to show that the Senator clearly intended § 241 to cover Fourteenth Amendment rights.

of Fourteenth Amendment rights, or that it should not include state action or actions by state officials.

We conclude, therefore, that it is incumbent upon us to read § 241 with full credit to its language. Nothing in the prior decisions of this Court or of other courts which have considered the matter stands in the way of that conclusion.[20]

The present application of the statutes at issue does not raise fundamental questions of federal-state relationships. We are here concerned with allegations which squarely and indisputably involve state action in direct violation of the mandate of the Fourteenth Amendment—that no State shall deprive any person of life or liberty without due process of law. This is a direct, traditional concern of the Federal Government. It is an area in which the federal interest has existed for at least a century, and in which federal participation has intensified as part of a renewed emphasis upon civil rights. Even as recently as 1951, when *Williams* I was decided, the federal role in the establishment and vindication of fundamental rights—such as the freedom to travel, nondiscriminatory access to public areas and nondiscriminatory educational facilities—was neither as pervasive nor as intense as it is today. Today, a decision interpreting a federal law in accordance with its historical design, to punish denials by state action of constitutional rights of the person can hardly be regarded as adversely affecting "the wise adjustment between State responsibility and national control . . . ." *Williams* I,

[20] This Court has rejected the argument that the constitutionality of § 241 may be affected by undue vagueness of coverage. The Court held with reference to § 242 that any deficiency is cured by the requirement that specific intent be proved. *Screws* v. *United States,* 325 U. S. 91. There is no basis for distinction between the two statutes in this respect. See *Williams* I, 341 U. S., at 93–95 (DOUGLAS, J.).

341 U. S., at 73 (opinion of Frankfurter, J.). In any event, the problem, being statutory and not constitutional, is ultimately, as it was in the beginning, susceptible of congressional disposition.

Reversed and remanded.

MR. JUSTICE BLACK concurs in the judgment and opinion of the Court except insofar as the opinion relies upon *United States* v. *Williams,* 341 U. S. 58; *United States* v. *Williams,* 341 U. S. 70; and *Williams* v. *United States,* 341 U. S. 97.

APPENDIX TO OPINION OF THE COURT.

Remarks of Senator Pool of North Carolina on sponsoring Sections 5, 6 and 7 of the Enforcement Act of 1870 (Cong. Globe, 41st Cong., 2d Sess., pp. 3611–3613):

Mr. POOL. Mr. President, the question involved in the proposition now before the Senate is one in which my section of the Union is particularly interested; although since the ratification of the fifteenth amendment, which we are now about to enforce by appropriate legislation, other sections of the country have become more or less interested in the same question. It is entering upon a new phase of reconstruction; that is, to enforce by appropriate legislation those great principles upon which the reconstruction policy of Congress was based.

I said upon a former occasion on this floor that the reconstruction policy of Congress had been progressive, and that it was necessary that it should be progressive still. The mere act of establishing governments in the recently insurgent States was one thing; the great principles upon which Congress proposed to proceed in establishing those governments was quite another thing, involving principles which lie at the very foundation of all that has been done, and which are intimately con-

nected with all the results that must follow from that and from the legislation of Congress connected with the whole subject.

Mr. President, the first thing that was done was the passage of the thirteenth amendment, by which slavery in the United States was abolished. By that four millions of people were taken out from under the protecting hand of interested masters and turned loose to take care of themselves. They were turned loose and put upon their own resources in communities which were imbued with prejudices against them as a race, communities which for the most part had for years past—indeed from the very time when those who are now in existence were born—been taught and had instilled into them a prejudice against the equality which has been attempted to be established for the colored citizens of the United States.

Mr. President, the condition which that thirteenth amendment imposed on the late insurrectionary States was one which demanded the serious consideration and attention of this Government. The equality which by the thirteenth, fourteenth, and fifteenth amendments has been attempted to be secured for the colored men, has not only subjected them to the operation of the prejudices which had theretofore existed, but it has raised against them still stronger prejudices and stronger feelings in order to fight down the equality by which it is claimed they are to control the legislation of that section of the country. They were turned loose among those people, weak, ignorant, and poor. Those among the white citizens there who have sought to maintain the rights which you have thrown upon that class of people, have to endure every species of proscription, of opposition, and of vituperation in order to carry out the policy of Congress, in order to lift up and to uphold the rights which you have conferred upon that class. It is

for that reason not only necessary for the freedmen, but it is necessary for the white people of that section that there should be stringent and effective legislation on the part of Congress in regard to these measures of reconstruction.

We have heard on former occasions on the floor of the Senate that there were organizations which committed outrages, which went through communities for the purposes, of intimidating and coercing classes of citizens in the exercise of their rights. We have been told here that perhaps it might be well that retaliation should be resorted to on the part of those who are oppressed. Sir, the time will come when retaliation will be resorted to unless the Government of the United States interposes to command and to maintain the peace; when there will be retaliation and civil war; when there will be bloodshed and tumult in various communities and sections. It is not only necessary for the freedmen, but it is important to the white people of the southern section, that by plain and stringent laws the United States should interpose and preserve the peace and quiet of the community.

The fifteenth amendment to the Constitution of the United States provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State on account of race, color, or previous condition of servitude. It speaks of "the right of citizens to vote." It has been said that voting is a privilege; but this amendment recognizes it as a right in the citizen; and this right is not to "be denied or abridged by the United States, or by any State." What are we to understand by that? Can individuals abridge it with impunity? Is there no power in this Government to prevent individuals or associations of individuals from abridging or contravening that provision of the Constitution? If that be so, legislation is unnecessary. If our legislation is to apply only to the

States, it is perfectly clear that it is totally unnecessary, inasmuch as we cannot pass a criminal law as applicable to a State; nor can we indict a State officer as an officer. It must apply to individuals. A State might attempt to contravene that provision of the Constitution by passing some positive enactment by which it would be contravened, but the Supreme Court would hold such enactment to be unconstitutional, and in that way the State would be restrained. But the word "deny" is used. There are various ways in which a State may prevent the full operation of this constitutional amendment. It cannot—because the courts would prevent it—by positive legislation, but by acts of omission it may practically deny the right. The legislation of Congress must be to supply acts of omission on the part of the States. If a State shall not enforce its laws by which private individuals shall be prevented by force from contravening the rights of the citizen under the amendment, it is in my judgment the duty of the United States Government to supply that omission, and by its own laws and by its own courts to go into the States for the purpose of giving the amendment vitality there.

The word "deny" is used not only in this fifteenth amendment, but I perceive in the fourteenth amendment it is also used. When the fourteenth amendment was passed there was in existence what is known as the civil rights bill, a part of which has been copied in the Senate bill now pending. The civil rights bill recognized all persons born or naturalized in the United States as citizens, and provided that they should have certain rights which were enumerated. They are, "to make and enforce contracts, to sue, be made parties, give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property," and to "the full and equal benefit of all laws and proceedings for the security of person and property."

The civil rights bill was to be enforced by making it criminal for any officer, under color of any State law, "to subject, or cause to be subjected, any citizen to the deprivation of any of the rights secured and protected" by the act. If an officer of any State were indicted for subjecting a citizen to the deprivation of any of those rights he was not to be indicted as an officer; it was as an individual. And so, under the fourteenth amendment to the Constitution, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." There the word "deny" is used again; it is used in contradistinction to the first clause, which says, "No State shall make or enforce any law" which shall do so and so. That would be a positive act which would contravene the right of a citizen; but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. It shall not deny by acts of omission, by a failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights. It is only when a State omits to carry into effect the provisions of the civil rights act, and to secure the citizens in their rights, that the provisions of the fifth section of the fourteenth amendment would be called into operation, which is, "that Congress shall enforce by appropriate legislation the provisions of this article."

There is no legislation that could reach a State to prevent its passing a law. It can only reach the individual citizens of the State in the enforcement of law. You have, therefore, in any appropriate legislation, to act on the citizen, not on the State. If you pass an act by which you make it an indictable offense for an officer

to execute any law of a State by which he trespasses upon any of these rights of the citizen it operates upon him as a citizen, and not as an officer. Why can you not just as well extend it to any other citizen of the country?

It is, in my judgment, incumbent upon Congress to pass the most stringent legislation on this subject. I believe that we have a perfect right under the Constitution of the United States, not only under these three amendments, but under the general scope and features and spirit of the Constitution itself, to go into any of these States for the purpose of protecting and securing liberty. I admit that when you go there for the purpose of restraining liberty, you can go only under delegated powers in express terms; but to go into the States for the purpose of securing and protecting the liberty of the citizen and the rights and immunities of American citizenship is in accordance with the spirit and whole object of the formation of the Union and the national Government.

There are, Mr. President, various ways in which the right secured by the fifteenth amendment may be abridged by citizens in a State. If a State should undertake by positive enactment, as I have said, to abridge the right of suffrage, the courts of the country would prevent it; and I find that in section two of the bill which has been proposed as a substitute by the Judiciary Committee of the Senate provision is made for cases where officers charged with registration or officers charged with the assessment of taxes and with making the proper entries in connection therewith, shall refuse the right to register or to pay taxes to a citizen. I believe the language of the Senate bill is sufficiently large and comprehensive to embrace any other class of officers that might be charged with any act that was necessary to enable a citizen to perform any prerequisite to voting. But, sir, individuals may prevent the exercise of the right of

suffrage; individuals may prevent the enjoyment of other rights which are conferred upon the citizen by the fourteenth amendment, as well as trespass upon the right conferred by the fifteenth. Not only citizens, but organizations of citizens, conspiracies, may be and are, as we are told, in some of the States formed for that purpose. I see in the fourth section of the Senate bill a provision for cases where citizens by threats, intimidation, bribery, or otherwise prevent, delay, or hinder the exercise of this right; but there is nothing here that strikes at organizations of individuals, at conspiracies for that purpose. I believe that any bill will be defective which does not make it a highly penal offense for men to conspire together, to organize themselves into bodies, for the express purpose of contravening the right conferred by the fifteenth amendment.

But, sir, there is a great, important omission in this bill as well as in that of the House. It seems not to have struck those who drew either of the two bills that the prevention of the exercise of the right of suffrage was not the only or the main trouble that we have upon our hands. Suppose there shall be an organization of individuals, or, if you please, a single individual, who shall take it upon himself to compel his fellow citizens to vote in a particular way. Suppose he threatens to discharge them from employment, to bring upon them the outrages which are being perpetrated by the Kuklux organizations, so as not to prevent their voting, but to compel them to vote in accordance with the dictates of the party who brings this coercion upon them. It seems to me it is necessary that we should legislate against that. That is a more threatening view of the subject than the mere preventing of registration or of entering men's names upon the assessment books for taxation or of depositing the ballot in the box. I think the bill cannot be perfected to meet the emergencies of the occasion

unless there be a section which meets that view of the case.

The Senator from Indiana [Mr. Morton] asks whether I have drawn an amendment to that effect. I have, but I cannot offer it at this time, for the simple reason that there is an amendment to an amendment pending.

Mr. MORTON. Let it be read for information.

Mr. POOL. It has been printed, and I send it to the desk to be read for information.

The Chief Clerk read the amendment intended to be proposed by Mr. Pool, as follows:

"Insert after section four of the Senate bill the following sections:

"SEC. 5. *And be it further enacted,* That it shall be unlawful for any person, with intent to hinder or influence the exercise of the right of suffrage as aforesaid, to coerce or intimidate, or attempt to coerce or intimidate any of the legally qualified voters in any State or Territory. Any person violating the provisions of this section shall be held guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned, or both, in the discretion of the court: the fine not to exceed $1,000, and the imprisonment not to exceed one year.

"SEC. 6. *And be it further enacted,* That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, such person shall be held guilty of felony, and on conviction thereof shall be fined and imprisoned; the fine not to exceed $5,000 and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to and disabled from holding any office or place of honor,

profit, or trust created by the Constitution or laws of the United States.

"SEC. 7. *And be it further enacted,* That if in the act of violating any provision in either of the two preceding sections, any other felony, crime, or misdemeanor shall be committed, the offender may be indicted or prosecuted for the same in the courts of the United States, as hereinafter provided, for violations of this act, and on conviction thereof shall be punished for the same with such punishments as are attached to like felonies, crimes, and misdemeanors by the laws of the State in which the offense may be committed.

"Strike out section twelve and substitute therefor the following:

"*And be it further enacted,* That the President of the United States, or such person as he may empower for that purpose, may employ in any State such part of the land and naval forces of the United States, or of the militia, as he may deem necessary to enforce the complete execution of this act; and with such forces may pursue, arrest, and hold for trial all persons charged with the violation of any of the provisions of this act, and enforce the attendance of witnesses upon the examination or trial of such persons."

. . . . .

Mr. POOL. The Senator from Indiana asked if I had an amendment prepared which met the view of the case I was presenting in regard to the compelling of citizens to vote in a particular way. The first section of the amendment which I have offered uses this language:

"That it shall be unlawful for any person with intent to hinder or influence the exercise of the right of suffrage as aforesaid, to coerce or intimidate or attempt to coerce or intimidate any of the legally qualified voters in any State or Territory."

But, Mr. President, there is another view which seems to have been lost sight of entirely by those who have drawn both the House bill and the bill now pending before the Senate, and from which we apprehend very much danger. It is this: the oppression of citizens because of having voted in a particular way, or having voted at all. It may often happen, as it has happened up to this time already, that upon the close of an election colored persons will be discharged from employment by their employers. They may be subjected to outrages of various kinds because they have participated in an election, and cast their votes in a particular way. That is not done for the purpose of punishment so much as for the purpose of deterring them from voting in any succeeding election, or from voting in a way that those who perpetrate these outrages do not desire them to do. I find that branch of the subject is entirely left out of view in the bill.

There is another feature of my amendment which I deem of some importance. It is this:

"That if in the act of violating any provision in either of the two preceding sections any other felony, crime, or misdemeanor shall be committed, the offender may be indicted or prosecuted for the same in the courts of the United States."

I think the most effective mode of preventing this intimidation and these attempts at coercion, as well as the outrages which grow out of these attempts, would be found in making any offense committed in the effort to violate them indictable before the courts of the United States. As was said before, in the discussion of the Georgia question in the Senate, the juries in the communities where these outrages are committed are often composed of men who are engaged in them, or of their friends, or of those who connive at them, or of persons

who are intimidated by them, and in many instances they dare not bring in a true bill when there is an attempt to indict, or if a true bill be found, they dare not go for conviction on the final trial. It is for that reason that I believe it will be better, it will be the only effective remedy, to take such offenders before the courts of the United States, and there have them tried by a jury which is not imbued with the prejudices and interests of those who perpetrate the crimes.

These are the principal features of the amendment which I have drawn in the effort to perfect this bill; and there is another one to which I will call the attention of the Senate. It is that in regard to calling out the military forces of the United States. I find that in the civil rights bill, as in the bill which has been introduced by the Senate Judiciary Committee, the President is authorized, either by himself or by such person as he may empower for that purpose, to use the military forces of the United States to enforce the act. There in both instances it stops. It has been objected to here that the expression, "or such other person as he may empower for that purpose," should not be in the bill; that it may be subject to abuse. I think it would have no good effect to keep that language in. The President may send his officers and he may empower whomsoever he pleases to take charge of his forces without any such provision.

But there is a use for these forces which seems not to have been adverted to in either the civil rights bill or in the bill that is now pending before the Senate. It is the holding of these offenders for examination and trial after they are arrested. Their confederates, if they are put in the common prisons of the State, will in nine cases out of ten release them. But more important still is it to use these forces to compel the attendance of witnesses; for a subterfuge resorted to is to keep witnesses away

from the trial. In many instances witnesses are more or less implicated in the commission of the offense. In other cases the witnesses are intimidated and cannot be obtained upon the trial. So in the amendment which I have prepared I have proposed that these forces may be used to enforce the attendance of witnesses both upon the examination and the trial. My purpose in introducing this was to perfect the Senate bill. I think, as I said yesterday, that that bill is liable to less objection than the House bill. I think it is more efficacious in its provisions. I think it is better that the Senate should direct its attention to perfecting that bill, in order that it may be made, when perfected, a substitute for the bill that came from the House.

That much being said upon the purpose of perfecting the bill and making it efficacious, I have very little more to say. I did not intend when I rose to say much upon the general power, which has been questioned here, to pass any law at all. I think it is better to do nothing than to do that which will not have the proper effect. To do that which will not accomplish the purpose would be worse than doing nothing at all. That the United States Government has the right to go into the States and enforce the fourteenth and the fifteenth amendments is, in my judgment, perfectly clear, by appropriate legislation that shall bear upon individuals. I cannot see that it would be possible for appropriate legislation to be resorted to except as applicable to individuals who violate or attempt to violate these provisions. Certainly we cannot legislate here against States. As I said a few moments ago, it is upon individuals that we must press our legislation. It matters not whether those individuals be officers or whether they are acting upon their own responsibility; whether they are acting singly or in organizations. If there is to be appropriate legislation at all, it must be that which applies to individuals.

I believe that the United States has the right, and that it is an incumbent duty upon it, to go into the States to enforce the rights of the citizens against all who attempt to infringe upon those rights when they are recognized and secured by the Constitution of the country. If we do not possess that right the danger to the liberty of the citizen is great indeed in many parts of this Union. I think this question will come time and again as years pass by, perhaps before another year, in different forms before the Senate. It is well that we should deal with it now and deal with it squarely, and I hope that the Senate will not hesitate in doing so.

Mr. President, the liberty of a citizen of the United States, the prerogatives, the rights, and the immunities of American citizenship, should not be and cannot be safely left to the mere caprice of States either in the passage of laws or in the withholding of that protection which any emergency may require. If a State by omission neglects to give to every citizen within its borders a free, fair, and full exercise and enjoyment of his rights it is the duty of the United States Government to go into the State, and by its strong arm to see that he does have the full and free enjoyment of those rights.

Upon that ground the Republican party must stand in carrying into effect the reconstruction policy, or the whole fabric of reconstruction, with all the principles connected with it, amounts to nothing at all; and in the end it will topple and fall unless it can be enforced by the appropriate legislation, the power to enact which has been provided in each one of the great charters of liberty which that party has put forth in its amendments to the Constitution. Unless the right to enforce it by appropriate legislation is enforced stringently and to the point, it is clear to my mind that there will be no efficacy whatever in what has been done up to this time to carry out and to establish that policy.

I did not rise, sir, for the purpose of arguing the question very much in detail. I did not rise for the purpose of making any appeals to the Senate; but more for the purpose of asserting here and arguing for a moment the general doctrine of the right of the United States to intervene against individuals in the States who attempt to contravene the amendment to the Constitution which we are now endeavoring to enforce, and for the purpose of calling attention to the defects in the bill and offering a remedy for them.

Per Curiam.

CLAYTON CHEMICAL & PACKAGING CO. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

No. 890. Decided March 28, 1966.

The Customs Court held that petitioner was entitled to reappraisal of the value of its imported product. The Court of Customs and Patent Appeals reversed the judgment for petitioner. It held that affidavits of petitioner's customers, on the basis of which petitioner sought to obtain reappraisal, had been improperly admitted by the Customs Court, and that there was no substantial evidence to support petitioner's claim, the affidavits being excluded from consideration. On petition for rehearing petitioner asked the Court of Customs and Patent Appeals to remand the case to the Customs Court to enable petitioner to offer evidence to cure the deficiency created by exclusion of the affidavits. The petition for rehearing was denied. *Held:* The Court of Customs and Patent Appeals erred in failing to remand for further proceedings.

Certiorari granted; 52 C. C. P. A. (Cust.) 111, 357 F. 2d 1009, reversed and remanded.

John Joseph McDermott and *John D. Rode* for petitioner.

Solicitor General Marshall for the United States.

Joseph Schwartz for the Association of the Customs Bar, New York, N. Y., as *amicus curiae,* in support of the petition.

PER CURIAM.

Petitioner brought a proceeding before a single judge of the Customs Court to reappraise the United States value of a product which it imported. The appraiser had relied upon the prices at which petitioner sold the product to establish its value for assessment of import duties. Petitioner offered in evidence certain affidavits to show that most of its sales of the product were for

experimental purposes and in experimental quantities, and hence were not relevant to show "the price at which such . . . imported merchandise is freely offered for sale . . . in the principal market of the United States to all purchasers . . . in the usual wholesale quantities and in the ordinary course of trade . . . ." Act of June 17, 1930, c. 497, § 402 (e), 46 Stat. 708, as amended, 19 U. S. C. § 1402 (e) (1964 ed.). Cf. *United States* v. *H. Muehlstein & Co.*, 42 Cust. Ct. 760 (1959).

Over objection of the United States that the affidavits were not admissible, the judge received them in evidence. The ground for admission of the affidavits was 28 U. S. C. § 2633 (1964 ed.), which provides that in reappraisement proceedings, "affidavits and depositions of persons whose attendance cannot reasonably be had . . . may be admitted in evidence." Relying on the affidavits, the single judge found that most of petitioner's sales were for experimental purposes. 49 Cust. Ct. 409 (1962).

On appeal by the United States from a reappraisal favorable to petitioner, the Appellate Term of the Second Division of the Customs Court held that the United States had not preserved its objection to the admissibility of the affidavits. 52 Cust. Ct. 620 (1964). The United States appealed to the Court of Customs and Patent Appeals. That court reversed the determination that the United States had not preserved its objection. It held that the affidavits were not admissible because petitioner had not shown that the attendance of the affiants could not reasonably be had, and agreed with the position of the United States that "with exclusion of the affidavits there is no substantial competent evidence of record to rebut the statutory presumption that the United States value of the imported merchandise was the value found by the appraiser." 52 C. C. P. A. (Cust.) 111, 120, 357 F. 2d 1009, 1016 (1965). The judgment of the Customs Court was accordingly reversed,

Judges Smith and Rich dissenting. On petition for rehearing, petitioner contended that if the affidavits were inadmissible, it was entitled to a remand to the Customs Court to enable it to fill the evidentiary void created by the holding that the affidavits were inadmissible. The petition was denied without opinion, Judges Smith and Rich again dissenting. Because we conclude that petitioner should have an opportunity to establish its contentions by other types of evidence that may be available to it, we grant a writ of certiorari and reverse.

The Solicitor General suggests that the Court of Customs and Patent Appeals may have deemed the affidavits and any evidence of experimental use that petitioner might present on remand, irrelevant to the question of United States value. The court did not so hold, and the tenor of its opinion is to the contrary. The Solicitor General also asserts that petitioner should have requested a remand prior to its petition for rehearing. As appellee in the Court of Customs and Patent Appeals, petitioner had no reason to anticipate that if the United States prevailed on the admissibility of the affidavits the court would nonetheless proceed to consider the merits of the reappraisal claim without affording petitioner an opportunity to present oral testimony in lieu of the excluded affidavits. We hold that the Court of Customs and Patent Appeals erred in refusing to remand the case to the Customs Court for further proceedings. Cf. *Ford Motor Co.* v. *Labor Board,* 305 U. S. 364, 373; *Standard-Vacuum Oil Co.* v. *United States,* 339 U. S. 157. Compare *American Propeller & Mfg. Co.* v. *United States,* 300 U. S. 475.

Reversed and remanded.

HOLLYWOOD BASEBALL ASSOCIATION *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 957. Decided March 28, 1966.

Certiorari granted; 352 F. 2d 350, vacated and remanded.

Arthur E. Gore for petitioner.

Solicitor General Marshall, Acting Assistant Attorney General Roberts and *Harry Baum* for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court for further consideration in light of *Malat* v. *Riddell, ante,* p. 569.

Syllabus.

DeGREGORY *v.* ATTORNEY GENERAL OF NEW HAMPSHIRE.

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

No. 396. Argued February 24, 1966.—Decided April 4, 1966.

Appellee made an investigation under a statute authorizing him as Attorney General of New Hampshire to investigate whenever he had information he deemed reasonable relating to "violations" covering a wide range of "subversive" activities designed to overthrow the constitutional form of the State's government. Appellant, answering questions relating to the period since 1957, stated that he did not serve in a subversive role and lacked knowledge of current subversion. He refused, without asserting the privilege against self-incrimination, to answer questions about earlier periods which respondent asked in reliance on a 1955 report connecting appellant with the Communist Party only up to 10 years before the investigation. The trial court found appellant guilty of contempt and the State Supreme Court affirmed. *Held:* On the record here the State's interest in protecting itself against subversion is too remote to override appellant's First Amendment right to political and associational privacy. Pp. 828–830.

(a) No attack is made on the truthfulness of appellant's testimony that he had not been involved with the Communist Party since 1957 and had no knowledge of Communist activities during that period. P. 829.

(b) The staleness of the basis for the investigation and the subject matter, which was of historical rather than current interest, made indefensible compelled disclosure of appellant's political and associational past. P. 829.

(c) The First Amendment protects that privacy and it may not be breached where there is no showing of a compelling state interest. P. 829.

(d) There is no evidence here of any Communist movement in New Hampshire or showing of danger of sedition to the State, and thus no "nexus" between appellant and subversive activities in the State. *Uphaus* v. *Wyman,* 360 U. S. 72, distinguished. Pp. 829–830.

106 N. H. 262, 209 A. 2d 712, reversed.

Howard S. Whiteside argued the cause and filed a brief for appellant.

R. Peter Shapiro, Assistant Attorney General of New Hampshire, argued the cause for appellee. With him on the brief were *William Maynard,* Attorney General, and *Joseph F. Gall,* Special Assistant Attorney General.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BRENNAN.

This is the third time that the constitutional rights of appellant challenged in investigations by New Hampshire into subversion have been brought to us.[1] The present case stems from an investigation by the Attorney General of the State under Rev. Stat. Ann. § 588:8–a (1965 Supp.), enacted in 1957, which provides in part:

> "At any time when the attorney general has information which he deems reasonable or reliable relating to violations of the provisions of this chapter he shall make full and complete investigation thereof and shall report to the general court the results of this investigation, together with his recommendations, if any, for legislation. . . . [T]he attorney general is hereby authorized to make public such information received by him, testimony given before him, and matters handled by him as he deems fit to effectuate the purposes hereof."

The "violations" cover a wide range of "subversive" activities designed to "overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government . . . of the

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[1] *DeGregory* v. *Wyman,* 360 U. S. 717; *DeGregory* v. *Attorney General,* 368 U. S. 19. After remand of the latter case appellant purged himself of contempt by answering in the negative the question "Are you presently a member of the Communist Party?" Subsequently, new hearings were held and it is out of them that the present case arises.

state of New Hampshire, or any political subdivision . . . by force, or violence." [2] § 588:1.

Appellant was willing to answer questions concerning his relationship with and knowledge of Communist activities since 1957, and in fact he did answer them.[3] But he refused to answer a series of questions put him concerning earlier periods.[4] His refusal, not being based on

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[2] Although the Act purports to extend its protection to the Federal Government as well, that field has been pre-empted. See *Pennsylvania* v. *Nelson*, 350 U. S. 497.

[3] "I am not now a member of the Communist Party and have not been at any time since this authority under which I was subject has been on the statute books; that I have no knowledge of any communistic activities in New Hampshire during this period, or any violations of law during this period of six and one-half years. In fact, I have not even been aware of the existence of any Communist Party in the State of New Hampshire at any time that this authority has been on the statute books."

[4] "Have you ever been a member of the Communist Party?

"When did you join the Communist Party?

"Were you a paid member of the Communist Party?

"Were you an officer of the Communist Party?

"Did you ever have access to or control of membership or financial records of the Communist Party in New Hampshire?

"Did you attend Communist Party meetings in New Hampshire?

"To what extent did Communist Party District I in Boston, Massachusetts, have control over the party's activities in New Hampshire?

"Did you ever attend any Communist Party meetings in New Hampshire wherein any person advocated to . . . overthrow, destroy or alter the Government of the State of New Hampshire, by force or violence?

"Did you ever attend any Communist Party meetings in New Hampshire where any person advocated, abetted, advised or taught by any means the commission of an act to constitute a clear and present danger to the security of this state?

"Did you or any person known to you destroy any books, records or files, or secrete any funds in this state belonging to or owned by the Communist Party?

"Did you at any time participate or assist in the formation of or contribute to the support of the Communist Party in New Hampshire?"

the Fifth Amendment, raised important questions under the First Amendment, made applicable to the States by the Fourteenth Amendment. He was committed to jail for a period of one year or until he purged himself of contempt. That judgment was affirmed by the New Hampshire Supreme Court. 106 N. H. 262, 209 A. 2d 712. The case is here on appeal. 382 U. S. 877.

The substantiality of appellant's First Amendment claim can best be seen by considering what he was asked to do. Appellant had already testified that he had not been involved with the Communist Party since 1957 and that he had no knowledge of Communist activities during that period. The Attorney General further sought to have him disclose information relating to his political associations of an earlier day, the meetings he attended, and the views expressed and ideas advocated at any such gatherings.[5] Indeed, the Attorney General here relied entirely upon a 1955 Report on Subversive Activities in New Hampshire to justify renewed investigation of appellant. The Report connects appellant with the Communist Party only until 1953, over 10 years prior to the investigation giving rise to the present contempt.

On the basis of our prior cases, appellant had every reason to anticipate that the details of his political associations to which he might testify would be reported in a pamphlet purporting to describe the nature of subversion in New Hampshire. (See *Uphaus* v. *Wyman,* 360 U. S. 72, 88–95, BRENNAN, J., dissenting.) Admittedly, "exposure—in the sense of disclosure—is an inescapable incident of an investigation into the presence of subversive persons within a State." *Uphaus* v. *Wyman, supra,* at 81. But whatever justification may have supported such exposure in *Uphaus* is absent here; the

[5] Prosecution for these activities was apparently barred by the six-year state statute of limitations, N. H. Rev. Stat. Ann. § 603:1, long before the investigation in 1964.

staleness of both the basis for the investigation and its subject matter makes indefensible such exposure of one's associational and political past—exposure which is objectionable and damaging in the extreme to one whose associations and political views do not command majority approval.[6]

"The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking." *Watkins* v. *United States,* 354 U. S. 178, 197. Investigation is a part of lawmaking and the First Amendment, as well as the Fifth, stands as a barrier to state intrusion of privacy. No attack is made on the truthfulness of the questions answered by appellant stating that he does not serve in a subversive role and lacks knowledge of any current subversion. There is no showing of "overriding and compelling state interest" (*Gibson* v. *Florida Legislative Comm.,* 372 U. S. 539, 546) that would warrant intrusion into the realm of political and associational privacy protected by the First Amendment. The information being sought was historical, not current. Lawmaking at the investigatory stage may properly probe historic events for any light that may be thrown on present conditions and problems. But the First Amendment prevents use of the power to investigate enforced by the contempt power to probe at will and without relation to existing need. *Watkins* v. *United States, supra,* at 197–200. The present record is devoid of any evidence that there is any Communist movement in New Hampshire. The 1955 Report deals primarily with "world-wide communism" and the Federal Government. There is no showing whatsoever of present danger of sedition against the State itself, the only area

[6] See *Gibson* v. *Florida Legislative Comm.,* 372 U. S. 539, 543–544; *Bates* v. *Little Rock,* 361 U. S. 516, 523–524; *NAACP* v. *Alabama,* 357 U. S. 449, 462–463. Cf. *Shelton* v. *Tucker,* 364 U. S. 479, 485–487; *Talley* v. *California,* 362 U. S. 60, 64–65.

to which the authority of the State extends.[7] There is thus absent that "nexus" between appellant and subversive activities in New Hampshire which the Court found to exist in *Uphaus* v. *Wyman, supra,* at 79. New Hampshire's interest on this record is too remote and conjectural to override the guarantee of the First Amendment that a person can speak or not, as he chooses, free of all governmental compulsion.

Reversed.

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

The Court appears to hold that there is on the record so limited a legislative interest and so little relation between it and the information sought from appellant that the Constitution shields him from having to answer the questions put to him.* New Hampshire in my view should be free to investigate the existence or nonexistence of Communist Party subversion, or any other legitimate subject of concern to the State, without first being asked to produce evidence of the very type to be sought in the course of the inquiry. Then, given that the subject of investigation in this case is a permissible one, the appellant seems to me a witness who could properly be called to testify about it; I cannot say as a constitutional matter that inquiry into the current operations of the local Communist Party could not be advanced by knowledge of its operations a decade ago. Believing that "[o]ur function . . . is purely one of constitutional adjudication" and "not to pass judgment upon the general wisdom or efficacy" of the investigating activities under scrutiny, *Barenblatt* v. *United States,* 360 U. S. 109, 125, I would affirm the judgment of the Supreme Court of New Hampshire.

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[7] *Pennsylvania* v. *Nelson, supra,* n. 2.

*No plea of a privilege against self-incrimination was interposed by the witness.

MILLER *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 196, Misc. Decided April 4, 1966.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Reno S. Harp III, Assistant Attorney General of Virginia, for appellee.

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.

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

DRUM ET AL. *v.* SEAWELL, CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA.

No. 1128. Decided April 4, 1966.

249 F. Supp. 877, affirmed.

Louis Rabil and *Robinson O. Everett* for appellants.

T. Wade Bruton, Attorney General of North Carolina, *James F. Bullock,* Assistant Attorney General, and *Thomas L. Young* for appellees.

PER CURIAM.

The motion to advance and expedite consideration is granted. The judgment is affirmed.

ESTATE OF LEYMAN *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 385. Decided April 4, 1966.

Certiorari granted; 344 F. 2d 763, vacated and remanded.

Daniel M. Gribbon, William H. Allen and *Matthew J. Zinn* for petitioner.

Solicitor General Marshall for respondent.

PER CURIAM.

Upon the consent of the Solicitor General and consideration of the entire record, the petition for a writ of certiorari is granted, the judgment of the United States Court of Appeals for the Sixth Circuit is vacated and the cause is remanded to that court with instructions to remand it to the United States Tax Court for computation and imposition of civil fraud penalty in accordance with the provisions of Public Law 89–359, 80 Stat. 28.

BALTIMORE & OHIO RAILROAD CO. ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL.

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

No. 143. Decided April 4, 1966.

238 F. Supp. 528, vacated and remanded with instructions to dismiss the case as moot.

Hugh B. Cox and *William H. Allen* for appellants.

Douglas F. Smith, Howard J. Trienens, George L. Saunders, Jr., John E. McCullough, S. R. Brittingham,

Jr., Monroe E. Clinton, Frank S. Farrell, Lawrence W. Hobbs, L. E. Torinus, Jr., and *E. L. Van Dellen* for appellees Atchison, Topeka & Santa Fe Railway Co. et al., and *E. P. Porter, Alan C. Furth, Charles W. Burkett, Robert L. Pierce* and *Thormund A. Miller* for appellees Southern Pacific Co. et al., on memoranda suggesting that the cause is moot. *Robert Y. Thornton,* Attorney General of Oregon, *Lloyd G. Hammel* and *Richard W. Sabin,* Assistant Attorneys General, *John J. O'Connell,* Attorney General of Washington, and *Frank P. Hayes,* Assistant Attorney General, for intervening plaintiffs-appellees, Regulatory Commissions of the State of Arizona et al., and *Mary Moran Pajalich* and *J. Thomason Phelps* for intervening plaintiffs-appellees, the State of California et al., on motions to affirm. *Solicitor General Marshall* and *Robert W. Ginnane* on the memorandum for the United States and the Interstate Commerce Commission in response to the suggestions of mootness and in opposition to the motions to affirm.

PER CURIAM.

We treat the order of the District Court as divisible from the appeals in No. 159, *Chicago & North Western R. Co.* v. *Atchison, Topeka & Santa Fe R. Co.,* and No. 576, *United States* v. *Atchison, Topeka & Santa Fe R. Co.* Upon consideration of the memoranda of certain appellees and an examination of the entire record, the judgment is vacated as respects the parties to this appeal and to that extent the cause is remanded to the District Court with instructions to dismiss the case as moot.

JENKINS *v.* MARYLAND.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 605, Misc. Decided April 4, 1966.

Certiorari granted; 238 Md. 451, 209 A. 2d 616, vacated and remanded.

Petitioner *pro se.*

Thomas B. Finan, Attorney General of Maryland, for respondent.

PER CURIAM.

Upon consideration of the entire record and the consent of the Attorney General of Maryland, the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The motion to remand is also granted, the judgment of the Court of Appeals of Maryland is vacated and the case is remanded to that court for further consideration in light of its decisions in *Schowgurow* v. *Maryland,* 240 Md. 121, 213 A. 2d 475, and *Smith* v. *Maryland,* 240 Md. 464, 214 A. 2d 563. This disposition of the case is without prejudice to any other questions presented by the petition for a writ of certiorari.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 834 and 901 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 FEBRUARY 14 THROUGH APRIL 4, 1966.

FEBRUARY 14, 1966.

Dismissal Under Rule 60.

No. 913, Misc. KANDL ET AL. *v.* URSE, COOK COUNTY MENTAL HEALTH CLINIC SUPERINTENDENT, ET AL. Motion for leave to file petition for writ of habeas corpus and for other relief as to petitioner Diane Kandl dismissed pursuant to Rule 60 of the Rules of this Court. *Harry R. Booth* for petitioner Diane Kandl. *Edward J. Hladis* for respondents.

FEBRUARY 18, 1966.

Certiorari Granted.

No. 970. FEDERAL TRADE COMMISSION *v.* DEAN FOODS CO. ET AL. C. A. 7th Cir. Certiorari granted and case set for oral argument on Monday, March 28, 1966. *Solicitor General Marshall, Assistant Attorney General Turner, Daniel M. Friedman* and *James McI. Henderson* for petitioner. *Hammond E. Chaffetz* for Dean Foods Co., and *L. Edward Hart, John Paul Stevens* and *Edward I. Rothschild* for Bowfund Corp., respondents. Reported below: 356 F. 2d 481.

FEBRUARY 21, 1966.

Miscellaneous Orders.

No. 407, Misc. WILLIAMS *v.* CALIFORNIA ADULT AUTHORITY ET AL. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se. Thomas C. Lynch,* Attorney General of California, and *Robert R. Granucci* and *John T. Murphy,* Deputy Attorneys General, for respondents.

No. 132. HOLT ET AL. *v.* KIRBY ET AL. C. A. 2d Cir. (Certiorari granted, 381 U. S. 933.) Motion of Randolph Phillips for leave to file brief, as *amicus curiae,* granted. Motion of Randolph Phillips for leave to participate in oral argument, as *amicus curiae,* denied. MR. JUSTICE FORTAS took no part in the consideration or decision of these motions. *Simon V. Haberman* on the motions. *Walter R. Mansfield* and *John J. McCann* for respondents Kirby et al., in opposition to the motions.

No. 318. BURNS, GOVERNOR OF HAWAII *v.* RICHARDSON ET AL.;

No. 323. CRAVALHO ET AL. *v.* RICHARDSON ET AL.; and

No. 409. ABE ET AL. *v.* RICHARDSON ET AL. Appeals from D. C. Hawaii. (Probable jurisdiction noted, 382 U. S. 807.) Motion of Harold S. Roberts for leave to file brief, as *amicus curiae,* granted. Motion of Harold S. Roberts for leave to participate in oral argument, as *amicus curiae,* denied. MR. JUSTICE FORTAS took no part in the consideration or decision of these motions. *Richard K. Sharpless* on the motions.

No. 490. SHEPPARD *v.* MAXWELL, WARDEN. C. A. 6th Cir. (Certiorari granted, 382 U. S. 916.) Motion of John T. Corrigan for leave to participate in oral argument, as *amicus curiae,* denied. *John T. Corrigan, pro se,* on the motion.

No. 545. JOSEPH E. SEAGRAM & SONS, INC., ET AL. *v.* HOSTETTER, CHAIRMAN, NEW YORK STATE LIQUOR AUTHORITY, ET AL. Appeal from Ct. App. N. Y. (Probable jurisdiction noted, 382 U. S. 924.) Motion of Wine & Spirits Wholesalers of America, Inc., for leave to file brief, as *amicus curiae,* granted. *Abraham Tunick* and *Fred M. Switzer III* on the motion.

No. 584. CALIFORNIA *v.* STEWART. Sup. Ct. Cal. (certiorari granted, 382 U. S. 937);

No. 759. MIRANDA *v.* ARIZONA. Sup. Ct. Ariz. (certiorari granted, 382 U. S. 925);

No. 760. VIGNERA *v.* NEW YORK. Ct. App. N. Y. (certiorari granted, 382 U. S. 925);

No. 761. WESTOVER *v.* UNITED STATES. C. A. 9th Cir. (certiorari granted, 382 U. S. 924); and

No. 762. JOHNSON ET AL. *v.* NEW JERSEY. Sup. Ct. N. J. (certiorari granted, 382 U. S. 925). Motion of respondent to dismiss the writ of certiorari in No. 584 denied. The motion of the National District Attorneys Association for leave to participate in oral argument, as *amicus curiae,* granted, and 15 minutes are allotted for that purpose. Motion of the Attorney General of New York for leave to participate in oral argument, as *amicus curiae,* granted, and 15 minutes are allotted for that purpose. The joint motion of counsel in No. 762 to remove this case from the summary calendar is granted and 15 additional minutes are allotted to each side.

William A. Norris on the motion in No. 584. *Duane R. Nedrud* on the motion for the National District Attorneys Association. *Louis J. Lefkowitz,* Attorney General of New York, and *Telford Taylor* on the motion for the Attorney General of New York. *M. Gene Haeberle* for petitioners and *Norman Heine* for respondent on the motion in No. 762.

No. 847. KATZENBACH, ATTORNEY GENERAL, ET AL. *v.* MORGAN ET UX.; and

No. 877. NEW YORK CITY BOARD OF ELECTIONS *v.* MORGAN ET UX. Appeals from D. C. D. C. (Probable jurisdiction noted, 382 U. S. 1007.) Motion of appellees for leave to proceed *in forma pauperis* granted. *Alfred Avins* on the motion.

No. 597. MILLS *v.* ALABAMA. Appeal from Sup. Ct. Ala. (Question of jurisdiction postponed, 382 U. S. 936.) Motion of the Alabama Press Association et al. for leave to participate in oral argument, as *amici curiae*, denied. *James C. Barton* on the motion.

No. 1075, Misc. WOOD *v.* BOLES, WARDEN;
No. 1079, Misc. HOCHBERG *v.* CALIFORNIA;
No. 1097, Misc. IN RE DAUP;
No. 1105, Misc. WHITE *v.* DIRECTOR, VETERANS ADMINISTRATION HOSPITAL;
No. 1108, Misc. LYNCH *v.* UNITED STATES;
No. 1130, Misc. LONG *v.* BOLES, WARDEN;
No. 1170, Misc. CERVANTES *v.* UNITED STATES; and
No. 1174, Misc. GREATHOUSE *v.* BOLES, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1064, Misc. MINCHELLA *v.* LEVIN, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL.; and
No. 1106, Misc. SCHACK *v.* ROBERTS, CLERK OF THE HOUSE OF REPRESENTATIVES. Motions for leave to file petitions for writs of mandamus denied.

No. 1052, Misc. SCHACK *v.* SIMPSON, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition and for other relief denied.

No. 1109, Misc. MORTON *v.* KANSAS ET AL. Motion for leave to file petition for writ of prohibition denied.

Probable Jurisdiction Noted.

No. 860. UNITED STATES *v.* FABRIZIO. Appeal from D. C. W. D. N. Y. Probable jurisdiction noted. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the

United States. *William Maynard,* Attorney General of New Hampshire, and *Joseph A. Millimet,* Special Assistant to the Attorney General, for the State of New Hampshire, as *amicus curiae,* in opposition to the appeal.

No. 789. UNITED STATES *v.* NATIONAL STEEL CORP. ET AL. Appeal from D. C. S. D. Tex. Probable jurisdiction noted. *Solicitor General Marshall, Assistant Attorney General Turner, Irwin A. Seibel* and *Jerry Z. Pruzansky* for the United States. *Denman Moody* and *C. Brien Dillon* for National Steel Corp. et al., and *B. J. Bradshaw* for Brown et al., appellees.

Certiorari Granted. (See also No. 455, Misc., *ante,* p. 106.)

No. 652. TRANSPORTATION-COMMUNICATION EMPLOYEES UNION *v.* UNION PACIFIC RAILROAD CO. C. A. 10th Cir. Motion for leave to file supplemental petition for writ of certiorari granted. Petition for writ of certiorari is also granted. *Milton Kramer* and *Lester P. Schoene* for petitioner. *James A. Wilcox* for respondent. *Clarence M. Mulholland, Edward J. Hickey, Jr.,* and *Richard R. Lyman* for Railway Labor Executives' Association, as *amicus curiae,* in support of the petition. Reported below: 349 F. 2d 408.

No. 869. HEIDER, ADMINISTRATOR *v.* MICHIGAN SUGAR CO. Sup. Ct. Mich. Certiorari granted. *Gregory M. Pillon* and *Bernard S. Kahn* for petitioner. *Carl H. Smith, Sr.,* for respondent. Reported below: 375 Mich. 490, 134 N. W. 2d 637.

No. 876. NATIONAL LABOR RELATIONS BOARD *v.* ACME INDUSTRIAL CO. C. A. 7th Cir. Certiorari granted. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *E. Allan Kovar* for respondent. Reported below: 351 F. 2d 258.

No. 346. Canada Packers, Ltd. *v.* Atchison, Topeka & Santa Fe Railway Co. et al. C. A. 7th Cir. Certiorari granted. *Charles B. Myers* for petitioner. *Harvey Huston* and *Floyd Stuppi* for respondents. *Solicitor General Marshall, Assistant Attorney General Turner* and *Robert B. Hummel* for the United States, as *amicus curiae,* in support of the petition. Reported below: 342 F. 2d 563.

No. 950. Bank of Marin *v.* England, Trustee in Bankruptcy. C. A. 9th Cir. Certiorari granted. *Carlos R. Freitas* for petitioner. *John Walton Dinkelspiel* for respondent. Reported below: 352 F. 2d 186.

Certiorari Denied. (See also No. 841, *ante,* p. 103; No. 1003, Misc., *ante,* p. 105; No. 1018, Misc., *ante,* p. 105; and No. 1036, Misc., *ante,* p. 102.)

No. 397. United States et al. *v.* American Broadcasting-Paramount Theatres, Inc. C. A. D. C. Cir. Certiorari denied. *Solicitor General Marshall,* former *Solicitor General Cox, Assistant Attorney General Turner, Lionel Kestenbaum, Henry Geller* and *Ruth V. Reel* for the United States et al. *James A. McKenna, Jr.,* and *Vernon L. Wilkinson* for respondent. Reported below: 120 U. S. App. D. C. 264, 345 F. 2d 954.

No. 791. Arrington *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. *James R. Willis* for petitioner. *John T. Corrigan* and *Charles W. Fleming* for respondent. Reported below: 2 Ohio St. 2d 172, 207 N. E. 2d 557; 3 Ohio St. 2d 61, 209 N. E. 2d 207.

No. 858. Hanover Insurance Co. *v.* Chrysler Corp. C. A. 7th Cir. Certiorari denied. *Theodore L. Locke* and *Hugh E. Reynolds, Jr.,* for petitioner. *Harry T. Ice* for respondent. Reported below: 350 F. 2d 652.

No. 698. CAMPBELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon Silverman* and *Victor S. Friedman* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *Joseph M. Howard* for the United States. Reported below: 351 F. 2d 336.

No. 781. TENNESSEE BURLEY TOBACCO GROWERS' ASSOCIATION *v.* COMMODITY CREDIT CORP. C. A. 6th Cir. Certiorari denied. *R. Arnold Kramer* for petitioner. *Solicitor General Marshall, Assistant Attorney General Douglas, Morton Hollander* and *J. F. Bishop* for respondent. Reported below: 350 F. 2d 34.

No. 793. FOWLER ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *William H. Bowen* for petitioners. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Joseph M. Howard* and *Burton Berkley* for the United States. Reported below: 352 F. 2d 100.

No. 821. INDIVIGLIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jerome Lewis* and *Thomas R. Newman* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States. Reported below: 352 F. 2d 276.

No. 830. GRAND RIVER DAM AUTHORITY *v.* NATIONAL GYPSUM CO. C. A. 10th Cir. Certiorari denied. *Q. B. Boydstun, Samuel Hess Crossland* and *James R. Ryan* for petitioner. *Remington Rogers, Gerard K. Donovan* and *Dan A. Rogers* for respondent. Reported below: 352 F. 2d 130.

No. 843. GINSBURG *v.* GINSBURG ET AL. C. A. 9th Cir. Certiorari denied. *Paul Ginsburg,* petitioner, *pro se.* Reported below: 352 F. 2d 337.

No. 837. BOWLING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Thomas D. Hirschfeld* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States. Reported below: 351 F. 2d 236.

No. 839. MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION *v.* MESSINA. C. A. D. C. Cir. Certiorari denied. *John Joseph Leahy* for petitioner. *Thomas S. Jackson* and *Austin P. Frum* for respondent. Reported below: 121 U. S. App. D. C. 328, 350 F. 2d 458.

No. 840. STRAUB, AKA LEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Bernard Berman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 351 F. 2d 304.

No. 842. ROSEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Edwin Gold* and *Michael J. Lazar* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 353 F. 2d 523.

No. 845. TIPPETT ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 353 F. 2d 335.

No. 857. BURGDORF *v.* CALIFORNIA ET AL. Dist. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 862. KNOLL ET AL. *v.* KNOLL ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 350 F. 2d 407.

No. 863. JONES *v.* FARONI. Sup. Ct. Ohio. Certiorari denied. *Gordon T. Canning, Jr.*, for petitioner. *Frank V. Opaskar* for respondent.

No. 866. NECCHI SEWING MACHINE SALES CORP. *v.* NECCHI S.P.A. C. A. 2d Cir. Certiorari denied. *Samuel B. Herbst* and *George Trosk* for petitioner. *David A. Botwinik* for respondent. Reported below: 348 F. 2d 693.

No. 867. COHEN ET AL. *v.* JOSEPH ET AL., TRUSTEES. C. A. 2d Cir. Certiorari denied. *Leonard Cohen* for petitioners. *Charles Seligson* for respondents.

No. 871. BUTLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Edward Bennett Williams* and *Harold Ungar* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 351 F. 2d 14.

No. 873. WABASH FIRE & CASUALTY INSURANCE CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Frank E. Haddad, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 878. DOUGLAS *v.* WIRTZ, SECRETARY OF LABOR. C. A. 4th Cir. Certiorari denied. *C. Kitchin Josey* for petitioner. *Solicitor General Marshall, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for respondent. Reported below: 353 F. 2d 30.

No. 879. GLAZER *v.* BOVE. Sup. Ct. App. Va. Certiorari denied. *Louis B. Fine* and *Howard I. Legum* for petitioner. *William M. Harris* and *Terry H. Davis, Jr.*, for respondent.

No. 881. BOYS TOWN, U.S.A., INC. *v.* WORLD CHURCH ET AL. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Ira M. Price II* for respondent Jackson Appliance, Inc. Reported below: 349 F. 2d 576.

No. 882. HAWLEY *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Frederick T. Stant, Jr.*, for petitioner. Reported below: 206 Va. 479, 144 S. E. 2d 314.

No. 883. UNITED STATES *v.* BLACK DIAMOND STEAMSHIP CORP. C. A. 4th Cir. Certiorari denied. *Solicitor General Marshall, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. *George F. Galland, Robert N. Kharasch* and *Amy Scupi* for respondent. Reported below: 351 F. 2d 387.

No. 885. SMITH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Fleetwood M. McCoy* for petitioner.

No. 886. BARNES *v.* REDERI A/B FREDRIKA ET AL. C. A. 4th Cir. Certiorari denied. *Calvin W. Breit* for petitioner. *Harry E. McCoy* for respondents. Reported below: 350 F. 2d 865.

No. 897. PIZITZ, INC., SUCCESSOR TO LOUIS PIZITZ DRY GOODS CO. *v.* PATTERSON, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *William S. Pritchard* and *Winston B. McCall* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Featherston* and *Gilbert E. Andrews* for respondent. Reported below: 353 F. 2d 267.

No. 895. ROBINSON ET AL. *v.* HUMBLE OIL & REFINING CO. ET AL. Sup. Ct. Miss. Certiorari denied. *W. E. Morse* for petitioners. Reported below: 253 Miss. 602, 176 So. 2d 307.

No. 899. SOUTHWEST POTASH CORP. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *William E. Willis* for petitioner. *Solicitor General Marshall, Assistant Attorney General Weisl, S. Billingsley Hill* and *Edmund B. Clark* for the United States. Reported below: 352 F. 2d 113.

No. 912. COZZI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Allen G. Wilsey* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 354 F. 2d 637.

No. 919. POWLESS *v.* STATE TAX COMMISSION OF THE STATE OF NEW YORK. Ct. App. N. Y. Certiorari denied. *Omar Z. Ghobashy* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Ruth Kessler Toch,* Acting Solicitor General, and *Julius L. Sackman* for respondent.

No. 953. FRANZBLAU ET AL. *v.* SOLES, ADMINISTRATRIX, ET AL. C. A. 3d Cir. Certiorari denied. *Samuel A. Larner* for petitioners. *Joseph F. Walsh* for respondents. Reported below: 352 F. 2d 47.

No. 681. ROBINSON ET AL. *v.* UNITED STATES. Ct. Cl. Motion for leave to file supplemental petition granted. Certiorari denied. *King David* and *Richard L. Gunn* for petitioners. *Solicitor General Marshall, Assistant Attorney General Weisl* and *S. Billingsley Hill* for the United States. Reported below: 170 Ct. Cl. 897.

No. 962. EMORY ET UX. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Burton Marks* for petitioners.

No. 777. CORAL GABLES FIRST NATIONAL BANK ET AL. *v.* AMERICAN SURETY CO. OF NEW YORK ET AL. C. A. 5th Cir. Motion of respondent American Surety Co. of New York for assessment of damages denied. Certiorari denied. *Leo L. Foster* and *William Gresham Ward* for petitioners. *William L. Gray, Jr.*, and *Tom Maxey* for American Surety Co. of New York, and *John H. Gunn* for Nicholas, respondents. Reported below: 349 F. 2d 595.

No. 838. DUESING *v.* UDALL, SECRETARY OF THE INTERIOR. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Max Barash* for petitioner. *Solicitor General Marshall, Assistant Attorney General Weisl, S. Billingsley Hill* and *Edmund B. Clark* for respondent. Reported below: 121 U. S. App. D. C. 370, 350 F. 2d 748.

No. 852. CHICAGO, BURLINGTON & QUINCY RAILROAD CO. *v.* ILLINOIS COMMERCE COMMISSION ET AL. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Jerome F. Dixon* for petitioner. *William G. Clark*, Attorney General of Illinois, and *Edward G. Finnegan*, Assistant Attorney General, for respondent Illinois Commerce Commission. Reported below: 33 Ill. 2d 274, 211 N. E. 2d 279.

No. 671, Misc. FORTNER *v.* BALKCOM, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Arthur K. Bolton*, Attorney General of Georgia, and *Peyton S. Hawes, Jr.*, Assistant Attorney General, for respondent.

No. 859. 2000 PLASTIC TUBULAR CASES ET AL. *v.* UNITED STATES. C. A. 3d Cir. Motion to dispense with printing petitioners' brief granted. Certiorari denied. Petitioner Knox *pro se*. *Solicitor General Marshall* for the United States. Reported below: 352 F. 2d 344.

No. 933. MANCUSI, WARDEN *v.* HETENYI. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, and *Samuel A. Hirshowitz,* First Assistant Attorney General, for petitioner. *Ernest J. Brown* for respondent. Reported below: 348 F. 2d 844.

No. 488, Misc. BENNETT *v.* WILKINS, WARDEN. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Amy Juviler* and *Barry Mahoney,* Assistant Attorneys General, for respondent.

No. 609, Misc. JOHNSON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Petitioner *pro se*. *Robert Matthews,* Attorney General of Kentucky, and *Charles W. Runyan,* Assistant Attorney General, for respondent. Reported below: 391 S. W. 2d 365.

No. 612, Misc. JONES *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* for respondent.

No. 701, Misc. BYRNE *v.* KYSAR ET AL. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Lawrence Gunnels* for Kysar et al., and *Daniel P. Ward* and *Edward J. Hladis* for Barish, respondents. Reported below: 347 F. 2d 734.

No. 660, Misc. CROW *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Petitioner *pro se.* *Norman H. Anderson,* Attorney General of Missouri, and *Howard L. McFadden* and *Gerald L. Birnbaum,* Assistant Attorneys General, for respondent. Reported below: 388 S. W. 2d 817.

No. 706, Misc. SIERRA *v.* HEINZE, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *Anthony S. Da Vigo,* Deputy Attorneys General, for respondents.

No. 735, Misc. DEMES *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *Harold F. Bradford,* Deputy Attorneys General, for respondent.

No. 744, Misc. GOODWIN *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Petitioner *pro se.* *Robert C. Londerholm,* Attorney General of Kansas, and *Charles N. Henson* and *Richard H. Seaton,* Assistant Attorneys General, for respondent.

No. 756, Misc. KROAH *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 818, Misc. HAZEL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Douglas G. Cole* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 348 F. 2d 452.

No. 859, Misc. GARVIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 833, Misc. OLIVER *v.* ATTORNEY GENERAL OF THE UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Doar,* and *David L. Norman* for the United States.

No. 856, Misc. BURR *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Ronald L. Gainer* for respondent. Reported below: 350 F. 2d 87.

No. 865, Misc. CRUZ *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. *Samuel D. Menin* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *James F. Pamp,* Assistant Attorney General, for respondent. Reported below: —— Colo. ——, 405 P. 2d 213.

No. 882, Misc. BOULAD *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Morris Lavine* for petitioner. Reported below: 235 Cal. App. 2d 118, 45 Cal. Rptr. 104.

No. 889, Misc. GLENN *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 349 F. 2d 1018.

No. 901, Misc. LINK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 352 F. 2d 207.

No. 908, Misc. FORD *v.* TRAYNOR, CHIEF JUSTICE, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 894, Misc. SMITH *v.* IDAHO ET AL. Sup. Ct. Idaho. Certiorari denied. Petitioner *pro se*. *Allan G. Shepard,* Attorney General of Idaho, and *M. Allyn Dingel, Jr.,* Assistant Attorney General, for respondents. Reported below: 89 Idaho 70, 403 P. 2d 221.

No. 902, Misc. MOHLER *v.* U. S. BOARD OF PAROLE ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Doar* and *David L. Norman* for respondents.

No. 909, Misc. BROOKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 351 F. 2d 282.

No. 915, Misc. MCGANN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 921, Misc. TOTH *v.* HEINZE, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 922, Misc. WILLIAMS *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 924, Misc. MACHADO *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 351 F. 2d 892.

No. 933, Misc. THOMAS *v.* WARD. C. A. 7th Cir. Certiorari denied.

No. 986, Misc. GAUTHIER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 28 Wis. 2d 412, 137 N. W. 2d 101.

No. 950, Misc. COLEMAN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 956, Misc. SAYLOR *v.* ALABAMA. Ct. App. Ala. Certiorari denied. Petitioner *pro se*. *Richmond M. Flowers*, Attorney General of Alabama, and *Paul T. Gish, Jr.*, Assistant Attorney General, for respondent. Reported below: 42 Ala. App. 666, 177 So. 2d 924.

No. 962, Misc. GURGANIOUS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 982, Misc. SCOTT *v.* LA VINA. Sup. Ct. Cal. Certiorari denied.

No. 983, Misc. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 351 F. 2d 475.

No. 991, Misc. FREEDMAN *v.* NATIONAL MARITIME UNION OF AMERICA, AFL–CIO, ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Abraham E. Freedman* for National Maritime Union of America, AFL–CIO, and *Alfred Giardino* for American Export Isbrandtsen Lines, Inc., respondents. Reported below: 347 F. 2d 167.

No. 993, Misc. TURPIN *v.* MAXWELL, WARDEN. Sup. Ct. Ohio. Certiorari denied.

No. 996, Misc. LEACH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 122 U. S. App. D. C. 280, 353 F. 2d 451.

No. 994, Misc. NELSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Sam Adam* for petitioner. Reported below: 33 Ill. 2d 48, 210 N. E. 2d 212.

No. 995, Misc. REICKAUER *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 351 F. 2d 612.

No. 1001, Misc. CIAMPINI *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 351 F. 2d 466.

No. 1005, Misc. TAYLOR *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 1009, Misc. MICHAELS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1010, Misc. HAYES *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *John A. K. Bradley* for respondent.

No. 1011, Misc. GREEN *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 1013, Misc. CASON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 1014, Misc. CURRIE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 1015, Misc. PEARCE *v.* COX, WARDEN. Sup. Ct. N. M. Certiorari denied.

No. 1016, Misc. BRINKLEY *v.* COX, WARDEN. Sup. Ct. N. M. Certiorari denied.

No. 1019, Misc. RHODES *v.* JONES. C. A. 8th Cir. Certiorari denied. Reported below: 351 F. 2d 884.

No. 1020, Misc. GARRISON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 1021, Misc. WARE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1024, Misc. BOGAN *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1031, Misc. SILVA *v.* COX, WARDEN. C. A. 10th Cir. Certiorari denied. *James A. Williams* and *John W. Low* for petitioner. Reported below: 351 F. 2d 61.

No. 1032, Misc. MOTT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 1041, Misc. SPRY *v.* OBERHAUSER. C. A. 9th Cir. Certiorari denied.

No. 1042, Misc. STILTNER *v.* WASHINGTON. Super. Ct. Wash., Lewis County. Certiorari denied.

No. 1046, Misc. DEVLIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 1048, Misc. FOJON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Thomas J. Brady* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1054, Misc. DARRAH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *John R. Snively* for petitioner. Reported below: 33 Ill. 2d 175, 210 N. E. 2d 478.

No. 1055, Misc. DeMary *v.* Pate, Warden. Cir. Ct. of Will County, Ill. Certiorari denied.

No. 1056, Misc. Brewer *v.* Pennsylvania Board of Parole et al. C. A. 3d Cir. Certiorari denied.

No. 1057, Misc. Dedmon *v.* California et al. Sup. Ct. Cal. Certiorari denied.

No. 1059, Misc. Kingston *v.* California et al. Sup. Ct. Cal. Certiorari denied.

No. 1065, Misc. Cordova *v.* Wilson, Warden, et al. Sup. Ct. Cal. Certiorari denied.

No. 1070, Misc. Barnes *v.* Beto, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 353 F. 2d 208.

No. 1072, Misc. Pratt *v.* California. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1076, Misc. Scott *v.* California District Court of Appeal, Second Appellate District, et al. C. A. 9th Cir. Certiorari denied.

No. 1087, Misc. Robinson *v.* Michigan. Sup. Ct. Mich. Certiorari denied.

No. 1088, Misc. Braun *v.* Wilson, Warden. Sup. Ct. Cal. Certiorari denied.

No. 1099, Misc. Hays *v.* California Adult Authority. C. A. 9th Cir. Certiorari denied.

No. 1139, Misc. Wager *v.* New York. Ct. App. N. Y. Certiorari denied.

No. 1103, Misc. CROSS *v.* KENTON, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall* for respondent.

No. 1125, Misc. CORONADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall* for the United States.

No. 1178, Misc. MACHADO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se.* *Nat H. Hentel* and *Benj. J. Jacobson* for respondent.

No. 1179, Misc. CRAWFORD *v.* DAVIS ET AL. C. A. 3d Cir. Certiorari denied. *Thomas B. Rutter* for petitioner.

No. 187, Misc. MCILVAINE ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Maurice R. Woulfe* for petitioners. *Jack P. F. Gremillion,* Attorney General of Louisiana, *William P. Schuler,* Assistant Attorney General, and *Jim Garrison* for respondent. Reported below: 247 La. 747, 174 So. 2d 515.

No. 223, Misc. YOUNG *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se.* *William I. Siegel* for respondent.

No. 505, Misc. ENGBERG *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se.* *Robert C. Londerholm,* Attorney General of Kansas, and *J. Richard Foth* and *Richard H. Seaton,* Assistant Attorneys General, for respondent. Reported below: 194 Kan. 520, 400 P. 2d 701.

No. 336, Misc. HOWELL *v.* OREGON. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se.* *Robert J. Elfers* for respondent. Reported below: 240 Ore. 558, 402 P. 2d 89.

Rehearing Denied.

No. 432. HOLMES ET AL. *v.* EDDY ET AL., 382 U. S. 892;

No. 614. NEHRING *v.* GERRITY, 382 U. S. 202;

No. 616. EASTER *v.* ZIFF ET AL., 382 U. S. 957;

No. 632. SCALZA *v.* UNITED STATES, 382 U. S. 973;

No. 660. JONES, ADMINISTRATOR *v.* UNITED STATES, 382 U. S. 975;

No. 1, Misc. STELLO *v.* PENNSYLVANIA, 382 U. S. 988;

No. 15, Misc. GILLENTINE *v.* UNITED STATES, 382 U. S. 999, *sub nom.* HERR ET AL. *v.* UNITED STATES;

No. 668, Misc. TRANTINO *v.* NEW JERSEY, 382 U. S. 993;

No. 697, Misc. BOWDEN *v.* CALIFORNIA ADULT AUTHORITY ET AL., 382 U. S. 965;

No. 772, Misc. VIDA *v.* ROTH, U. S. DISTRICT JUDGE, 382 U. S. 996;

No. 773, Misc. SKOLNICK *v.* HALLETT ET AL., 382 U. S. 996;

No. 794, Misc. ESKRIDGE *v.* RHAY, PENITENTIARY SUPERINTENDENT, 382 U. S. 996;

No. 807, Misc. FURTAK *v.* NEW YORK, 382 U. S. 997;

No. 838, Misc. MCGANN *v.* RICHARDSON, WARDEN, ET AL., 382 U. S. 1007;

No. 898, Misc. MCINTOSH *v.* UNITED STATES, 382 U. S. 1029; and

No. 978, Misc. ZANCA *v.* MAIMONIDES HOSPITAL, 382 U. S. 1020. Petitions for rehearing denied.

No. 709. MUTH, ADMINISTRATRIX *v.* ATLASS ET AL., EXECUTORS; and

No. 733. DARR, ADMINISTRATRIX *v.* ATLASS ET AL., EXECUTORS, 382 U. S. 988. Motion of American Trial Lawyers Association for leave to file brief, as *amicus curiae,* in support of the petition for rehearing, granted. Petition for rehearing denied.

No. 1044, October Term, 1962. WAPNICK *v.* UNITED STATES, 374 U. S. 829, 375 U. S. 871; and

No. 494, October Term, 1964. BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO., 379 U. S. 934, 986. Motions for leave to file second petitions for rehearing denied. MR. JUSTICE FORTAS took no part in the consideration or decision of these motions.

No. 402, Misc. FJELLHAMMER *v.* UNITED STATES ET AL., 382 U. S. 869;

No. 518, Misc. BIRDSELL *v.* UNITED STATES, 382 U. S. 963; and

No. 524, Misc. HERNANDEZ *v.* CALIFORNIA, 382 U. S. 909. Motions for leave to file petitions for rehearing denied.

FEBRUARY 28, 1966.

Miscellaneous Orders.

No. 968. BELL *v.* TEXAS. Ct. Crim. App. Tex. (Certiorari granted, 382 U. S. 1023.) Motion for appointment of counsel granted. It is ordered that *Tom R. Scott, Esquire,* of Midland, Texas, be, and he is hereby, appointed to serve as counsel for the petitioner in this case.

No. 1061, Misc. GENERAL SANI-CAN MANUFACTURING CORP. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS ET AL. Motion for leave to file petition for writ of mandamus denied. *Morris Kirschstein* for petitioner. *Fred S. Lockwood* for respondents.

Certiorari Granted. (See also No. 58, October Term, 1964, *ante*, p. 270; Nos. 112, 125, 230 and 234, *ante*, p. 265; and No. 818, *ante*, p. 262.)

No. 824. ABBOTT LABORATORIES ET AL. *v.* GARDNER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL. C. A. 3d Cir. Certiorari granted. *Gerhard A. Gesell, Stanley L. Temko, Lloyd N. Cutler, Marshall Hornblower, C. Joseph Stetler, Alexander L. Nichols* and *William S. Megonigal, Jr.*, for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *William W. Goodrich* for respondents. Reported below: 352 F. 2d 286.

No. 870. UNITED GAS PIPE LINE CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 5th Cir. Certiorari granted. *Vernon W. Woods* and *Saunders Gregg* for petitioner. *Solicitor General Marshall, Richard A. Solomon* and *Howard E. Wahrenbrock* for the Federal Power Commission, and *Lloyd F. Thanhouser* and *Bruce R. Merrill* for Continental Oil Co., respondents. Reported below: 350 F. 2d 689.

No. 921. HOWARD *v.* KENTUCKY. Ct. App. Ky. Certiorari granted. *John Y. Brown* for petitioner. *Robert Matthews*, Attorney General of Kentucky, and *Charles W. Runyan*, Assistant Attorney General, for respondent. Reported below: 395 S. W. 2d 355.

No. 206, Misc. LONG *v.* DISTRICT COURT OF IOWA, IN AND FOR LEE COUNTY. Sup. Ct. Iowa. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari is also granted limited to the following question:

"Did the refusal of the state trial court to provide a transcript for the petitioner, solely because state law made no provision for furnishing of a transcript without the payment of a fee, deny the petitioner the opportunity to obtain full appellate review of the trial court's denial of the petitioner's petition for a writ of habeas corpus and thereby deprive the petitioner of the equal protection of the laws?"

Case transferred to appellate docket. Petitioner *pro se*. *Lawrence F. Scalise,* Attorney General of Iowa, and *Don R. Bennett,* Assistant Attorney General, for respondent.

Certiorari Denied.

No. 684. SID RICHARDSON CARBON & GASOLINE CO. *v.* MOORE CO. OF SIKESTON, MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied. *Rufus S. Garrett, Jr.,* for petitioner. *Paul B. Rava* and *John H. Lashly* for respondents. Reported below: 347 F. 2d 921.

No. 822. ENGLAND *v.* AUTOMATIC CANTEEN CO. OF AMERICA. C. A. 6th Cir. Certiorari denied. *Lyman Brownfield* and *Phillip K. Folk* for petitioner. *Earl F. Morris* and *Kenneth E. Scranton* for respondent. Reported below: 349 F. 2d 988.

No. 829. CITY OF COLUMBUS *v.* ROYAL ET AL. Sup. Ct. Ohio. Certiorari denied. *Alba L. Whiteside* for petitioner. *James C. Britt* for respondents. Reported below: 3 Ohio St. 2d 154, 209 N. E. 2d 405.

No. 832. World Airways, Inc., et al. *v.* National Mediation Board et al. C. A. 9th Cir. Certiorari denied. *Jerome C. Byrne* for petitioners. *Solicitor General Marshall* for respondents. Reported below: 347 F. 2d 350.

No. 851. Brennan *v.* Grover et al. Sup. Ct. Colo. Certiorari denied. Petitioner *pro se*. *Charles E. Grover, pro se,* and for other respondents. Reported below: — Colo. —, 404 P. 2d 544.

No. 861. Forgett *v.* United States. C. A. 6th Cir. Certiorari denied. *Charles J. Irwin* and *Eugene Gressman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States. Reported below: 349 F. 2d 601.

No. 888. United Biscuit Co. of America *v.* Federal Trade Commission. C. A. 7th Cir. Certiorari denied. *William Simon, John Bodner, Jr.,* and *Clarence H. Ross* for petitioner. *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Milton J. Grossman, James McI. Henderson* and *Miles J. Brown* for respondent. Reported below: 350 F. 2d 615.

No. 903. Broderick & Bascom Rope Co. *v.* Mangan. C. A. 7th Cir. Certiorari denied. *Alvin G. Hubbard* and *Reese Hubbard* for petitioner. *James A. Dooley* for respondent. Reported below: 351 F. 2d 24.

No. 904. Nesbitt *v.* United States. Ct. Cl. Certiorari denied. *C. D. Ellison* for petitioner. *Solicitor General Marshall, Assistant Attorney General Weisl, S. Billingsley Hill* and *Elizabeth Dudley* for the United States. Reported below: 170 Ct. Cl. 666, 345 F. 2d 583.

No. 905. TIBBETTS *v.* KNOWLES. C. C. P. A. Certiorari denied. *Charles S. Grover* and *James W. Dent* for petitioner. *Wilfred S. Stone* and *Leo A. Rosetta* for respondent. Reported below: 52 C. C. P. A. (Pat.) 1800, 347 F. 2d 591.

No. 907. PHILIPP *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 350 F. 2d 950.

No. 911. LA PLACA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Francis J. DiMento* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 354 F. 2d 56.

No. 913. INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL. *v.* JEFFREY GALION MANUFACTURING CO. C. A. 6th Cir. Certiorari denied. *Russell H. Volkema* for petitioners. *J. Walston Werum* for respondent. Reported below: 350 F. 2d 512.

No. 914. SPINK *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Myra Spink* for petitioner.

No. 926. SALEMI *v.* DUFFY CONSTRUCTION CORP. Sup. Ct. Ohio. Certiorari denied. *John Maktos, P. D. Maktos* and *Moses Krislov* for petitioner. *Ashley M. Van Duzer* for respondent. Reported below: 3 Ohio St. 2d 169, 209 N. E. 2d 566.

No. 892. ROCHA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Antonio de J. Cardozo* for petitioner. *Solicitor General Marshall* for respondent. Reported below: 351 F. 2d 523.

No. 910. SIMLER *v.* CONNER ET AL. C. A. 10th Cir. Certiorari denied. *John B. Ogden* for petitioner. *Leslie L. Conner, pro se,* and *James M. Little* for respondent Conner. Reported below: 352 F. 2d 138.

No. 704. HILLEGAS *v.* SAMS, COUNTY ATTORNEY FOR LOWNDES COUNTY, MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Jack Greenberg, James M. Nabrit III, Anthony G. Amsterdam, R. Jess Brown* and *Jack H. Young* for petitioner. *Joe T. Patterson,* Attorney General of Mississippi, and *William A. Allain,* Assistant Attorney General, for respondents. Reported below: 349 F. 2d 859.

No. 856. LORD ET AL. *v.* HELMANDOLLAR ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted and the judgment of the United States Court of Appeals for the District of Columbia Circuit reversed. *Jose del Castillo, Gervasio G. Sese* and *Cornelio O. Lopez* for petitioners. *Solicitor General Marshall, Assistant Attorney General Weisl, S. Billingsley Hill* and *Raymond N. Zagone* for respondents. Reported below: 121 U. S. App. D. C. 168, 348 F. 2d 780.

No. 556, Misc. PAGANO *v.* UNITED STATES; and

No. 633, Misc. CASTELLANA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioner in No. 556, Misc. *Nathan Kestnbaum* for petitioners in No. 633, Misc. Reported below: 349 F. 2d 264.

No. 989, Misc. HOLLAND *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall* for the United States.

No. 563, Misc. VARNADOE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Gerald W. Getty* and *James J. Doherty* for petitioner. *William G. Clark,* Attorney General of Illinois, and *Richard A. Michael* and *Philip J. Rock,* Assistant Attorneys General, for respondent.

No. 903, Misc. EDWARDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States.

No. 979, Misc. REEVES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1008, Misc. MOON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 351 F. 2d 464.

No. 1094, Misc. COTA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 99 Ariz. 237, 408 P. 2d 27.

No. 1104, Misc. EDGERTON *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 1118, Misc. MCCAFFREY *v.* BLACKWELL, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Marshall, Assistant Attorney General Doar* and *David L. Norman* for respondent.

No. 1095, Misc. SIMARI *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1121, Misc. SHELDON *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied.

No. 1124, Misc. KINMON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 396 S. W. 2d 331.

No. 1133, Misc. OPPENHEIMER *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 236 Cal. App. 2d 863, 46 Cal. Rptr. 476.

No. 1136, Misc. DI PALERMO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1140, Misc. WILSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *Malvina H. Guggenheim* for respondent.

No. 1145, Misc. WELLS *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied.

No. 1146, Misc. ORTEGA *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1159, Misc. MCINTOSH *v.* STEPHENSON ET AL. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondents. Reported below: 354 F. 2d 978.

No. 1164, Misc. CANTRELL *v.* CALIFORNIA ADULT AUTHORITY ET AL. C. A. 9th Cir. Certiorari denied.

No. 1168, Misc. FLANAGAN *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1169, Misc. POSTELL *v.* WILSON, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

Rehearing Denied.

No. 715. ST. LOUIS MAILERS' UNION LOCAL NO. 3 *v.* GLOBE-DEMOCRAT PUBLISHING CO., 382 U. S. 979;

No. 755. FRAZIER *v.* CALIFORNIA, 382 U. S. 988;

No. 169, Misc. STILTNER *v.* RHAY, PENITENTIARY SUPERINTENDENT, 382 U. S. 1012;

No. 746, Misc. ELDRIDGE *v.* UNITED STATES, 382 U. S. 994; and

No. 944, Misc. MUNDT ET AL. *v.* HOME FEDERAL SAVINGS & LOAN ASSOCIATION ET AL., 382 U. S. 1019. Petitions for rehearing denied.

No. 52. TEHAN, SHERIFF *v.* UNITED STATES EX REL. SHOTT, 382 U. S. 406. Petition for rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE FORTAS took no part in the consideration or decision of this petition.

MARCH 7, 1966.

Miscellaneous Orders.

No. 1192, Misc. MCDONALD *v.* RHAY, PENITENTIARY SUPERINTENDENT;

No. 1214, Misc. SMITH *v.* MAXWELL, WARDEN;

No. 1245, Misc. SMITH *v.* MYERS, CORRECTIONAL SUPERINTENDENT;

No. 1264, Misc. ROBINSON *v.* STATE HOSPITAL DIRECTOR; and

No. 1268, Misc. CUMMINGS *v.* FLORIDA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 20. CARNATION CO. *v.* PACIFIC WESTBOUND CONFERENCE ET AL., *ante*, p. 213.

It is ordered that the opinion of the Court in this case handed down on February 28, 1966, is amended as follows:

(1) By striking that portion of the last paragraph on page eight of the slip opinion commencing with the words "Even if" and concluding with the words "Court of Appeals' decision" in the first line of page nine;

(2) By striking the first, third, and fourth sentences of the paragraph commencing on page nine and concluding on page ten, and adding the following "An appeal from the Commission's decision is now pending." after the sentence commencing "The Commission completed" in said paragraph;

(3) By striking the words "for a determination of the antitrust issues." from the last paragraph of the opinion and substituting therefor the words "with instructions to stay the action pending the final outcome of the Shipping Act proceedings and then to proceed in a manner consistent with this opinion."

No. 752, Misc. REYES *v.* KLINGER ET AL. Motion for leave to file petition for writ of habeas corpus denied. MR. JUSTICE DOUGLAS is of the opinion that the motion for leave to file should be granted.

No. 1226, Misc. FARNSWORTH *v.* TURNER, WARDEN; and

No. 1255, Misc. FURTAK *v.* WILKINS, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 1210, Misc. DUVAL *v.* UNITED STATES. Motion for leave to file petition for writ of prohibition denied.

No. 73. UNITED STATES *v.* GRINNELL CORP. ET AL.;

No. 74. GRINNELL CORP. *v.* UNITED STATES;

No. 75. AMERICAN DISTRICT TELEGRAPH CO. *v.* UNITED STATES;

No. 76. HOLMES ELECTRIC PROTECTIVE CO. *v.* UNITED STATES; and

No. 77. AUTOMATIC FIRE ALARM CO. OF DELAWARE *v.* UNITED STATES. Appeals from D. C. R. I. (Probable jurisdiction noted, 381 U. S. 910.) Motion for additional time for oral argument and for leave to have more than two attorneys participate in oral argument granted. One and one-half hours allotted to each side and four attorneys permitted to participate in oral argument for appellants. *Denis G. McInerney* for Grinnell Corp., *Macdonald Flinn* for American District Telegraph Co., *Bud G. Holman* for Holmes Electric Protective Co., and *J. Francis Hayden* for Automatic Fire Alarm Co. of Delaware, on the motion.

No. 695. COLLIER *v.* UNITED STATES. C. A. 6th Cir. (Certiorari granted, 382 U. S. 890.) Motion of the United States to vacate and remand for further consideration denied. *Solicitor General Marshall* for the United States, on the motion. Petitioner *pro se* in opposition.

Certiorari Denied. (See also No. 786, *ante,* p. 412; No. 920, *ante,* p. 411; and Misc. Nos. 1226 and 1255, *supra,* p. 932.)

No. 366. MCCULLOUGH TOOL CO. ET AL. *v.* WELL SURVEYS, INC., ET AL. C. A. 10th Cir. Certiorari denied. *Edward S. Irons, R. Welton Whann, James E. Harrington* and *Richard B. McDermott* for petitioners. *Robert W. Fulwider, Rufus S. Day, Jr.,* and *Robert J. Woolsey* for respondents. Reported below: 343 F. 2d 381.

No. 154. SERVO CORP. OF AMERICA *v.* GENERAL ELECTRIC CO. C. A. 4th Cir. Certiorari denied. *Thomas F. Reddy, Jr.*, and *Roy C. Hopwood* for petitioner. *Charles H. Walker, Leonard G. Muse* and *Frank W. Rogers* for respondent. Reported below: 337 F. 2d 716.

No. 499. OUTBOARD MARINE CORP. *v.* HOLLEY. C. A. 7th Cir. Certiorari denied. *S. Lawrence Wheeler* for petitioner. *Charles B. Spangenberg* for respondent. Reported below: 345 F. 2d 351.

No. 572. ALLBRIGHT-NELL CO. ET AL. *v.* SCHNELL ET AL. C. A. 7th Cir. Certiorari denied. *Richard D. Mason* and *M. Hudson Rathburn* for petitioners. *Charles J. Merriam* and *Norman M. Shapiro* for respondents. Reported below: 348 F. 2d 444.

No. 612. M. B. SKINNER CO. *v.* CONTINENTAL INDUSTRIES, INC. C. A. 10th Cir. Certiorari denied. *Charles J. Merriam* and *Norman M. Shapiro* for petitioner. *Richard B. McDermott* for respondent. Reported below: 346 F. 2d 170.

No. 764. AMERICAN AIR FILTER CO., INC. *v.* CONTINENTAL AIR FILTERS, INC. C. A. 6th Cir. Certiorari denied. *Albert C. Johnston* for petitioner. *Carl F. Schaffer* for respondent. Reported below: 347 F. 2d 931.

No. 900. NELLO L. TEER CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Joseph C. Wells* and *Paul M. Rhodes* for petitioner. *Solicitor General Marshall, Assistant Attorney General Douglas, David L. Rose* and *Jack H. Weiner* for the United States. *Travis Brown* for Associated General Contractors of America, as *amicus curiae*, in support of the petition. Reported below: 172 Ct. Cl. 255, 348 F. 2d 533.

No. 765. JETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *John Jay Hooker, Jr.*, and *William R. Willis, Jr.*, for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Joseph M. Howard* and *John P. Burke* for the United States. Reported below: 352 F. 2d 179.

No. 772. FELBURN *v.* NEW YORK CENTRAL RAILROAD CO. ET AL. C. A. 6th Cir. Certiorari denied. *Albert R. Teare* and *Donald A. Teare* for petitioner. *Daniel L. Morris* and *John F. Dolan* for respondents. Reported below: 350 F. 2d 416.

No. 846. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF BORAX ET AL. C. A. 2d Cir. Certiorari denied. *Acting Solicitor General Spritzer, Acting Assistant Attorney General Roberts, Robert N. Anderson* and *Gilbert E. Andrews* for petitioner. *Julius G. Hirsch* for Estate of Borax et al. and *Gerald H. Ullman* for Wondsel, respondents. Reported below: 349 F. 2d 666.

No. 891. ANDERSON ET AL. *v.* SHUFORD. C. A. 10th Cir. Certiorari denied. *Robert C. Hawley* for petitioners. *William H. Erickson* for respondent. Reported below: 352 F. 2d 755.

No. 917. ESTATE OF MAYER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Edward S. Bentley* for petitioner. *Solicitor General Marshall, C. Moxley Featherston* and *Meyer Rothwacks* for respondent. Reported below: 351 F. 2d 617.

No. 927. PANCZKO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Melvin B. Lewis* and *Julius Lucius Echeles* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 353 F. 2d 676.

No. 915. W. E. GRACE MANUFACTURING CO. ET AL. *v.* BROS INC. C. A. 5th Cir. Certiorari denied. *Channing L. Richards* for petitioners. *Andrew E. Carlsen* for respondent. Reported below: 351 F. 2d 208.

No. 925. CHANDLER, U. S. DISTRICT JUDGE *v.* TEXACO, INC. C. A. 10th Cir. Certiorari denied. *Gus Rinehart* for petitioner. *George W. Jansen* for respondent. Reported below: 354 F. 2d 655.

No. 929. COMMONWEALTH OIL REFINING CO., INC. *v.* MARTINEZ ET AL. Sup. Ct. P. R. Certiorari denied. *Stuart Rothman* and *Rubén Rodríguez-Antongiorgi* for petitioner. Reported below: — P. R. —.

No. 930. DICKER ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *George Cochran Doub, Sheldon E. Bernstein* and *Thomas A. Flannery* for petitioners. *Solicitor General Marshall, Assistant Attorney General Weisl, S. Billingsley Hill* and *A. Donald Mileur* for the United States. Reported below: 122 U. S. App. D. C. 158, 352 F. 2d 455.

No. 943. RANGEN, INC., ET AL. *v.* STERLING NELSON & SONS, INC. C. A. 9th Cir. Certiorari denied. *Peter W. Billings* for petitioners. *Paul H. Ray* for respondent. Reported below: 351 F. 2d 851.

No. 976. KAM HON HO ET AL. *v.* KAM MOON KAM ET AL. C. A. 9th Cir. Certiorari denied. *Leon L. M. Chun* and *W. Y. Char* for petitioners. *Herbert Y. C. Choy* for respondents.

No. 983. NORTHWEST AIRLINES, INC. *v.* ALASKA AIRLINES, INC. C. A. 9th Cir. Certiorari denied. *Bernard M. Shanley* for petitioner. *William J. Junkerman* for respondent. Reported below: 351 F. 2d 253.

No. 966. Hearst Corp., Baltimore News American Division *v.* Local Union No. 24, International Brotherhood of Electrical Workers, AFL–CIO. C. A. 4th Cir. Certiorari denied. *Theodore Sherbow* and *William A. Agee* for petitioner. *Thomas X. Dunn* for respondent. Reported below: 352 F. 2d 957.

No. 997. Worthington Corp. *v.* Lease Management, Inc. C. A. 6th Cir. Certiorari denied. *Ronald A. Jacks* for petitioner. *Edward D. Wells* for respondent. Reported below: 352 F. 2d 24.

No. 936. Beaver et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Thaddeus Rojek* for petitioners. *Solicitor General Marshall, Assistant Attorney General Weisl, Roger P. Marquis* and *Elizabeth Dudley* for the United States. *Darrell F. Smith,* Attorney General, and *Dale R. Shumway,* Special Assistant Attorney General, for the State of Arizona, as *amicus curiae,* in support of the petition. Reported below: 350 F. 2d 4.

No. 362, Misc. James *v.* Wainwright, Corrections Director. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se. Earl Faircloth,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent.

No. 639, Misc. Grizzell *v.* Florida. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Earl Faircloth,* Attorney General of Florida, and *T. T. Turnbull,* Assistant Attorney General, for respondent.

No. 765, Misc. Brown *v.* Cavell, Penitentiary Superintendent. C. A. 3d Cir. Certiorari denied.

No. 424, Misc. PEREZ *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se.* *Earl Faircloth,* Attorney General of Florida, *James G. Mahorner,* Assistant Attorney General, for respondent.

No. 555, Misc. THOMAS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se.* *Earl Faircloth,* Attorney General of Florida, and *John S. Burton,* Assistant Attorney General, for respondent.

No. 608, Misc. FAZIO *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, and *Mortimer Sattler,* Assistant Attorney General, for respondent. Reported below: 348 F. 2d 418.

No. 846, Misc. BENTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, and *Robert R. Granucci* and *Michael J. Phelan,* Deputy Attorneys General, for respondent.

No. 1068, Misc. OWENS *v.* HEINZE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1069, Misc. LYNN ET AL. *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 1081, Misc. PINCH *v.* MAXWELL, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 3 Ohio St. 2d 212, 210 N. E. 2d 883.

No. 1113, Misc. TARIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall* for the United States. Reported below: 353 F. 2d 71.

No. 1077, Misc. OVERBY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1082, Misc. CARUSO *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1083, Misc. STEVENS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 1084, Misc. BROWN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1132, Misc. IN RE SANTANA. Sup. Ct. P. R. Certiorari denied. Reported below: —— P. R. ——.

No. 1193, Misc. RODRIGUEZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Petitioner *pro se*. *Michael Juviler* for respondent.

No. 1148, Misc. RHODES *v.* MEYER ET AL. C. A. 8th Cir. Certiorari and other relief denied. Reported below: 353 F. 2d 316.

Rehearing Denied.

No. 816. GOVERNMENT EMPLOYEES INSURANCE CO. *v.* UNITED STATES, 382 U. S. 1026;

No. 732, Misc. VASQUEZ-OCHOA *v.* UNITED STATES, 382 U. S. 1027;

No. 896, Misc. ODELL *v.* STATE DEPARTMENT OF PUBLIC WELFARE OF WISCONSIN ET AL., 382 U. S. 420; and

No. 931, Misc. PARKER *v.* BOARD OF EDUCATION, PRINCE GEORGE'S COUNTY, MARYLAND, 382 U. S. 1030. Petitions for rehearing denied.

No. 593. KOEHRING CO. *v.* HYDE CONSTRUCTION CO., INC., ET AL., 382 U. S. 362. Petition for rehearing and motion to amend the order of remand denied.

No. 255, October Term, 1963. BROS INCORPORATED *v.* BROWNING MANUFACTURING CO. ET AL., 375 U. S. 825. Motion for leave to file petition for rehearing denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this motion.

MARCH 10, 1966.

Dismissal Under Rule 60.

No. 159. CHICAGO & NORTH WESTERN RAILWAY CO. ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. Appeal from D. C. S. D. Cal. Appeal as to appellant Chicago, Rock Island & Pacific Railroad Co. dismissed pursuant to Rule 60 of the Rules of this Court. *Nuel D. Belnap, Richard M. Freeman, Bryce L. Hamilton, Raymond K. Merrill, Nye F. Morehouse, John W. Adams, Martin L. Cassell* and *Frank R. Johnston* for appellants. *Douglas F. Smith, Howard J. Trienens, George L. Saunders, Jr., John E. McCullough, S. R. Brittingham, Jr., Monroe E. Clinton, Frank S. Farrell, Lawrence W. Hobbs, L. E. Torinus, Jr.,* and *E. L. Van Dellen* for Atchison, Topeka & Santa Fe Railway Co. et al.; *E. P. Porter, Alan C. Furth, Charles W. Burkett, Robert L. Pierce* and *Thormund A. Miller* for Southern Pacific Co. et al., appellees. Reported below: 238 F. Supp. 528.

MARCH 21, 1966.

Miscellaneous Orders.

No. 913, Misc. KANDL *v.* URSE, COOK COUNTY MENTAL HEALTH CLINIC SUPERINTENDENT, ET AL. Motion for leave to file petition for writ of habeas corpus and for other relief denied. *Harry R. Booth* for petitioner. *Edward J. Hladis* and *Daniel P. Ward* for respondents.

No. —. ROSENSTIEL *v.* ROSENSTIEL. Motion to defer consideration of No. 934 denied. *Peyton Ford* for petitioner. *Louis Nizer* for respondent.

Probable Jurisdiction Noted or Postponed.

No. 386. GARRITY ET AL. *v.* NEW JERSEY. Appeal from Sup. Ct. N. J. Further consideration of the question of jurisdiction postponed to the hearing of the case on the merits. *Daniel L. O'Connor* for appellants. *Norman Heine* and *James G. Aiken* for appellee. Reported below: 44 N. J. 209, 207 A. 2d 689; 44 N. J. 259, 208 A. 2d 146.

No. 954. WATKINS *v.* CONWAY. Appeal from Sup. Ct. Ga. Probable jurisdiction noted. *Emmet J. Bondurant II* for appellant. Reported below: 221 Ga. 374, 144 S. E. 2d 721.

Certiorari Granted. (See also No. 24, *ante*, p. 573.)

No. 642. GILES ET AL. *v.* MARYLAND. Ct. App. Md. Certiorari granted. *Joseph Forer* and *Hal Witt* for petitioners. *Thomas B. Finan,* Attorney General of Maryland, and *Donald Needle,* Assistant Attorney General, for respondent. Reported below: 239 Md. 458, 212 A. 2d 101.

No. 898. IMMIGRATION AND NATURALIZATION SERVICE *v.* ERRICO. C. A. 9th Cir. Certiorari granted. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for petitioner. *Edwin J. Peterson* for respondent. Reported below: 349 F. 2d 541.

No. 1007, Misc. SCOTT, AKA PLUMMER *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket and set for oral argument immediately following No. 898. *Edward Q. Carr, Jr.,* for petitioner. *Solicitor General Marshall* for respondent. Reported below: 350 F. 2d 279.

No. 826. COSTELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted limited to Question 1 presented by petition which reads as follows:

"1. Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court, especially in view of its recent decision in *Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70 (1965), overrule *United States* v. *Kahriger,* 345 U. S. 22 (1953) and *Lewis* v. *United States,* 348 U. S. 419 (1955)?"

Ira B. Grudberg for petitioner. Reported below: 352 F. 2d 848.

No. 944. SPEVACK *v.* KLEIN. Ct. App. N. Y. Certiorari granted. *Lawrence J. Latto, William H. Dempsey, Jr.,* and *Bernard Shatzkin* for petitioner. *Solomon A. Klein,* respondent, *pro se.*

Certiorari Denied. (See also No. 931, *ante,* p. 574.)

No. 50. UNITED STATES *v.* S & A Co. C. A. 8th Cir. Certiorari denied. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for the United States. *Leland W. Scott* for respondent. Reported below: 338 F. 2d 629.

No. 763. PERFECT FIT PRODUCTS MANUFACTURING CO., INC. *v.* MONSANTO CHEMICAL CO., SUCCESSOR TO CHEMSTRAND CORP.; and

No. 937. MONSANTO CHEMICAL CO., SUCCESSOR TO CHEMSTRAND CORP. *v.* PERFECT FIT PRODUCTS MANUFACTURING CO., INC. C. A. 2d Cir. Certiorari denied. *Jay F. Gordon* for petitioner in No. 763 and for respondent in No. 937. *Granville M. Brumbaugh* for petitioner in No. 937 and for respondent in No. 763. Reported below: 349 F. 2d 389.

No. 864. TRAMONTANA *v.* VARIG AIRLINES. C. A. D. C. Cir. Certiorari denied. *Eugene Gressman* and *Hyman Smollar* for petitioner. *Harry A. Bowen* and *John L. Laskey* for respondent. Reported below: 121 U. S. App. D. C. 338, 350 F. 2d 468.

No. 894. SALTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Frank E. Haddad, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 346 F. 2d 509.

No. 918. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. *Lester P. Schoene, Milton Kramer* and *Richard H. Frank* for petitioners. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 122 U. S. App. D. C. 8, 350 F. 2d 791.

No. 934. WOOD *v.* WOOD. Ct. App. N. Y. Certiorari denied. *Harris B. Steinberg* for petitioner. *Simon H. Rifkind* for respondent. Reported below: 16 N. Y. 2d 64, 209 N. E. 2d 709.

No. 935. FORREST VILLAGE APARTMENTS, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Carl L. Shipley* for petitioner. *Solicitor General Marshall* for the United States.

No. 938. TENNESSEE GAS TRANSMISSION CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Vernon M. Turner* for petitioner. *Solicitor General Marshall, Assistant Attorney General Weisl, Roger P. Marquis, Howard O. Sigmond* and *Raymond N. Zagone* for the United States.

No. 945. TREMONT, AKA LARRO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *James F. Schaeffer* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 351 F. 2d 144.

No. 946. VELOTTA *v.* MCGETTRICK. Sup. Ct. Ohio. Certiorari denied. *Don DeRocco* for petitioner. *John T. Corrigan* for respondent.

No. 948. KINDELAN ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Thomas H. Anderson* for petitioners. *Solicitor General Marshall, Acting Assistant Attorney General Featherston* and *Robert N. Anderson* for the United States. Reported below: 351 F. 2d 310.

No. 949. WILSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Harold Gruenberg* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 352 F. 2d 889.

No. 955. FOULKES, ADMINISTRATOR *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Lawrence J. Simmons* for petitioner. *Solicitor General Marshall* for the United States.

No. 975. AETNA CASUALTY & SURETY CO. *v.* THIRD NATIONAL BANK & TRUST CO. C. A. 3d Cir. Certiorari denied. *Elmer W. Beasley* for petitioner. *Ernest J. Gazda* for respondent.

No. 978. RYAN, ASSIGNEE *v.* VICKERS. Sup. Ct. Colo. Certiorari denied. *Milton J. Blake* for petitioner. *John H. Pickering* and *M. O. Shivers, Jr.,* for respondent. Reported below: —— Colo. ——, 406 P. 2d 794.

No. 972. BRUNER ET UX. *v.* TEXAS. Sup. Ct. Tex. Certiorari denied. *Heard L. Floore* for petitioners. *Waggoner Carr*, Attorney General of Texas, and *Hawthorne Phillips, T. B. Wright, Carroll R. Graham, Fred M. Talkington* and *F. William Colburn*, Assistant Attorneys General, for respondent.

No. 974. CROUCH, PROBATE JUDGE *v.* STANLEY, ADMINISTRATOR. Ct. Civ. App. Tex., 11th Sup. Jud. Dist. Certiorari denied. Reported below: 390 S. W. 2d 795.

No. 979. ERTEL MANUFACTURING CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Harry P. Dees* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 352 F. 2d 916.

No. 981. KIRSCHNER ET AL., TRADING AS K-N ENTERPRISES *v.* WEST CO. C. A. 3d Cir. Certiorari denied. *Harry R. Kozart* for petitioners. *Theodore Voorhees* for respondent.

No. 982. PERRYTON WHOLESALE, INC. *v.* PIONEER DISTRIBUTING CO. OF KANSAS, INC. C. A. 10th Cir. Certiorari denied. *Dale M. Stucky* for petitioner. *Malcolm Miller* for respondent. Reported below: 353 F. 2d 618.

No. 998. KISER ET AL. *v.* BREAKS INTERSTATE PARK COMMISSION. Sup. Ct. App. Va. Certiorari denied. *S. H. Sutherland* for petitioners. *Robert T. Winston* for respondent.

No. 986. FRIED *v.* BROOKLYN BAR ASSOCIATION. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *Benjamin R. Raphael* for respondent.

No. 992. 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.

No. 1003. LOCKE *v.* RIVER LINES, INC. C. A. 9th Cir. Certiorari denied. *Edward R. Kay* for petitioner. *Graydon S. Staring* for respondent. Reported below: 352 F. 2d 307.

No. 1007. CHARLESTON COMMUNITY MEMORIAL HOSPITAL *v.* DARLING. Sup. Ct. Ill. Certiorari denied. *Jack E. Horsley* and *Fred H. Kelly* for petitioner. *Stanford S. Meyer* for respondent. Reported below: 33 Ill. 2d 326, 211 N. E. 2d 253.

No. 1019. GREEN ET AL. *v.* OSGOOD-LEWIS-PERKINS, INC. Sup. Ct. Neb. Certiorari denied. *William L. Walker* for petitioners. *James R. Hoover* for respondent. Reported below: 178 Neb. 807, 135 N. W. 2d 718; 179 Neb. 133, 137 N. W. 2d 241.

No. 889. RIESS ET UX. *v.* MURCHISON ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted and the judgment of the United States Court of Appeals for the Ninth Circuit reversed. *Max Frank Deutz* for petitioners. *John J. Quinn, Jr.,* for respondents.

No. 932. GOODMAN ET UX. *v.* FUTROVSKY ET AL. Sup. Ct. Del. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACK are of the opinion that certiorari should be granted. *Leonard S. Goodman, pro se,* and for other petitioner. *Leroy A. Brill* and *William S. Potter* for respondents Cohen et al. Reported below: —— Del. ——, 213 A. 2d 899.

No. 1038. GRASBERGER, TRUSTEE IN BANKRUPTCY, ET AL. *v.* CALISSI, EXECUTRIX, ET AL. C. A. 3d Cir. Certiorari denied. *Peter P. Zion* for petitioners.

No. 947. TEN INDIVIDUAL DEFENDANTS ET AL. *v.* INDIAN LAKE ESTATES, INC. C. A. D. C. Cir. Motion of Arthur J. Hillman for leave to file a brief, as *amicus curiae,* granted. Certiorari denied. *J. H. Krug* and *Albert Philipson* for petitioners. *Ralph E. Becker* and *F. Murray Callahan* for respondent. *Arthur J. Hillman,* as *amicus curiae,* in support of the petition. Reported below: 121 U. S. App. D. C. 305, 350 F. 2d 435.

No. 952. ARO MANUFACTURING CO., INC., ET AL. *v.* AUTOMOBILE BODY RESEARCH CORP. C. A. 1st Cir. Motion to use record in No. 21, October Term, 1960, and No. 75, October Term, 1963, granted. Certiorari denied. *David Wolf* and *Charles Hieken* for petitioners. Reported below: 352 F. 2d 400.

No. 961. BELL *v.* UNITED STATES. C. A. 6th Cir. Motion to adopt portions of petition in No. 794 granted. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this motion and petition. *C. Allen High, Edward B. Henslee, Jr.,* and *Francis H. Monek* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Philip R. Monahan* for the United States. Reported below: 351 F. 2d 868.

No. 988. ALABAMA ET AL. *v.* BLAND. C. A. 5th Cir. Motion to dispense with printing respondent's brief granted. Certiorari denied. *Richmond M. Flowers,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for petitioners. *Fred S. Ball* for respondent. Reported below: 356 F. 2d 8.

No. 977. E. I. Du Pont de Nemours & Co., Inc. *v.* Maloney; and

No. 1093, Misc. Maloney *v.* E. I. Du Pont de Nemours & Co. C. A. D. C. Cir. Certiorari denied. Mr. Justice Harlan took no part in the consideration or decision of these petitions. *William H. Allen* for petitioner in No. 977 and for respondent in No. 1093, Misc. *Henry Lincoln Johnson, Jr.*, for petitioner in No. 1093, Misc. Reported below: 122 U. S. App. D. C. 268, 352 F. 2d 936.

No. 462, Misc. Woodley *v.* California. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Norman H. Sokolow*, Deputy Attorney General, for respondent.

No. 717, Misc. Bailey *v.* Van Buskirk. C. A. 9th Cir. Certiorari denied. *H. Bruce Baumeister* for petitioner. *Solicitor General Marshall, Assistant Attorney General Douglas, David L. Rose* and *Robert V. Zener* for respondent. Reported below: 345 F. 2d 298.

No. 724, Misc. Chambers *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Marco Loffredo* and *Phillip A. Hubbart* for petitioner. *Earl Faircloth*, Attorney General of Florida, and *James T. Carlisle*, Assistant Attorney General, for respondent. Reported below: 176 So. 2d 597.

No. 741, Misc. Carter *v.* Wisconsin. Sup. Ct. Wis. Certiorari denied. Petitioner *pro se*. *Bronson C. LaFollette*, Attorney General of Wisconsin, and *William A. Platz* and *Warren H. Resh*, Assistant Attorneys General, for respondent. Reported below: 27 Wis. 2d 451, 134 N. W. 2d 444, 136 N. W. 2d 561.

No. 203, Misc. DI PAOLO *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Petitioner *pro se.* *Michael R. Imbriani* and *Raymond R. Trombadore,* Deputy Attorneys General of New Jersey, for respondent.

No. 742, Misc. SMITH *v.* CITY OF TOLEDO. Sup. Ct. Ohio. Certiorari denied. *Merritt W. Green II* for petitioner. *John A. DeVictor, Jr.,* and *John J. Burkhart* for respondent. Reported below: 3 Ohio St. 2d 80, 209 N. E. 2d 410.

No. 748, Misc. ELFE *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, and *Mortimer Sattler,* Assistant Attorney General, for respondent.

No. 782, Misc. BILOCHE *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. *Francis Hoague* for petitioner. *James E. Kennedy* for respondent. Reported below: 66 Wash. 2d 325, 402 P. 2d 491.

No. 791, Misc. MURRAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States. Reported below: 351 F. 2d 330.

No. 863, Misc. CASTELLANO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 350 F. 2d 852.

No. 916, Misc. ANSOURIAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall* for the United States.

No. 860, Misc. CARABALLO *v.* LAVALLEE, 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 *Arthur L. Schiff,* Assistant Attorney General, for respondent.

No. 877, Misc. GUIDRY *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Petitioner *pro se.* *Waggoner Carr,* Attorney General of Texas, *Hawthorne Phillips,* First Assistant Attorney General, *T. B. Wright,* Executive Assistant Attorney General, and *Howard M. Fender* and *Lonny F. Zwiener,* Assistant Attorneys General, for respondent.

No. 917, Misc. FORSBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Donald I. Bierman* for the United States. Reported below: 351 F. 2d 242.

No. 938, Misc. BOWMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Vincent Hallinan* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson,* and *Philip R. Monahan* for the United States. Reported below: 350 F. 2d 913.

No. 947, Misc. DAGAMPAT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 352 F. 2d 245.

No. 963, Misc. COLEMAN *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 46 N. J. 16, 214 A. 2d 393.

No. 951, Misc. HARPER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 122 U. S. App. D. C. 23, 350 F. 2d 1000.

No. 974, Misc. CAREY *v.* BENNETT. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for respondent.

No. 1025, Misc. KAUFMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Robert O. Hetlage* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 350 F. 2d 408.

No. 1092, Misc. PERRY *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 1102, Misc. STEVENSON *v.* MANCUSI, WARDEN. Ct. App. N. Y. Certiorari denied.

No. 1112, Misc. RODRIGUEZ *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1126, Misc. TAYLOR *v.* OHIO; and
No. 1142, Misc. JONES *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 4 Ohio St. 2d 13, 211 N. E. 2d 198.

No. 1141, Misc. HARRIS *v.* WILSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 351 F. 2d 840.

No. 1134, Misc. EVANS *v.* DINER'S CLUB, INC. C. A. 2d Cir. Certiorari denied.

No. 1115, Misc. FURTAK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1143, Misc. WALLS *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 353 F. 2d 210.

No. 1144, Misc. THOMAS *v.* CLARK, ATTORNEY GENERAL OF ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 1147, Misc. LESTER *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Petitioner *pro se.* *George F. McCanless,* Attorney General of Tennessee, and *Edgar P. Calhoun,* Assistant Attorney General, for respondent. Reported below: —— Tenn. ——, 393 S. W. 2d 288.

No. 1150, Misc. MCGRATH *v.* MCMANN, 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 *Michael H. Rauch,* Deputy Assistant Attorney General, for respondent. Reported below: 348 F. 2d 373.

No. 1162, Misc. AURILLO *v.* FOGLIANI, WARDEN. Sup. Ct. Nev. Certiorari denied.

No. 1172, Misc. TORNETTO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1176, Misc. BROWN *v.* GIFFIN INDUSTRIES, INC., ET AL. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se.* *Samuel J. Powers, Jr.,* for respondents. Reported below: 178 So. 2d 873.

No. 1156, Misc. VESS *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 352 F. 2d 325.

No. 1183, Misc. SHOTKIN *v.* COHEN. Dist. Ct. App. Fla., 3d Dist. Certiorari denied.

No. 1185, Misc. NEAL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1189, Misc. BAGLEY *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. Sup. Ct. Wash. Certiorari denied.

No. 1198, Misc. VAN SLYKE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 1199, Misc. COLLINS *v.* YEAGER, PRISON KEEPER. Sup. Ct. N. J. Certiorari denied.

No. 1211, Misc. WELLER *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 1212, Misc. WASHINGTON *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. *Charles A. Hobbs* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, and *John P. Moore,* Assistant Attorney General, for respondent. Reported below: —— Colo. ——, 405 P. 2d 735.

No. 1216, Misc. SMITH *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. *John R. Snively* for petitioner. *William G. Clark,* Attorney General of Illinois, *Fred Leach,* Assistant Attorney General, *William R. Nash* and *Alfred W. Cowan, Jr.,* for respondent. Reported below: 63 Ill. App. 2d 369, 211 N. E. 2d 456.

No. 1196, Misc. WELSHER *v.* BURKE, WARDEN. Sup. Ct. Wis. Certiorari denied. Reported below: 28 Wis. 2d 160, 135 N. W. 2d 849.

No. 1217, Misc. BELL *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. *Marco Loffredo* and *Phillip A. Hubbart* for petitioner. Reported below: 175 So. 2d 80.

No. 1219, Misc. MERCER *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1222, Misc. SALAZAR *v.* WILSON, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1249, Misc. SAMUELS *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

Rehearing Denied.

No. 828. LICHOTA ET UX. *v.* UNITED STATES, 382 U. S. 1027;

No. 187, Misc. MCILVAINE ET AL. *v.* LOUISIANA, *ante*, p. 921;

No. 368, Misc. RAINSBERGER *v.* NEVADA, 382 U. S. 455;

No. 843, Misc. SMITH *v.* ELLINGTON ET AL., 382 U. S. 998;

No. 977, Misc. ANDREWS *v.* SMITH ET AL., 382 U. S. 1029;

No. 1018, Misc. NIELSEN *v.* NEBRASKA STATE BAR ASSOCIATION, *ante*, p. 105; and

No. 1139, Misc. WAGER *v.* NEW YORK, *ante*, p. 920. Petitions for rehearing denied.

MARCH 28, 1966.

Miscellaneous Orders.

No. 79. CASCADE NATURAL GAS CORP. *v.* EL PASO NATURAL GAS CO. ET AL.;

No. 82. CALIFORNIA *v.* EL PASO NATURAL GAS CO. ET AL.; and

No. 596. SOUTHERN CALIFORNIA EDISON CO. *v.* EL PASO NATURAL GAS CO. ET AL. Appeals from D. C. Utah. (Probable jurisdiction noted, 382 U. S. 970.) Motion of appellee, El Paso Natural Gas Co., to strike portions of the designation of record, and motion of appellants to strike the cross-designation of record, denied without prejudice to the further order of this Court as to costs. *Gregory A. Harrison* and *Atherton Phleger* on the motion for appellee El Paso Natural Gas Co. *William M. Bennett, H. B. Jones, Jr., Rollin E. Woodbury, Harry W. Sturges, Jr.,* and *William E. Marx* on the motion for appellants.

No. 847. KATZENBACH, ATTORNEY GENERAL, ET AL. *v.* MORGAN ET UX.; and

No. 877. NEW YORK CITY BOARD OF ELECTIONS *v.* MORGAN ET UX. Appeals from D. C. D. C. (Probable jurisdiction noted, 382 U. S. 1007.) Motion of the Attorney General of Puerto Rico for leave to participate in oral argument, as *amicus curiae,* granted, and 20 minutes are allotted for that purpose. Twenty additional minutes are allotted to counsel for appellees. *Raphael Hernandez Colon,* Attorney General of Puerto Rico, on the motion.

No. 1317, Misc. POSTELL *v.* WILSON, WARDEN; and

No. 1320, Misc. MCLAMB *v.* WILSON, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1011. WALLACE ET AL. *v.* VIRGINIA. C. A. 4th Cir. Motion to advance denied. *George E. Allen, Sr., Anthony G. Amsterdam, Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, S. W. Tucker* and *Henry L. Marsh III* on the motion.

No. 1125. BOND ET AL. *v.* FLOYD ET AL. Appeal from D. C. N. D. Ga. Motion to advance denied. *Leonard B. Boudin* and *Victor Rabinowitz* for appellants on the motion. *Arthur K. Bolton,* Attorney General of Georgia, *William L. Harper, Paul L. Hanes* and *Alfred Evans, Jr.,* Assistant Attorneys General, for appellees in opposition to the motion.

No. 1068. LONG *v.* DISTRICT COURT OF IOWA, IN AND FOR LEE COUNTY. Sup. Ct. Iowa. (Certiorari granted, *ante,* p. 925.) Motion for appointment of counsel granted. It is ordered that *Ronald L. Carlson, Esquire,* of Iowa City, Iowa, be, and he is hereby, appointed to serve as counsel for the petitioner in this case.

No. 1308, Misc. JOHNSON *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.

Certiorari Granted. (See also No. 890, *ante,* p. 821; and No. 957, *ante,* p. 824.)

No. 875, Misc. CHAPMAN ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari granted, limited to the following questions:

"Where there is a violation of the rule of *Griffin* v. *California,* 380 U. S. 609, (1) can the error be held to be

harmless, and (2) if so, was the error harmless in this case?"

Case transferred to the appellate docket. THE CHIEF JUSTICE took no part in the consideration or decision of this motion and petition. *Morris Lavine* for petitioners. *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Raymond M. Momboisse,* Deputy Attorney General, for respondent. Reported below: 63 Cal. 2d 178, 404 P. 2d 209.

Certiorari Denied. (See also No. 1308, Misc., *supra.*)

No. 901. ROUGH DIAMOND CO., INC., ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Carl L. Shipley* for petitioners. *Solicitor General Marshall, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Edward Berlin* for the United States. Reported below: 173 Ct. Cl. 15, 351 F. 2d 636.

No. 922. KNETSCH ET UX. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *William Lee McLane, Nola McLane* and *Thaddeus Rojek* for petitioners. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Harry Baum* and *Philip R. Miller* for the United States. Reported below: 172 Ct. Cl. 378, 348 F. 2d 932.

No. 989. PERATI ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Marshall, Assistant Attorney General Weisl, Roger P. Marquis* and *Raymond N. Zagone* for the United States. Reported below: 352 F. 2d 788.

No. 1005. PAYSON *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Penrose Lucas Albright* for petitioner. *Solicitor General Marshall* for the United States.

No. 939. S. D. Warren Co. *v.* National Labor Relations Board. C. A. 1st Cir. Certiorari denied. *Robert W. Meserve* and *John R. Halley* for petitioner. *Solicitor General Marshall, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Leonard M. Wagman* for respondent. Reported below: 353 F. 2d 494.

No. 990. Thaggard *v.* United States. C. A. 5th Cir. Certiorari denied. *Ira De Ment III* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 354 F. 2d 735.

No. 993. Flick-Reedy Corp. *v.* Hydro-Line Manufacturing Co.; and

No. 994. Hydro-Line Manufacturing Co. *v.* Flick-Reedy Corp. C. A. 7th Cir. Certiorari denied. *John Rex Allen, James C. Wood* and *Lloyd W. Mason* for petitioner in No. 993. *Martin J. Brown* and *Malcolm S. Bradway* for respondent in No. 993 and for petitioner in No. 994. *James C. Wood* and *Lloyd W. Mason* for respondent in No. 994. Reported below: 351 F. 2d 546.

No. 1001. Kenner *v.* United States. C. A. 2d Cir. Certiorari denied. *Howard Hilton Spellman* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 354 F. 2d 780.

No. 1002. Knight & Wall Co. et al. *v.* Bryant, Governor of Florida, et al. Sup. Ct. Fla. Certiorari denied. *Tom Fairfield Brown* for petitioners. *Earl Faircloth,* Attorney General of Florida, and *Edward D. Cowart* and *Larry Levy,* Assistant Attorneys General, for respondents. Reported below: 178 So. 2d 5.

No. 1006. BAILEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Lewis G. Odom, Jr.*, for petitioner. *Solicitor General Marshall* for the United States. Reported below: 352 F. 2d 805.

No. 1010. CRAIG *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *Jack Greenberg, James M. Nabrit III, Leroy D. Clark, Michael Meltsner, Charles Stephen Ralston, H. W. Dixon, Jay H. Topkis* and *Anthony G. Amsterdam* for petitioner. Reported below: 179 So. 2d 202.

Nos. 1012 and 1013. DROBNICK ET AL. *v.* DEPARTMENT OF PUBLIC WORKS AND BUILDINGS OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Petitioners *pro se*. *William G. Clark*, Attorney General of Illinois, and *Harold G. Andrews* and *Donald T. Morrison*, Special Assistant Attorneys General, for respondent.

No. 1016. SIGNATROL, INC., ET AL. *v.* SCHULENBURG ET AL., DBA TIME-O-MATIC CO. ET AL. Sup. Ct. Ill. Certiorari denied. *Horace E. Gunn* and *Owen Rall* for petitioners. *Horace A. Young* for respondents. Reported below: 33 Ill. 2d 379, 212 N. E. 2d 865.

No. 1021. YOST ET AL. *v.* GUNBY, ORDINARY OF FULTON COUNTY, ET AL. Sup. Ct. Ga. Certiorari denied. *G. Seals Aiken* for petitioners. *John Tye Ferguson, Harold Sheats, George P. Dillard, Henry L. Bowden* and *Jack P. Etheridge* for respondents.

No. 1104. CARDEN *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *William Earl Badgett* for petitioner. *George F. McCanless*, Attorney General of Tennessee, and *Thomas E. Fox*, Assistant Attorney General, for respondent.

No. 1047. GOLDSTEIN *v.* DOFT. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Samuel B. Seidel* for respondent. Reported below: 353 F. 2d 484.

No. 1066. ALBERS *v.* STATE BOARD OF EQUALIZATION, STATE OF CALIFORNIA. Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Lemuel D. Sanderson* and *Hugh T. Fullerton* for petitioner. *Thomas C. Lynch,* Attorney General of California, *Ernest P. Goodman,* Assistant Attorney General, and *John J. Klee, Jr.,* Deputy Attorney General, for respondent. Reported below: 237 Cal. App. 2d 494, 47 Cal. Rptr. 69.

No. 1024. ROBINSON *v.* CONNECTICUT. Sup. Ct. Err. Conn. Motion to dispense with printing petition for writ of certiorari granted. Certiorari denied.

No. 858, Misc. CHAVERS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Petitioner *pro se. Richmond M. Flowers,* Attorney General of Alabama, and *David W. Clark,* Assistant Attorney General, for respondent.

No. 872, Misc. DOWD *v.* MAXWELL, WARDEN. Sup. Ct. Ohio. Certiorari denied. Petitioner *pro se. William B. Saxbe,* Attorney General of Ohio, and *William C. Baird,* Assistant Attorney General, for respondent. Reported below: 3 Ohio St. 2d 117, 209 N. E. 2d 421.

No. 884, Misc. COLLINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Meyer Licht* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 349 F. 2d 863.

No. 1191, Misc. HILL *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1182, Misc. SANDERS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 195 Kan. 701, 408 P. 2d 587.

No. 932, Misc. CADE *v.* BALKCOM, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se.* *Arthur K. Bolton,* Attorney General of Georgia, and *Carter A. Setliff,* Assistant Attorney General, for respondent.

No. 1033, Misc. TANDLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1127, Misc. BOOKER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *David W. Palmer* for petitioners. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 341 F. 2d 535.

No. 1195, Misc. CHURCHILL ET AL. *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Edward Raiden* for petitioners.

No. 1201, Misc. DARST *v.* WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES ET AL. Sup. Ct. Wash. Certiorari denied.

No. 1207, Misc. GRAY *v.* HENDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 354 F. 2d 986.

No. 1202, Misc. CONTI *v.* PATTERSON. Sup. Ct. Colo. Certiorari denied.

No. 1247, Misc. STEWART *v.* JANES. Ct. Civ. App. Tex., 7th Sup. Jud. Dist. Certiorari denied. Petitioner *pro se*. *William L. Kerr* for respondent. Reported below: 393 S. W. 2d 428.

No. 1215, Misc. SIWECKI *v.* KAISER JEEP CORP. Sup. Ct. Ohio. Certiorari denied. Petitioner *pro se*. *Robert L. Maier* for respondent.

No. 1236, Misc. DIXON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1243, Misc. GOHLKE *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1248, Misc. WASHINGTON *v.* RECORDER'S COURT JUDGE. Sup. Ct. Mich. Certiorari denied.

No. 1259, Misc. NAFE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1262, Misc. WHITE *v.* WILSON, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1265, Misc. OWENSBY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States. Reported below: 353 F. 2d 412.

No. 1303, Misc. ELLIS, ADMINISTRATOR *v.* STONEWALL PROPERTIES, INC. Sup. Ct. App. Va. Certiorari denied.

No. 1221, Misc. THOMAS *v.* PATE, WARDEN. C. A. 7th Cir. Petition for writ of certiorari is denied as untimely. *Thomas B. McNeill* for petitioner. Reported below: 351 F. 2d 910.

No. 1343, Misc. De Lago *v.* New York. Ct. App. N. Y. Certiorari denied. Reported below: 16 N. Y. 2d 289, 213 N. E. 2d 659.

Rehearing Denied.

No. 30. Idaho Sheet Metal Works, Inc. *v.* Wirtz, Secretary of Labor, *ante*, p. 190;

No. 31. Wirtz, Secretary of Labor *v.* Steepleton General Tire Co., Inc., et al., *ante*, p. 190;

No. 255, Misc. Williams *v.* Tennessee, 382 U. S. 961;

No. 924, Misc. Machado *v.* Wilkins, Warden, *ante*, p. 916;

No. 1019, Misc. Rhodes *v.* Jones, *ante*, p. 919;

No. 1042, Misc. Stiltner *v.* Washington, *ante*, p. 919;

No. 1054, Misc. Darrah *v.* Illinois, *ante*, p. 919; and

No. 1083, Misc. Stevens *v.* Ohio, *ante*, p. 939. Petitions for rehearing denied.

No. 843. Ginsburg *v.* Ginsburg et al., *ante*, p. 907. Petition for rehearing and motion to remand denied.

No. 1132, Misc. In re Disbarment of Santana, *ante*, p. 939. Petition for rehearing and for other relief denied.

April 1, 1966.

Miscellaneous Order.

No. —. Thomson et al. *v.* California. Berkeley-Albany Municipal Court, County of Alameda. Application for a stay presented to Mr. Justice Douglas, and by him referred to the Court, denied. Applicants *pro se*. *Thomas C. Lynch*, Attorney General of California, and *J. F. Coakley* in opposition.

APRIL 4, 1966.

Miscellaneous Orders.

No. 594. GOJACK *v.* UNITED STATES. C. A. D. C. Cir. (Certiorari granted, 382 U. S. 937.) Motion of petitioner to remove this case from summary calendar is denied. *Melvin L. Wulf* on the motion.

No. 847. KATZENBACH, ATTORNEY GENERAL, ET AL. *v.* MORGAN ET UX.; and

No. 877. NEW YORK CITY BOARD OF ELECTIONS *v.* MORGAN ET UX. Appeals from D. C. D. C. (Probable jurisdiction noted, 382 U. S. 1007.) Motion of the Attorney General of New York for leave to participate in oral argument, as *amicus curiae,* granted, and thirty minutes are allotted for that purpose. Thirty additional minutes are allotted to counsel for appellants. *Louis J. Lefkowitz,* Attorney General of New York, *Ruth Kessler Toch,* Acting Solicitor General, and *Jean M. Coon,* Assistant Attorney General, on the motion. [For earlier orders in these cases, see also *ante,* pp. 903, 955.]

No. 1309, Misc. SCHACK *v.* FLORIDA ET AL.;

No. 1314, Misc. ALLEN *v.* WILSON, WARDEN, ET AL.; and

No. 1337, Misc. JOHNSON *v.* CALIFORNIA ADULT AUTHORITY. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted.

No. 159. CHICAGO & NORTH WESTERN RAILWAY CO. ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL.; and

No. 576. UNITED STATES ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. Appeals from D. C.

S. D. Cal. Probable jurisdiction noted. The cases are consolidated and a total of three hours is allotted for oral argument. *Nuel D. Belnap, Richard M. Freeman, Bryce L. Hamilton, Raymond K. Merrill, Nye F. Morehouse, John W. Adams, Martin L. Cassell* and *Frank R. Johnston* for appellants in No. 159. *Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, Jerry Z. Pruzansky, Robert W. Ginnane* and *Arthur J. Cerra* for the United States et al. in No. 576. *Douglas F. Smith, Howard J. Trienens, George L. Saunders, Jr., John E. McCullough, S. R. Brittingham, Jr., Monroe E. Clinton, Frank S. Farrell, Lawrence W. Hobbs, L. E. Torinus, Jr.,* and *E. L. Van Dellen* for Atchison, Topeka & Santa Fe Railway Co. et al., and *E. P. Porter, Alan C. Furth, Charles W. Burkett, Robert L. Pierce* and *Thormund A. Miller* for Southern Pacific Co. et al., appellees in both cases. *Robert Y. Thornton,* Attorney General of Oregon, *Lloyd G. Hammel* and *Richard W. Sabin,* Assistant Attorneys General, *John J. O'Connell,* Attorney General of Washington, and *Frank P. Hayes,* Assistant Attorney General, for Regulatory Commissions of the State of Arizona et al., and *Mary Moran Pajalich* and *J. Thomason Phelps* for the State of California et al., intervening plaintiffs-appellees in both cases. Reported below: 238 F. Supp. 528.

Certiorari Granted. (See also No. 385, *ante,* p. 832; and No. 605, Misc., *ante,* p. 834.)

No. 406, Misc. MILLER *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup Ct. Wash. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket. Petitioner *pro se. John J. O'Connell,* Attorney General of Washington, and *Stephen C. Way,* Assistant Attorney General, for respondent.

No. 850. CICHOS *v.* INDIANA. Sup. Ct. Ind. Certiorari granted. *John P. Price* and *Cleon H. Foust* for petitioner. *John J. Dillon,* Attorney General of Indiana, and *Charles S. White* for respondent. Reported below: —— Ind. ——, 208 N. E. 2d 685; —— Ind. ——, 210 N. E. 2d 363.

No. 1039. UNITED STATES *v.* DEMKO. C. A. 3d Cir. Certiorari granted. *Solicitor General Marshall, Assistant Attorney General Douglas, Morton Hollander* and *Richard S. Salzman* for the United States. Reported below: 350 F. 2d 698.

No. 493, Misc. ANDERS *v.* CALIFORNIA. Sup. Ct. Cal. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket. Petitioner *pro se. Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *George J. Roth,* Deputy Attorney General, for respondent.

Certiorari Denied. (See also No. 196, Misc., *ante,* p. 831.)

No. 347. IN RE FOSTER. C. C. P. A. Certiorari denied. *Edward S. Irons, Stanley M. Clark* and *Mary Helen Sears* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the Commissioner of Patents in opposition. Reported below: 52 C. C. P. A. (Pat.) 1808, 343 F. 2d 980.

No. 971. BURDE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Albert A. Wedeen* for petitioners. *Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *Melva M. Graney* for respondent. Reported below: 352 F. 2d 995.

No. 1014. LUSK ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Isidore H. Wachtel* for petitioners. *Solicitor General Marshall, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. Reported below: 173 Ct. Cl. 291.

No. 1015. R. C. OWEN CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *William Waller* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts* and *I. Henry Kutz* for respondent. Reported below: 351 F. 2d 410.

No. 1017. IRWIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Joseph M. Cohen* and *Louis W. Bookheim, Jr.*, for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 354 F. 2d 192.

No. 1018. HOBBS *v.* LANE, WARDEN. Sup. Ct. Ind. Certiorari denied. *Robert C. Probst* for petitioner. Reported below: — Ind. —, 208 N. E. 2d 182.

No. 1020. W. W. I. Z., INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. *Carl L. Shipley* for petitioners. *Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Milton J. Grossman, Henry Geller, John H. Conlin* and *Lenore G. Ehrig* for respondent Federal Communications Commission. Reported below: 122 U. S. App. D. C. 127, 351 F. 2d 824.

No. 1037. FLEMING *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 33 Ill. 2d 431, 211 N. E. 2d 677.

No. 1023. Blanchard Importing & Distributing Co., Inc. *v.* Charles Gilman & Son, Inc., et al. C. A. 1st Cir. Certiorari denied. *Harold E. Cole* for petitioner. Reported below: 353 F. 2d 400.

No. 1025. Royal Court Apartments, Inc. *v.* United States. Ct. Cl. Certiorari denied. *Carl L. Shipley* for petitioner. *Solicitor General Marshall* for the United States.

No. 1027. Alabama Electric Cooperative, Inc. *v.* Securities and Exchange Commission et al. C. A. D. C. Cir. Certiorari denied. *Bennett Boskey, Joseph Volpe, Jr.,* and *J. M. Williams, Jr.,* for petitioner. *Solicitor General Marshall, Philip A. Loomis, Jr., David Ferber, Ellwood L. Englander* and *Richard E. Nathan* for the Securities and Exchange Commission, and *John Bingham* and *Ezekiel G. Stoddard* for Alabama Power Co. et al., respondents. Reported below: 122 U. S. App. D. C. 367, 353 F. 2d 905.

No. 1031. Bakes *v.* United States. C. A. 7th Cir. Certiorari denied. *Joseph I. Bulger* for petitioner. *Solicitor General Marshall, Acting Assistant Attorney General Roberts, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 354 F. 2d 640.

No. 1033. Heinze, Warden *v.* Cunningham. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Doris H. Maier,* Assistant Attorney General, for petitioner. Reported below: 352 F. 2d 1.

No. 1042. Carr *v.* United States. Ct. Cl. Certiorari denied. *Henry R. Carr* for petitioner. *Solicitor General Marshall* for the United States.

No. 1022. TABAS *v.* HUDSON. Sup. Ct. Fla. Certiorari denied. *Tobias Simon* for petitioner.

No. 1036. BROOKS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 355 F. 2d 540.

No. 1041. PENN ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Robert Kasanof* and *Carl Rachlin* for petitioners. *Frank S. Hogan, H. Richard Uviller, Michael Juviler* and *Alan F. Liebowitz* for respondent.

No. 1043. GOLDMAN *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Jacob Kossman* and *Calvin W. Breit* for petitioner.

No. 1044. JIGGS, INC., ET AL. *v.* SLUMBERTOGS, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Maximilian Bader* and *I. Walton Bader* for petitioners. *Milton Mound* for respondents. Reported below: 353 F. 2d 720.

No. 1048. COTTAGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *George S. Fitzgerald* and *Paul B. Mayrand* for petitioner. *Solicitor General Marshall, Assistant Attorney General Vinson, Beatrice Rosenberg* and *Mervyn Hamburg* for the United States. Reported below: 354 F. 2d 975.

No. 1051. DORCHESTER GAS PRODUCING CO. *v.* FEDERAL POWER COMMISSION. C. A. 3d Cir. Certiorari denied. *Bernard A. Foster, Jr.*, and *Donald B. Robertson* for petitioner. *Solicitor General Marshall, Richard A. Solomon, Howard E. Wahrenbrock* and *Leo E. Forquer* for respondent. Reported below: 353 F. 2d 162.

No. 1052. LOGAN *v.* EMPRESA LINEAS MARITIMAS ARGENTINAS ET AL. C. A. 1st Cir. Certiorari denied. *Lawrence F. O'Donnell* for petitioner. *Seymour P. Edgerton* for Empresa Lineas Maritimas Argentinas and *Thomas D. Burns* for Jarka Corp. of New England, respondents. Reported below: 353 F. 2d 373.

No. 1070. JERVIS CORP. *v.* NELMOR CORP. C. A. 6th Cir. Certiorari denied. *Clarence B. Zewadski* for petitioner. *Max R. Kraus* for respondent. Reported below: 354 F. 2d 923.

No. 1084. MOZINGO *v.* YORK COUNTY NATURAL GAS AUTHORITY. C. A. 4th Cir. Certiorari denied. *Henry Hammer* and *James P. Mozingo III, pro se,* for petitioner. *C. W. F. Spencer, Jr.,* and *Huger Sinkler* for respondent. Reported below: 352 F. 2d 78.

No. 479, Misc. DAVENPORT *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Petitioner *pro se. Robert Matthews,* Attorney General of Kentucky, and *George F. Rabe,* Assistant Attorney General, for respondent. Reported below: 390 S. W. 2d 662.

No. 543, Misc. FARRELL *v.* BURKE, WARDEN. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Bronson C. La Follette,* Attorney General of Wisconsin, and *William A. Platz* and *Warren H. Resh,* Assistant Attorneys General, for respondent.

No. 793, Misc. LOGAN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se. Isidore Dollinger* and *Walter E. Dillon* for respondent. Reported below: 16 N. Y. 2d 741, 209 N. E. 2d 729.

No. 975, Misc. WALLIS *v.* PENNSYLVANIA. Ct. of Quarter Sessions of Northampton County, Pa. Certiorari denied.

No. 836, Misc. GALLEGOS ET AL. *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. *H. D. Reed* for petitioners. *Duke W. Dunbar,* Attorney General of Colorado, and *James W. Creamer, Jr.,* Assistant Attorney General, for respondent. Reported below: —— Colo. ——, 403 P. 2d 864.

No. 999, Misc. HARDIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Petitioner *pro se. Earl Faircloth,* Attorney General of Florida, and *T. T. Turnbull,* Assistant Attorney General, for respondent.

No. 1045, Misc. CONWAY *v.* CALIFORNIA ADULT AUTHORITY. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se. Thomas C. Lynch,* Attorney General of California, and *Robert R. Granucci* and *Michael R. Marron,* Deputy Attorneys General, for respondent.

No. 1190, Misc. SIMPSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Acting Solicitor General Spritzer* for the United States. Reported below: 353 F. 2d 530.

No. 1232, Misc. HARRIS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 33 Ill. 2d 389, 211 N. E. 2d 693.

No. 1252, Misc. RHODES *v.* HOUSTON ET AL. C. A. 8th Cir. Certiorari denied.

No. 1256, Misc. KHABIRI *v.* VIRGINIA ELECTRIC & POWER CO. ET AL. C. A. 4th Cir. Certiorari denied.

No. 1274, Misc. GATLING *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1275, Misc. HUMPHREY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 142, Misc. McGRUDER *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se.* *Matthew J. Ryan, Jr.*, for respondent. Reported below: 348 Mass. 712, 205 N. E. 2d 726.

No. 370, Misc. SPICA *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Robert W. Yost* for petitioner. *Norman H. Anderson,* Attorney General of Missouri, and *James J. Murphy,* Assistant Attorney General, for respondent. Reported below: 389 S. W. 2d 35.

No. 504, Misc. JUPITER *v.* CALIFORNIA LEGISLATURE ET AL. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *Anthony S. Da Vigo,* Deputy Attorneys General, for respondents.

No. 490, Misc. BRYANT *v.* WILKINS, WARDEN. Ct. App. N. Y. Certiorari denied on representation of Attorney General of New York that there is an adequate state remedy available to petitioner. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, and *Anthony J. Lokot,* Assistant Attorney General, for respondent.

No. 594, Misc. PERT *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied on representation of Attorney General of Florida that there is an adequate state remedy available to petitioner. Petitioner *pro se.* *Earl Faircloth,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent.

No. 1240, Misc. BLACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Marshall* for the United States.

No. 1280, Misc. LEYDE *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

Rehearing Denied.

No. 709, October Term, 1963. GORSUCH ET AL. *v.* LANDOE, 376 U. S. 950, *sub nom.* GORSUCH ET AL. *v.* DE PINTO ET AL.; and

No. 887, Misc. HACKETT *v.* UNITED STATES, 382 U. S. 1029. Motions for leave to file petitions for rehearing denied.

No. 837. BOWLING *v.* UNITED STATES, *ante*, p. 908;

No. 862. KNOLL ET AL. *v.* KNOLL ET AL., *ante*, p. 909;

No. 926. SALEMI *v.* DUFFY CONSTRUCTION CORP., *ante*, p. 927;

No. 525, Misc. WRIGHT *v.* UNITED STATES, 382 U. S. 1015; and

No. 1133, Misc. OPPENHEIMER *v.* CALIFORNIA, *ante*, p. 930. Petitions for rehearing denied.

AMENDMENTS TO RULES OF CIVIL PROCEDURE

FOR THE

UNITED STATES DISTRICT COURTS

Effective July 1, 1966

The following amendments to the Rules of Civil Procedure for the United States District Courts were prescribed by the Supreme Court of the United States on February 28, 1966, pursuant to 28 U. S. C. §§ 2072 and 2073, and were reported to Congress by THE CHIEF JUSTICE on the same date, *post,* p. 1030.

The amendments became effective on July 1, 1966, as provided in paragraphs 2 and 4 of the Court's order, *post,* pp. 1031–1032.

For earlier publications of the Rules of Civil Procedure and the amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, and 374 U. S. 861.

These amendments to the Rules of Civil Procedure unify the civil and admiralty procedure. For earlier publications of the Rules of Practice in Admiralty and Maritime Cases and the amendments thereto, see 368 U. S. 1019, and the citations listed therein.

This page is purposely numbered 1029. The numbers between 973 and 1029 were purposely omitted in order to make it possible to use the same page numbers for the rules amendments in this bound volume of the United States Reports as were used in the preliminary print of 384 U. S., part 4, where the amendments were previously published.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

FEBRUARY 28, 1966.

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court, I have the honor to report to the Congress the attached amendments to the Rules of Civil Procedure for the United States District Courts, which have been adopted by the Supreme Court, pursuant to Title 28, U. S. C., Sec. 2072.

Accompanying these amendments is the Report of the Judicial Conference of the United States, submitted to the Court for its consideration pursuant to Title 28, U. S. C., Sec. 331.

I also am enclosing a statement by MR. JUSTICE BLACK, dissenting.

Respectfully,

(Signed) EARL WARREN,
Chief Justice of the United States.

SUPREME COURT OF THE UNITED STATES

MONDAY, FEBRUARY 28, 1966

ORDERED:

1. That the Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein Rules 23.1, 23.2, 44.1 and 65.1, Supplemental Rules A, B, C, D, E and F for Certain Admiralty and Maritime Claims, and amendments to Rules 1, 4, 8, 9, 12, 13, 14, 15, 17, 18, 19, 20, 23, 24, 26, 38, 41, 42, 43, 44, 47, 53, 59, 65, 68, 73, 74, 75, 81 and 82, and to Forms 2 and 15, as hereinafter set forth:

[See *infra,* pp. 1039–1085.]

2. That the foregoing amendments and additions to the Rules of Civil Procedure shall take effect on July 1, 1966, and shall govern all proceedings in actions brought thereafter and also in all further proceedings in actions then pending, except to the extent that in the opinion of the Court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies.

3. That the Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing amendments and additions to the Rules of Civil Procedure in accordance with the provisions of Title 28, U. S. C., §§ 2072 and 2073.

4. That: (a) subdivision (c) of Rule 6 of the Rules of Civil Procedure for the United States District Courts promulgated by this Court on December 20, 1937, effective September 16, 1938; (b) Rule 2 of the Rules for Practice and Procedure under section 25 of An Act To amend and consolidate the Acts respecting copyright, approved March 4, 1909, promulgated by this Court on June 1, 1909, effective July 1, 1909;* and (c) the Rules

*[REPORTER'S NOTE: For earlier publication of the Copyright Rules and the amendment thereto, see 214 U. S. 533 and 307 U. S. 652.]

of Practice in Admiralty and Maritime Cases, promulgated by this Court on December 6, 1920, effective March 7, 1921, as revised, amended and supplemented, be, and they hereby are, rescinded, effective July 1, 1966.

MR. JUSTICE BLACK, dissenting.

The Amendments to the Federal Rules of Civil and Criminal* Procedure today transmitted to the Congress are the work of very capable advisory committees. Those committees, not the Court, wrote the rules. Whether by this transmittal the individual members of the Court who voted to transmit the rules intended to express approval of the varied policy decisions the rules embody I am not sure. I am reasonably certain, however, that the Court's transmittal does not carry with it a decision that the amended rules are all constitutional. For such a decision would be the equivalent of an advisory opinion which, I assume the Court would unanimously agree, we are without constitutional power to give. And I agree with my Brother DOUGLAS that some of the proposed criminal rules go to the very border line if they do not actually transgress the constitutional right of a defendant not to be compelled to be a witness against himself. This phase of the criminal rules in itself so infects the whole collection of proposals that, without mentioning other objections, I am opposed to transmittal of the proposed amendments to the criminal rules.

I am likewise opposed to transmittal of the proposed revision of the civil rules. In the first place I think the provisions of 28 U. S. C. § 2072 (1964 ed.), under which these rules are transmitted and the corresponding section, 18 U. S. C. § 3771 (1964 ed.), relating to the criminal rules, both of which provide for giving transmitted rules the effect of law as though they had been properly enacted by Congress are unconstitutional for reasons I

*For the amendments to the Federal Rules of Criminal Procedure, to which this dissent also applies, see *post*, p. 1095.

have previously stated.[1] And in prior dissents I have stated some of the basic reasons for my objections to repeated rules revisions [2] that tend to upset established meanings and need not repeat those grounds of objection here. The confusion created by the adoption of the present rules, over my objection, has been partially dispelled by judicial interpretations of them by this Court and other courts. New rules and extensive amendments to present rules will mean renewed confusion resulting in new challenges and new reversals and prejudicial "pretrial" dismissals of cases before a trial on the merits for failure of lawyers to understand and comply with new rules of uncertain meaning. Despite my continuing objection to the old rules, it seems to me that since they have at least gained some degree of certainty it would be wiser to "bear those ills we have than fly to others we know not of," unless, of course, we are reasonably sure that the proposed reforms of the old rules are badly needed. But I am not. The new proposals, at least some of them, have, as I view them, objectionable possibilities that cause me to believe our judicial system could get along much better without them.

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[1] In a statement accompanying a previous transmittal of the civil rules, MR. JUSTICE DOUGLAS and I said:

"MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are opposed to the submission of these rules to the Congress under a statute which permits them to 'take effect' and to repeal 'all laws in conflict with such rules' without requiring any affirmative consideration, action, or approval of the rules by Congress or by the President. We believe that while some of the Rules of Civil Procedure are simply housekeeping details, many determine matters so substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation which, in our judgment, the Constitution requires to be initiated in and enacted by the Congress and approved by the President. The Constitution, as we read it, provides that all laws shall be enacted by the House, the Senate, and the President, not by the mere failure of Congress to reject proposals of an outside agency. . . ." (Footnotes omitted.) 374 U. S. 865–866.

[2] 346 U. S. 946, 374 U. S. 865. And see 368 U. S. 1011 and 1012.

The momentum given the proposed revision of the old rules by this Court's transmittal makes it practically certain that Congress, just as has this Court, will permit the rules to take effect exactly as they were written by the Advisory Committee on Rules. Nevertheless, I am including here a memorandum I submitted to the Court expressing objections to the Committee's proposals and suggesting changes should they be transmitted. These suggestions chiefly center around rules that grant broad discretion to trial judges with reference to class suits, pretrial procedures, and dismissal of cases with prejudice. Cases coming before the federal courts over the years now filling nearly 40 volumes of Federal Rules Decisions show an accumulation of grievances by lawyers and litigants about the way many trial judges exercise their almost unlimited discretionary powers to use pretrial procedures to dismiss cases without trials. In fact, many of these cases indicate a belief of many judges and legal commentators that the cause of justice is best served in the long run not by trials on the merits but by summary dismissals based on out-of-court affidavits, pretrial depositions, and other pretrial techniques. My belief is that open-court trials on the merits where litigants have the right to prove their case or defense best comport with due process of law.

The proposed rules revisions, instead of introducing changes designed to prevent the continued abuse of pretrial power to dismiss cases summarily without trials, move in the opposite direction. Of course, each such dismissal results in removal of one more case from our congested court dockets, but that factor should not weigh more heavily in our system of justice than assuring a full-fledged due process trial of every bona fide lawsuit brought to vindicate an honest, substantial claim. It is to protect this ancient right of a person to have his case tried rather than summarily thrown out of court that I

suggested to the Court that it recommend changes in the Committee's proposals of the nature set out in the following memorandum.

"Dear Brethren:

"I have gone over all the proposed amendments carefully and while there are probably some good suggestions, it is my belief that the bad results that can come from the adoption of these amendments predominate over any good they can bring about. I particularly think that every member of the Court should examine with great care the amendments relating to class suits. It seems to me that they place too much power in the hands of the trial judges and that the rules might almost as well simply provide that 'class suits can be maintained either for or against particular groups whenever in the discretion of a judge he thinks it is wise.' The power given to the judge to dismiss such suits or to divide them up into groups at will subjects members of classes to dangers that could not follow from carefully prescribed legal standards enacted to control class suits.

"In addition, the rules as amended, in my judgment, greatly aggravate the evil of vesting judges with practically uncontrolled power to dismiss with prejudice cases brought by plaintiffs or defenses interposed by defendants. The power to dismiss a plaintiff's case or to render judgments by default against defendants can work great harm to both parties. There are many inherent urges in existence which may subconsciously incline a judge towards disposing of the cases before him without having to go through the burden of a trial. Mr. Chief Justice White, before he became Chief Justice, wrote an opinion in the case of *Hovey* v. *Elliott,* 167 U. S. 409, which pointed out grave constitutional questions raised by attempting to punish the parties by depriving them of the right to try their law suits or to defend against law suits brought against them by others.

"Rule 41 entitled 'Dismissal of Actions' points up the great power of judges to dismiss actions and provides an automatic method under which a dismissal must be construed as a dismissal 'with prejudice' unless the judge specifically states otherwise. For that reason I suggest to the Conference that if the Rules are accepted, including that one, the last sentence of Rule 41 (b) be amended so as to provide that a simple order of dismissal by a judge instead of operating 'as an adjudication upon the merits,' as the amended rule reads, shall provide that such a dismissal 'does not operate as an adjudication upon the merits.'

"As a further guarantee against oppressive dismissals I suggest the addition of the following as subdivision (c) of Rule 41.

> " 'No plaintiff's case shall be dismissed or defendant's right to defend be cut off because of the neglect, misfeasance, malfeasance, or failure of their counsel to obey any order of the court, until and unless such plaintiff or defendant shall have been personally served with notice of their counsel's delinquency, and not then unless the parties themselves do or fail to do something on their own part that can legally justify dismissal of the plaintiff's case or of the defendant's defense.'

"This proposed amendment is suggested in order to protect litigants, both plaintiffs and defendants, against being thrown out of court as a penalty for their lawyer's neglect or misconduct. The necessity for such a rule is shown, I think, by the dismissal of the plaintiff's case in *Link* v. *Wabash R. Co.*, 370 U. S. 626. The usual argument against this suggestion is that a party to a law suit hires his lawyer and should therefore be responsible for everything his lawyer does in the conduct of his case. This may be a good argument with reference to affluent litigants who not only know the best lawyers but are able

to hire them. It is a wholly unrealistic argument, however, to make with reference to individual persons who do not know the ability of various lawyers or who are not financially able to hire those at the top of the bar and who are compelled to rely on the assumption that a lawyer licensed by the State is competent. It seems to me to be an uncivilized practice to punish clients by throwing their cases out of court because of their lawyers' conduct. It may be supportable by good, sound, formal logic but I think has no support whatever in a procedural system supposed to work as far as humanly possible to the end of obtaining equal and exact justice.

"H. L. B."

For all the reasons stated above and in my previous objections to the transmittals of rules I dissent from the transmittals here.

AMENDMENTS TO RULES OF CIVIL PROCEDURE

FOR THE

UNITED STATES DISTRICT COURTS

Rule 1. Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 4. Process

(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)–(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.

Rule 8. General Rules of Pleading

(e) Pleading To Be Concise and Direct; Consistency.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

Rule 9. Pleading Special Matters

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14 (c), 26 (a), 38 (e), 73 (h), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15.

Rule 12. Defenses and Objections—When and How Presented—by Pleading or Motion—Motion for Judgment on the Pleadings

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim,

counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or

insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15 (a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7 (a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Rule 13. Counterclaim and Cross-Claim

(h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

Rule 14. Third-Party Practice

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party

defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

(c) ADMIRALTY AND MARITIME CLAIMS. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9 (h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff

may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make his defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

(c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

RULE 17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

(a) REAL PARTY IN INTEREST. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a

contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Rule 18. Joinder of Claims and Remedies

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons To Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in subdivision (a) (1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) PLEADING REASONS FOR NONJOINDER. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)–(2) hereof who are not joined, and the reasons why they are not joined.

(d) EXCEPTION OF CLASS ACTIONS. This rule is subject to the provisions of Rule 23.

RULE 20. PERMISSIVE JOINDER OF PARTIES

(a) PERMISSIVE JOINDER. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined

in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action To Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment,

whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allega-

tions as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 23.1. Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Rule 23.2. Actions Relating to Unincorporated Associations

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23 (d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23 (e).

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 26. Depositions Pending Action

(a) When Depositions May Be Taken. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45.

Depositions shall be taken only in accordance with these rules, except that in admiralty and maritime claims within the meaning of Rule 9 (h) depositions may also be taken under and used in accordance with sections 863, 864, and 865 of the Revised Statutes (see note preceding 28 U. S. C. § 1781). The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

Rule 38. Jury Trial of Right

(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9 (h).

Rule 41. Dismissal of Actions

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 (a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

RULE 42. CONSOLIDATION; SEPARATE TRIALS

(b) SEPARATE TRIALS. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

RULE 43. EVIDENCE

(f) INTERPRETERS. The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

RULE 44. PROOF OF OFFICIAL RECORD

(a) AUTHENTICATION.

(1) DOMESTIC. An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official

duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

(2) FOREIGN. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) LACK OF RECORD. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) OTHER PROOF. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

Rule 44.1. Determination of Foreign Law

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.

Rule 47. Jurors

(b) Alternate Jurors. The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

Rule 53. Masters

(a) Appointment and Compensation. Each district court with the concurrence of a majority of all the judges

thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, a commissioner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) REFERENCE. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

RULE 59. NEW TRIALS; AMENDMENT OF JUDGMENTS

(d) ON INITIATIVE OF COURT. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

RULE 65. INJUNCTIONS

(a) PRELIMINARY INJUNCTION.

(1) NOTICE. No preliminary injunction shall be issued without notice to the adverse party.

(2) CONSOLIDATION OF HEARING WITH TRIAL ON MERITS. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) TEMPORARY RESTRAINING ORDER; NOTICE; HEARING; DURATION. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary

injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) SECURITY. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

RULE 65.1. SECURITY: PROCEEDINGS AGAINST SURETIES

Whenever these rules, including the Supplemental Rules for Certain Admiralty and Maritime Claims, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion

as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

Rule 68. Offer of Judgment

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Rule 73. Appeal to a Court of Appeals

(a) How and When Taken. An appeal permitted by law from a district court to a court of appeals shall be taken by filing a notice of appeal with the district court within 30 days from the entry of the judgment appealed from, except that: (1) in any action in which the United States or an officer or agency thereof is a

party, the notice of appeal may be filed by any party within 60 days from such entry; (2) upon a showing of excusable neglect the district court in any action may extend the time for filing the notice of appeal not exceeding 30 days from the expiration of the original time herein prescribed; (3) if a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise herein prescribed, whichever period last expires; (4) an appeal by permission of a court of appeals obtained under Title 28, U. S. C., § 1292 (b) shall be taken in accordance with the rules of the court of appeals. The running of the time for appeal is terminated as to all parties by a timely motion made by any party pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50 (b); or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation, filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

(b) NOTICE OF APPEAL. The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall

name the court to which the appeal is taken. The clerk shall serve notice of the filing of the notice of appeal by mailing a copy thereof to the attorney of record of each party other than the appellant, or, if a party is not represented by an attorney, then to the party at his last known address, but his failure to do so does not affect the validity of the appeal, and such notification is sufficient notwithstanding the death of the party or of his attorney prior to the giving of the notification. The clerk shall note on each copy thus served the date on which the notice of appeal was filed, and shall note in the civil docket the names of the parties to whom he mails the copies, with date of mailing.

(c) Bond on Appeal. Unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal, he shall file a bond for such costs or deposit equivalent security therefor with the notice of appeal, but security shall not be required of an appellant who is not subject to costs. The bond or equivalent security shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the court of appeals may award if the judgment is modified. If a bond on appeal or equivalent security in the sum of two hundred and fifty dollars is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk.

(d) Supersedeas Bond. Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and dam-

ages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. A separate supersedeas bond need not be given, unless otherwise ordered, when the appellant has already filed in the district court security including the event of appeal, except for the difference in amount, if any.

(f) JUDGMENTS AGAINST SURETY. The provisions of Rule 65.1 apply to a surety upon an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule.

(g) DOCKETING THE APPEAL; FILING OF THE RECORD ON APPEAL. The appellant shall cause the record on appeal as provided for in Rules 75 and 76 to be filed with the court of appeals and the appeal to be docketed there within 40 days from the date of filing the notice of appeal. The record will be filed and the appeal docketed upon receipt by the clerk of the court of appeals, within the 40 days herein provided or within such shorter or longer period as the court may prescribe, of the record

on appeal and, unless the appellant is authorized to proceed without prepayment of fees, of the docket fee fixed by the Judicial Conference of the United States. When more than one appeal is taken from the same judgment to the same court of appeals, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of filing the first notice of appeal. In all cases the district court may extend the time for filing the record and docketing the appeal upon motion of an appellant made within the period for filing and docketing as originally prescribed or as extended by a previous order, or upon its own motion by order entered within such period; but the district court shall not extend the time to a day more than 90 days from the date of filing the first notice of appeal. The motion of an appellant for an extension shall show that his inability to effect timely filing and docketing is due to causes beyond his control or to circumstances which may be deemed excusable neglect. The district court or the court of appeals may require the record to be filed and the appeal to be docketed at any time within the time otherwise provided or fixed.

(h) Interlocutory Appeals in Admiralty and Maritime Cases. These rules do not affect the appealability of interlocutory judgments in admiralty cases pursuant to Title 28, U. S. C., § 1292 (a)(3). The reference in that statute to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of Rule 9 (h).

Rule 74. Joint Appeals to the Supreme Court or to a Court of Appeals

If two or more persons are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate notices of appeal, and they may thereafter proceed on appeal as a single appellant.

Rule 75. Record on Appeal to a Court of Appeals

(a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases. The parties may agree by written stipulation filed in the district court that designated parts of the record need not be transmitted to the court of appeals, in which event the parts shall be retained in the district court unless thereafter the court of appeals shall order or any party shall request their transmission, but the parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript Is Ordered. Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on the appeal. If an appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the issues by the appellant, order such parts from the reporter or procure an order from the district court requiring the appellant to do so. At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(c) STATEMENT OF THE EVIDENCE OR PROCEEDINGS WHEN NO REPORT WAS MADE OR WHEN THE TRANSCRIPT IS UNAVAILABLE. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

(d) CORRECTION OR MODIFICATION OF THE RECORD. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

(e) TRANSMISSION OF THE RECORD. Within the time provided or fixed under the provisions of Rule 73 (g) for filing the record and docketing the appeal, the clerk of the district court shall transmit the record to the clerk of the court of appeals. The appellant shall comply with the provisions of subdivision (b) of this rule and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is taken, each appellant shall comply with the

provisions of subdivision (b) and of this subdivision, and a single record shall be transmitted. Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks of both courts for the transportation and receipt of bulky or weighty exhibits.

Upon stipulation of the parties, or by order of the district court at the request of any party, the clerk shall retain the record for use by the parties in preparing appellate papers. In that event, the appellant shall cause the record to be filed and the appeal to be docketed in the court of appeals within the time provided or fixed under the provisions of Rule 73 (g) by presenting to the clerk of the court of appeals a partial record in the form of a copy of the docket entries, accompanied by a certificate of counsel for the appellant, or of the appellant if he is without counsel, reciting that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree, or as the court may order, the appellant shall request the clerk of the district court to transmit the record.

(f) Retention of the Record in the District Court by Order of Court. The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted. If the record is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk shall retain the record and shall transmit a copy of the order and of the docket entries together with such parts of the record as the district court shall allow and copies of such parts as the parties may designate. If the

record is retained in the district court by order of either court, the clerk shall retain it subject to the order of the court of appeals, and transmission of the copy of the docket entries shall constitute transmission of the record.

(g) RECORD FOR PRELIMINARY HEARING IN THE COURT OF APPEALS. If prior to the time the record is transmitted a party desires to make in the court of appeals a motion for dismissal, for admission to bail, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk at the request of any party shall transmit to the court of appeals such parts of the original record as the parties shall designate.

(h) RETURN OF THE RECORD TO THE DISTRICT COURT. After an appeal has been disposed of, the original papers comprising the record on appeal shall be returned to the custody of the district court.

RULE 81. APPLICABILITY IN GENERAL

(a) TO WHAT PROCEEDINGS APPLICABLE.

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U. S. C., §§ 7651–81. They do not apply to proceedings in bankruptcy or proceedings in copyright under Title 17, U. S. C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia except to appeals therein.

(2) In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, and quo warranto. The requirements of Title 28,

U. S. C., § 2253, relating to certification of probable cause in certain appeals in habeas corpus cases remain in force.

(3) In proceedings under Title 9, U. S. C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U. S. C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings.

Rule 82. Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9 (h) shall not be treated as a civil action for the purposes of Title 28, U. S. C., §§ 1391–93.

Form 2. Allegation of Jurisdiction

(a) Jurisdiction founded on diversity of citizenship and amount.

Plaintiff is a [citizen of the State of Connecticut] [1] [corporation incorporated under the laws of the State of Connecticut having its principal place of business in the State of Connecticut] and defendant is a corporation incorporated under the laws of the State of New York having its principal place of business in a State other than the State of Connecticut. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

(b) Jurisdiction founded on the existence of a Federal question and amount in controversy.

The action arises under [the Constitution of the United States, Article ..., Section ...]; [the ..... Amendment to the Constitution of the United States, Section ...]; [the Act of ....., ... Stat. ...; U. S. C., Title ..., § ...]; [the Treaty of the United States (here describe the treaty)],[2] as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

(c) Jurisdiction founded on the existence of a question arising under particular statutes.

The action arises under the Act of ....., ... Stat. ...; U. S. C., Title ..., § ..., as hereinafter more fully appears.

(d) Jurisdiction founded on the admiralty or maritime character of the claim.

This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears. [If the pleader wishes to invoke the distinctively maritime procedures referred to in Rule 9 (h), add the following or its substantial equivalent: This is an admiralty or maritime claim within the meaning of Rule 9 (h).]

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[1] Form for natural person.

[2] Use the appropriate phrase or phrases. The general allegation of the existence of a Federal question is ineffective unless the matters constituting the claim for relief as set forth in the complaint raise a Federal question.

Form 15. Complaint for Damages Under Merchant Marine Act

1. Allegation of jurisdiction. [If the pleader wishes to invoke the distinctively maritime procedures referred to in Rule 9 (h), add the following or its substantial equivalent: This is an admiralty or maritime claim within the meaning of Rule 9 (h).]

2. During all the times herein mentioned defendant was the owner of the steamship ..... and used it in the transportation of freight for hire by water in interstate and foreign commerce.

3. During the first part of (month and year) at ..... plaintiff entered the employ of defendant as an able seaman on said steamship under seamen's articles of customary form for a voyage from ..... ports to the Orient and return at a wage of ..... dollars per month and found, which is equal to a wage of ..... dollars per month as a shore worker.

4. On June 1, 1936, said steamship was about ..... days out of the port of ..... and was being navigated by the master and crew on the return voyage to ..... ports. (Here describe weather conditions and the condition of the ship and state as in an ordinary complaint for personal injuries the negligent conduct of defendant.)

5. By reason of defendant's negligence in thus (brief statement of defendant's negligent conduct) and the unseaworthiness of said steamship, plaintiff was (here describe plaintiff's injuries).

6. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning ..... dollars per day. By these injuries he has been made incapable of any gainful activity; has suffered great physical and mental pain, and has incurred expense in the amount of ..... dollars for medicine, medical attendance, and hospitalization.

Wherefore plaintiff demands judgment against defendant in the sum of ..... dollars and costs.

SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Rule A. Scope of Rules

These Supplemental Rules apply to the procedure in admiralty and maritime claims within the meaning of Rule 9 (h) with respect to the following remedies:

(1) Maritime attachment and garnishment;

(2) Actions in rem;

(3) Possessory, petitory, and partition actions;

(4) Actions for exoneration from or limitation of liability.

These rules also apply to the procedure in statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not. Except as otherwise provided, references in these Supplemental Rules to actions in rem include such analogous statutory condemnation proceedings.

The general Rules of Civil Procedure for the United States District Courts are also applicable to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules.

Rule B. Attachment and Garnishment: Special Provisions

(1) When Available; Complaint, Affidavit, and Process. With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's

knowledge, or to the best of his information and belief, the defendant cannot be found within the district. When a verified complaint is supported by such an affidavit the clerk shall forthwith issue a summons and process of attachment and garnishment. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4 (e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E (8) these Supplemental Rules do not apply to state remedies so invoked.

(2) NOTICE TO DEFENDANT. No judgment by default shall be entered except upon proof, which may be by affidavit, (a) that the plaintiff or the garnishee has given notice of the action to the defendant by mailing to him a copy of the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt, or (b) that the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4 (d) or (i), or (c) that the plaintiff or the garnishee has made diligent efforts to give notice of the action to the defendant and has been unable to do so.

(3) ANSWER.

(a) BY GARNISHEE. The garnishee shall serve his answer, together with answers to any interrogatories served with the complaint, within 20 days after service of process upon him. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in his hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against him. If he admits any debts, credits, or effects, they shall be held in his hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court.

(b) By Defendant. The defendant shall serve his answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.

Rule C. Actions in rem: Special Provisions

(1) When Available. An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

(2) Complaint. In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

(3) Process. Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest of the vessel or other property that is the subject of the action and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in

part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment.

(4) NOTICE. No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E (5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, § 30, as amended.

(5) ANCILLARY PROCESS. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

(6) CLAIM AND ANSWER; INTERROGATORIES. The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve his answer within 20 days after the filing of the claim. The claim shall be

verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that he is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

Rule D. Possessory, Petitory, and Partition Actions

In all actions for possession, partition, and to try title maintainable according to the course of the admiralty practice with respect to a vessel, in all actions so maintainable with respect to the possession of cargo or other maritime property, and in all actions by one or more part owners against the others to obtain security for the return of the vessel from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the vessel for any voyage on giving security for its safe return, the process shall be by a warrant of arrest of the vessel, cargo, or other property, and by notice in the manner provided by Rule B (2) to the adverse party or parties.

Rule E. Actions in rem and quasi in rem: General Provisions

(1) Applicability. Except as otherwise provided, this rule applies to actions in personam with process of maritime attachment and garnishment, actions in rem, and petitory, possessory, and partition actions, supplementing Rules B, C, and D.

(2) Complaint; Security.

(a) Complaint. In actions to which this rule is applicable the complaint shall state the circumstances from which the claim arises with such par-

ticularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

(b) SECURITY FOR COSTS. Subject to the provisions of Rule 54 (d) and of relevant statutes, the court may, on the filing of the complaint or on the appearance of any defendant, claimant, or any other party, or at any later time, require the plaintiff, defendant, claimant, or other party to give security, or additional security, in such sum as the court shall direct to pay all costs and expenses that shall be awarded against him by any interlocutory order or by the final judgment, or on appeal by any appellate court.

(3) PROCESS.

(a) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. Process in rem and of maritime attachment and garnishment shall be served only within the district.

(b) ISSUANCE AND DELIVERY. Issuance and delivery of process in rem, or of maritime attachment and garnishment, shall be held in abeyance if the plaintiff so requests.

(4) EXECUTION OF PROCESS; MARSHAL'S RETURN; CUSTODY OF PROPERTY.

(a) IN GENERAL. Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

(b) TANGIBLE PROPERTY. If tangible property is to be attached or arrested, the marshal shall take it into his possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal

shall execute the process by affixing a copy thereof to the property in a conspicuous place and by leaving a copy of the complaint and process with the person having possession or his agent. In furtherance of his custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until notified by the marshal or his deputy or by the clerk that the vessel has been released in accordance with these rules.

(c) INTANGIBLE PROPERTY. If intangible property is to be attached or arrested the marshal shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and process requiring him to answer as provided in Rules B (3)(a) and C (6); or he may accept for payment into the registry of the court the amount owed to the extent of the amount claimed by the plaintiff with interest and costs, in which event the garnishee or other obligor shall not be required to answer unless alias process shall be served.

(d) DIRECTIONS WITH RESPECT TO PROPERTY IN CUSTODY. The marshal may at any time apply to the court for directions with respect to property that has been attached or arrested, and shall give notice of such application to any or all of the parties as the court may direct.

(e) EXPENSES OF SEIZING AND KEEPING PROPERTY; DEPOSIT. These rules do not alter the provisions of Title 28, U. S. C., § 1921, as amended, relative to the expenses of seizing and keeping property attached or arrested and to the requirement of deposits to cover such expenses.

(5) RELEASE OF PROPERTY.

(a) SPECIAL BOND. Except in cases of seizures for forfeiture under any law of the United States, whenever process of maritime attachment and gar-

nishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisement, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

(b) GENERAL BOND. The owner of any vessel may file a general bond or stipulation, with sufficient surety, to be approved by the court, conditioned to answer the judgment of such court in all or any actions that may be brought thereafter in such court in which the vessel is attached or arrested. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by plaintiffs in all actions begun and pending in which such vessel has been attached or arrested. Judgments and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such actions. The district court may make necessary orders to carry this rule into effect, particularly as to the giving of proper notice of any action against or attachment of a vessel for which a general bond has been filed. Such bond or stipulation shall be indorsed by the clerk with a minute of the actions

wherein process is so stayed. Further security may be required by the court at any time.

If a special bond or stipulation is given in a particular case, the liability on the general bond or stipulation shall cease as to that case.

(c) RELEASE BY CONSENT OR STIPULATION; ORDER OF COURT OR CLERK; COSTS. Any vessel, cargo, or other property in the custody of the marshal may be released forthwith upon his acceptance and approval of a stipulation, bond, or other security, signed by the party on whose behalf the property is detained or his attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal or other officer of the court shall be released without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action; but the marshal shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid.

(d) POSSESSORY, PETITORY, AND PARTITION ACTIONS. The foregoing provisions of this subdivision (5) do not apply to petitory, possessory, and partition actions. In such cases the property arrested shall be released only by order of the court, on such terms and conditions and on the giving of such security as the court may require.

(6) REDUCTION OR IMPAIRMENT OF SECURITY. Whenever security is taken the court may, on motion and hearing, for good cause shown, reduce the amount of security given; and if the surety shall be or become insufficient, new or additional sureties may be required on motion and hearing.

(7) SECURITY ON COUNTERCLAIM. Whenever there is asserted a counterclaim arising out of the same trans-

action or occurrence with respect to which the action was originally filed, and the defendant or claimant in the original action has given security to respond in damages, any plaintiff for whose benefit such security has been given shall give security in the usual amount and form to respond in damages to the claims set forth in such counterclaim, unless the court, for cause shown, shall otherwise direct; and proceedings on the original claim shall be stayed until such security is given, unless the court otherwise directs. When the United States or a corporate instrumentality thereof as defendant is relieved by law of the requirement of giving security to respond in damages it shall nevertheless be treated for the purposes of this subdivision E (7) as if it had given such security if a private person so situated would have been required to give it.

(8) RESTRICTED APPEARANCE. An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment whether pursuant to these Supplemental Rules or to Rule 4 (e), may be expressly restricted to the defense of such claim, and in that event shall not constitute an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

(9) DISPOSITION OF PROPERTY; SALES.

(a) ACTIONS FOR FORFEITURES. In any action in rem to enforce a forfeiture for violation of a statute of the United States the property shall be disposed of as provided by statute.

(b) INTERLOCUTORY SALES. If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any

party or of the marshal, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, on motion of the defendant or claimant, order delivery of the property to him, upon the giving of security in accordance with these rules.

(c) SALES; PROCEEDS. All sales of property shall be made by the marshal or his deputy, or other proper officer assigned by the court where the marshal is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

RULE F. LIMITATION OF LIABILITY

(1) TIME FOR FILING COMPLAINT; SECURITY. Not later than six months after his receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of his interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at his option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, his interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The plaintiff shall also give security for costs and, if he elects to give security, for interest at the rate of 6 per cent per annum from the date of the security.

(2) COMPLAINT. The complaint shall set forth the facts on the basis of which the right to limit liability is

asserted, and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage, if any, on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer his interest in the vessel to a trustee, the complaint must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

(3) Claims Against Owner; Injunction. Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or his property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or his property with respect to any claim subject to limitation in the action.

(4) Notice to Claimants. Upon the owner's compliance with subdivision (1) of this rule the court shall issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing

them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice. For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for the filing of claims. The plaintiff not later than the day of second publication shall also mail a copy of the notice to every person known to have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice shall be mailed to the decedent at his last known address, and also to any person who shall be known to have made any claim on account of such death.

(5) Claims and Answer. Claims shall be filed and served on or before the date specified in the notice provided for in subdivision (4) of this rule. Each claim shall specify the facts upon which the claimant relies in support of his claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability he shall file and serve an answer to the complaint unless his claim has included an answer.

(6) Information To Be Given Claimants. Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall mail to the attorney for each claimant (or if the claimant has no attorney to the claimant himself) a list setting forth (a) the name of each claimant, (b) the name and address of his attorney (if he is known to have one), (c) the nature of his claim, i. e., whether property loss, property damage, death, personal injury, etc., and (d) the amount thereof.

(7) INSUFFICIENCY OF FUND OR SECURITY. Any claimant may by motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and, after notice and hearing, the court may similarly order that the deposit or security be increased or reduced.

(8) OBJECTIONS TO CLAIMS: DISTRIBUTION OF FUND. Any interested party may question or controvert any claim without filing an objection thereto. Upon determination of liability the fund deposited or secured, or the proceeds of the vessel and pending freight, shall be divided pro rata, subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priority to which they may be legally entitled.

(9) VENUE; TRANSFER. The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may

be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is wrongly laid the court shall dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought. If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules.

AMENDMENTS TO RULES OF CRIMINAL PROCEDURE

FOR THE

UNITED STATES DISTRICT COURTS

Effective July 1, 1966

The following amendments to the Rules of Criminal Procedure for the United States District Courts were prescribed by the Supreme Court of the United States on February 28, 1966, pursuant to 18 U. S. C. § 3771 and were reported to Congress by THE CHIEF JUSTICE on the same date, *post*, p. 1088.

The amendments became effective on July 1, 1966, as provided in paragraphs 2 and 4 of the Court's order, *post*, p. 1089.

For earlier publications of the Rules of Criminal Procedure and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, and 350 U. S. 1017.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

FEBRUARY 28, 1966.

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court, I have the honor to report to the Congress the attached amendments to the Rules of Criminal Procedure for the United States District Courts, which have been adopted by the Supreme Court, pursuant to Title 18, U. S. C., Sec. 3771.

Accompanying these amendments is the Report of the Judicial Conference of the United States, submitted to the Court for its consideration pursuant to Title 28, U. S. C., Sec. 331.

I also am enclosing a statement by MR. JUSTICE BLACK dissenting and one by MR. JUSTICE DOUGLAS dissenting in part.

Respectfully,

(Signed) EARL WARREN,
Chief Justice of the United States.

SUPREME COURT OF THE UNITED STATES

MONDAY, FEBRUARY 28, 1966

ORDERED:

1. That the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein Rules 17.1 and 26.1 and amendments to Rules 4, 5, 6, 7, 11, 14, 16, 17, 18, 20, 21, 23, 24, 25, 28, 29, 30, 32, 33, 34, 35, 37, 38, 40, 44, 45, 46, 49, 54, 55 and 56, and to Form 26, as hereinafter set forth:

[See *infra*, pp. 1095–1116.]

2. That the foregoing amendments and additions to the Rules of Criminal Procedure shall take effect on July 1, 1966, and shall govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

3. That the Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing amendments and additions to the Rules of Criminal Procedure in accordance with the provisions of Title 18, U. S. C., section 3771.

4. That Rule 19 and subdivision (c) of Rule 45 of the Rules of Criminal Procedure for the United States District Courts, promulgated by this Court on December 26, 1944, effective March 21, 1946, are hereby rescinded, effective July 1, 1966.

[For dissenting statement of MR. JUSTICE BLACK, see *ante*, p. 1032.]

MR. JUSTICE DOUGLAS, dissenting in part.

I reiterate today what I stated on an earlier occasion (374 U. S. 865, 869–870) (statement of BLACK and DOUGLAS, JJ.), that the responsibility for promulgating Rules of the kind we send to Congress today should rest with the Judicial Conference and not the Court. It is the

Judicial Conference, not the Court, which appoints the Advisory Committee on Criminal Rules which makes the actual recommendations.[1] Members of the Judicial Conference, being in large part judges of the lower courts and attorneys who are using the Rules day in and day out, are in a far better position to make a practical judgment upon their utility or inutility than we.

But since under the statute [2] the Rules go to Congress only on the initiative of the Court, I cannot be only a conduit. I think that placing our imprimatur on the amendments to the Rules entails a large degree of responsibility of judgment concerning them. Some of the criminal Rules which we forward to Congress today are very bothersome—not in the sense that they may be unwieldy or unworkable—but in the sense that they may entrench on important constitutional rights of defendants.

In my judgment, the amendments to Rule 16 dealing with discovery require further reflection. To the extent that they expand the defendant's opportunities for discovery, they accord with the views of a great many commentators who have concluded that a civilized society ought not to tolerate the conduct of a criminal prosecution as a "game." [3] But the proposed changes in the

[1] 28 U. S. C. § 331 (1964 ed.), which establishes the Judicial Conference of the United States, provides that the Conference shall "carry on a continuous study of the operation and effect of the general rules of practice and procedure . . . prescribed by the Supreme Court . . . ." The Conference has resolved that a standing Committee on Rules of Practice and Procedure be appointed by the Chief Justice and that, in addition, five advisory committees be established to recommend to the Judicial Conference changes in the rules of practice and procedure for the federal courts. See Annual Report of the Proceedings of the Judicial Conference of the United States 6–7 (1958).

[2] 18 U. S. C. § 3771 (1964 ed.).

[3] See, *e. g.*, Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth? 1963 Wash. U. L. Q. 279; Louisell, Criminal Discovery: Dilemma Real or Apparent? 49 Calif. L. Rev. 56 (1961); Traynor, Ground Lost and Found in Criminal Discovery, 39 N. Y. U. L. Rev. 228 (1964).

Rule go further. Rule 16 (c) would permit a trial judge to condition granting the defendant discovery on the defendant's willingness to permit the prosecution to discover "scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof" which (1) are in the defendant's possession; (2) he intends to produce at trial; and (3) are shown to be material to the preparation of the prosecution's case.[4]

The extent to which a court may compel the defendant to disclose information or evidence pertaining to his case without infringing the privilege against self-incrimination is a source of current controversy among judges, prosecutors, defense lawyers, and other legal commentators. A distinguished state court has concluded—although not without a strong dissent—that the privilege is not violated by discovery of the names of expert medical witnesses whose appearance at trial is contemplated by the defense.[5] I mean to imply no views on the point, except to note that a serious constitutional question lurks here.

The prosecution's opportunity to discover evidence in the possession of the defense is somewhat limited in the proposal with which we deal in that it is tied to the exercise by the defense of the right to discover from the prosecution. But *if* discovery, by itself, of information in the possession of the defendant would violate the privilege against self-incrimination, is it any less a violation if conditioned on the defendant's exercise of the oppor-

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[4] The proposed rule explicitly provides that the prosecution may not discover nonmedical documents or reports "made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys."

[5] *Jones* v. *Superior Court,* 58 Cal. 2d 56, 372 P. 2d 919. See Comment, 51 Calif. L. Rev. 135; Note, 76 Harv. L. Rev. 838 (1963). The case is more extensively treated in Louisell, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma, 53 Calif. L. Rev. 89 (1965).

tunity to discover evidence? May benefits be conditioned on the abandonment of constitutional rights? See, *e. g., Sherbert* v. *Verner,* 374 U. S. 398, 403–406. To deny a defendant the opportunity for discovery—an opportunity not withheld from defendants who agree to prosecutorial discovery or from whom discovery is not sought—merely because the defendant chooses to exercise the constitutional right to refrain from self-incrimination arguably imposes a penalty upon the exercise of that fundamental privilege. It is said, however, that fairness may require disclosure by a defendant who obtains information from the prosecution. Perhaps—but the proposed rule establishes no such standards. Its application is mechanical: if the defendant is allowed discovery, so, too, is the prosecution. No requirement is imposed, for example, that the subject matter of the material sought to be discovered by the prosecution be limited to that relating to the subject of the defendant's discovery.

The proposed addition of Rule 17.1 also suggests difficulties, perhaps of constitutional dimension. This rule would establish a pretrial conference procedure. The language of the rule and the Advisory Committee's comments suggest that under some circumstances, the conference might even take place in the absence of the defendant! Cf. *Lewis* v. *United States,* 146 U. S. 370; Fed. Rules Crim. Proc. Rule 43.

The proposed amendment to Rule 32 (c)(2) states that the trial judge "may" disclose to the defendant or his counsel the contents of a presentence report on which he is relying in fixing sentence. The imposition of sentence is of critical importance to a man convicted of crime. Trial judges need presentence reports so that they may have at their disposal the fullest possible information. See *Williams* v. *New York,* 337 U. S. 241. But while the formal rules of evidence do not apply to restrict the factors which the sentencing judge may consider, fairness would, in my opinion, require that the defendant be advised of the facts—perhaps very damaging to him—

on which the judge intends to rely. The presentence report may be inaccurate, a flaw which may be of constitutional dimension. Cf. *Townsend* v. *Burke,* 334 U. S. 736. It may exaggerate the gravity of the defendant's prior offenses. The investigator may have made an incomplete investigation. See Tappan, Crime, Justice, and Correction 556 (1960). There may be countervailing factors not disclosed by the probation report. In many areas we can rely on the sound exercise of discretion by the trial judge; but how can a judge know whether or not the presentence report calls for a reply by the defendant? Its faults may not appear on the face of the document.

Some States require full disclosure of the report to the defense.[6] The proposed Model Penal Code takes the middle ground and requires the sentencing judge to disclose to the defense the factual contents of the report so that there is an opportunity to reply.[7] Whatever should be the rule for the federal courts, it ought not to be one which permits a judge to impose sentence on the basis of information of which the defendant may be unaware and to which he has not been afforded an opportunity to reply.

I do not think we should approve Rules 16, 17.1, and 32 (c)(2). Instead, we should refer them back to the Judicial Conference and the Advisory Committee for further consideration and reflection, where I believe they were approved only by the narrowest majority.

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[6] *E. g.,* Calif. Penal Code § 1203.

[7] Model Penal Code § 7.07 (5) (Proposed Official Draft, 1962). The Code provides that the sources of confidential information need not be disclosed. "Less disclosure than this hardly comports with elementary fairness." Comment to § 7.07 (Tent. Draft No. 2, 1954), at 55. A discarded draft of the amendment to Fed. Rules Crim. Proc. Rule 32 would have allowed disclosure to defense counsel of the report, from which the confidential sources would be removed. A defendant not represented by counsel would be told of the "essential facts" in the report. See 8 Moore's Federal Practice—Cipes, Criminal Rules ¶¶ 32.03 [4], 32.09 (1965).

AMENDMENTS TO RULES OF CRIMINAL PROCEDURE

FOR THE

UNITED STATES DISTRICT COURTS

RULE 4. WARRANT OR SUMMONS UPON COMPLAINT

(a) ISSUANCE. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

RULE 5. PROCEEDINGS BEFORE THE COMMISSIONER

(b) STATEMENT BY THE COMMISSIONER. The commissioner shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

RULE 6. THE GRAND JURY

(d) WHO MAY BE PRESENT. Attorneys for the government, the witness under examination, interpreters

when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) SECRECY OF PROCEEDINGS AND DISCLOSURE. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(f) FINDING AND RETURN OF INDICTMENT. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a judge in open court. If the defendant is in custody or has given bail and 12 jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith.

RULE 7. THE INDICTMENT AND THE INFORMATION

(f) BILL OF PARTICULARS. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within 10

days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Rule 11. Pleas

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

Rule 14. Relief From Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Rule 16. Discovery and Inspection

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the

defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) OTHER BOOKS, PAPERS, DOCUMENTS, TANGIBLE OBJECTS OR PLACES. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U. S. C. § 3500.

(c) DISCOVERY BY THE GOVERNMENT. If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody

or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(d) TIME, PLACE AND MANNER OF DISCOVERY AND INSPECTION. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(e) PROTECTIVE ORDERS. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court *in camera.* If the court enters an order granting relief following a showing *in camera,* the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(f) TIME OF MOTIONS. A motion under this rule may be made only within 10 days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(g) CONTINUING DUTY TO DISCLOSE; FAILURE TO COMPLY. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial,

a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

Rule 17. Subpoena

(b) Defendants Unable to Pay. The court shall order at any time that a subpoena be issued for service on a named witness upon an *ex parte* application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

(d) Service. A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to him the fee for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.

Rule 17.1. Pretrial Conference

At any time after the filing of the indictment or information the court upon motion of any party or upon its

own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or his attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and his attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.

Rule 18. Place of Prosecution and Trial

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.

Rule 20. Transfer From the District for Plea and Sentence

(a) Indictment or Information Pending. A defendant arrested or held in a district other than that in which the indictment or information is pending against him may state in writing that he wishes to plead guilty or *nolo contendere,* to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested or is held, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is held and the prosecution shall continue in that district.

(b) Indictment or Information Not Pending. A defendant arrested on a warrant issued upon a complaint

in a district other than the district of arrest may state in writing that he wishes to plead guilty or *nolo contendere,* to waive trial in the district in which the warrant was issued and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys and upon the filing of an information or the return of an indictment, the clerk of the court for the district in which the warrant was issued shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant was arrested and the prosecution shall continue in that district. When the defendant is brought before the court to plead to an information filed in the district where the warrant was issued, he may at that time waive indictment as provided in Rule 7, and the prosecution may continue based upon the information originally filed.

(c) EFFECT OF NOT GUILTY PLEA. If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced and the proceeding shall be restored to the docket of that court. The defendant's statement that he wishes to plead guilty or *nolo contendere* shall not be used against him.

(d) JUVENILES. A juvenile (as defined in 18 U. S. C. § 5031) who is arrested or held in a district other than that in which he is alleged to have committed an act in violation of a law of the United States not punishable by death or life imprisonment may, after he has been advised by counsel and with the approval of the court and the United States attorney, consent to be proceeded against as a juvenile delinquent in the district in which he is arrested or held. The consent shall be given in writing before the court but only after the court has

apprised the juvenile of his rights, including the right to be returned to the district in which he is alleged to have committed the act, and of the consequences of such consent.

(e) SUMMONS. For the purpose of initiating a transfer under this rule a person who appears in response to a summons issued under Rule 4 shall be treated as if he had been arrested on a warrant in the district of such appearance.

RULE 21. TRANSFER FROM THE DISTRICT FOR TRIAL

(a) FOR PREJUDICE IN THE DISTRICT. The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

(b) TRANSFER IN OTHER CASES. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district.

(c) PROCEEDINGS ON TRANSFER. When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district.

RULE 23. TRIAL BY JURY OR BY THE COURT

(c) TRIAL WITHOUT A JURY. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

Rule 24. Trial Jurors

(c) Alternate Jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

Rule 25. Judge; Disability

(a) During Trial. If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

(b) After Verdict or Finding of Guilt. If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court

after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

Rule 26.1. Determination of Foreign Law

A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 26. The court's determination shall be treated as a ruling on a question of law.

Rule 28. Expert Witnesses and Interpreters

(a) Expert Witnesses. The court may order the defendant or the government or both to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law. The parties also may call expert witnesses of their own selection.

(b) INTERPRETERS. The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the court may direct.

RULE 29. MOTION FOR JUDGMENT OF ACQUITTAL

(a) MOTION BEFORE SUBMISSION TO JURY. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) RESERVATION OF DECISION ON MOTION. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) MOTION AFTER DISCHARGE OF JURY. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Rule 32. Sentence and Judgment

(a) Sentence.

(1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

(2) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(c) PRESENTENCE INVESTIGATION.

(2) REPORT. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(f) REVOCATION OF PROBATION. The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing.

RULE 33. NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Rule 34. Arrest of Judgment

The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea of guilty or *nolo contendere,* or within such further time as the court may fix during the 7-day period.

Rule 35. Correction or Reduction of Sentence

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

Rule 37. Taking Appeal; and Petition for Writ of Certiorari

(a) Taking Appeal to a Court of Appeals.

(1) How an Appeal Is Taken; Notice of Appeal. An appeal permitted by law from a district court to a court of appeals is taken by filing a notice of appeal in the district court within the time provided by paragraph (2) of this subdivision. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. A copy of the notice of appeal and a statement of the docket

entries shall be forwarded immediately by the clerk of the district court to the clerk of the court of appeals. The clerk shall serve notice of the filing of a notice of appeal by mailing a copy thereof to all parties other than the appellant. When an appeal is taken by a defendant, the clerk shall also serve a copy of the notice of appeal upon him, either by personal service or by mail addressed to him. The clerk shall note on each copy to be served the date on which the notice of appeal was filed, and shall note in the docket the names of the parties on whom he serves copies, with the date of mailing or other service. Failure of the clerk to serve notice shall not affect the validity of the appeal.

(2) TIME FOR TAKING APPEAL. The notice of appeal by a defendant shall be filed within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of the order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed within 30 days after entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this paragraph when it is entered in the criminal docket. Upon a showing of excusable neglect, the district court may, before or after the time has expired, with or without motion and notice,

extend the time for filing the notice of appeal otherwise allowed to any party for a period not to exceed 30 days from the expiration of the original time prescribed by this paragraph.

RULE 38. STAY OF EXECUTION, AND RELIEF PENDING REVIEW

(a) STAY OF EXECUTION.

(2) IMPRISONMENT. A sentence of imprisonment shall be stayed if an appeal is taken and the defendant is admitted to bail. If the defendant is not admitted to bail, the court may recommend to the Attorney General that the defendant be retained at, or transferred to, a place of confinement near the place of trial or the place where his appeal is to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of his appeal to the court of appeals.

RULE 40. COMMITMENT TO ANOTHER DISTRICT; REMOVAL

(b) ARREST IN DISTANT DISTRICT.

(2) STATEMENT BY COMMISSIONER OR JUDGE. The commissioner or judge shall inform the defendant of the charge against him, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a hearing or to waive a hearing by signing a waiver before the commissioner or judge. The commissioner or judge shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him, shall allow him reasonable opportunity to consult counsel and shall admit him to bail as provided in these rules.

RULE 44. RIGHT TO AND ASSIGNMENT OF COUNSEL

(a) RIGHT TO ASSIGNED COUNSEL. Every defendant who is unable to obtain counsel shall be entitled to have

counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless he waives such appointment.

(b) ASSIGNMENT PROCEDURE. The procedures for implementing the right set out in subdivision (a) shall be those provided by law and by local rules of court established pursuant thereto.

RULE 45. TIME

(a) COMPUTATION. In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in these rules, "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) ENLARGEMENT. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34, 35, 37 (a)(2) and 39 (c), except to the extent and under the conditions stated in them.

RULE 46. RELEASE ON BAIL

(c) TERMS. If the defendant is admitted to bail, the terms thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail, the character of the defendant, and the policy against unnecessary detention of defendants pending trial.

(d) FORM, CONDITIONS AND PLACE OF DEPOSIT. A person required or permitted to give bail shall execute a bond for his appearance. The commissioner or court or judge or justice, having regard to the considerations set forth in subdivision (c), may require one or more sureties, may authorize the acceptance of cash or bonds or notes of the United States in an amount equal to or less than the face amount of the bond, or may authorize the release of the defendant without security upon his written agreement to appear at a specified time and place and upon such conditions as may be prescribed to insure his appearance. Bail given originally on appeal shall be deposited in the registry of the district court from which the appeal is taken.

(h) SUPERVISION OF DETENTION PENDING TRIAL. The court shall exercise supervision over the detention of defendants and witnesses within the district pending trial for the purpose of eliminating all unnecessary detention. The attorney for the government shall make a biweekly report to the court listing each defendant and witness who has been held in custody pending indictment, arraignment or trial for a period in excess of 10 days. As to each witness so listed the attorney for the government shall make a statement of the reasons why such witness should not be released with or without the taking of his deposition pursuant to Rule 15 (a). As to each defendant so listed the attorney for the government shall make

a statement of the reasons why the defendant is still held in custody.

Rule 49. Service and Filing of Papers

(a) Service: When Required. Written motions other than those which are heard *ex parte,* written notices, designations of record on appeal and similar papers shall be served upon each of the parties.

(c) Notice of Orders. Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party a notice thereof and shall make a note in the docket of the mailing. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 37 (a)(2).

Rule 54. Application and Exception

(a) Courts and Commissioners.

(1) Courts. These rules apply to all criminal proceedings in the United States District Courts; in the District Court of Guam and the District Court of the Virgin Islands; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that all offenses shall continue to be prosecuted in the District Court of Guam and in the District Court of the Virgin Islands by information as heretofore except such as may be required by local law to be prosecuted by indictment by grand jury. Except as otherwise provided in the Canal Zone Code, these rules apply to all criminal proceedings in the United States District Court for the District of the Canal Zone.

(b) Proceedings.

(5) Other Proceedings. These rules are not applicable to extradition and rendition of fugitives; forfeiture of property for violation of a

statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20 (d) they do not apply to proceedings under Title 18, U. S. C., Chapter 403—Juvenile Delinquency—so far as they are inconsistent with that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300–4305, 33 U. S. C. §§ 391–396, or to proceedings involving disputes between seamen under Revised Statutes §§ 4079–4081, as amended, 22 U. S. C. §§ 256–258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325–327, 16 U. S. C. §§ 772–772i, or to proceedings against a witness in a foreign country under Title 28, U. S. C., § 1784.

Rule 55. Records

The clerk of the district court and each United States commissioner shall keep such records in criminal proceedings as the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, may prescribe. Among the records required to be kept by the clerk shall be a book known as the "criminal docket" in which, among other things, shall be entered each order or judgment of the court. The entry of an order or judgment shall show the date the entry is made.

Rule 56. Courts and Clerks

The court of appeals and the district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New

Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, and Christmas Day.

FORM 26. NOTICE OF APPEAL

In the United States District Court for the
..... District of .....,
..... Division

United States of America
v.
John Doe
} No. .....

Notice is hereby given that John Doe, defendant above named, hereby appeals to the United States Court of Appeals for the ..... Circuit (from the final judgment) (from the order (describing it)) entered in this proceeding on the ..... day of ....., 19...

Dated .....

(s) .....
.....
(address)
*Attorney for John Doe**

*Or "Appellant" or "Clerk" as the case may be.

INDEX

ACCUMULATION OF INCOME. See **Taxes**, 2.

ACTIONS. See **Federal Rules of Civil Procedure**; **Stockholders.**

ADJUSTMENT OF DEBTS. See **Bankruptcy Act.**

ADMINISTRATIVE ORDERS REVIEW ACT. See **Federal Maritime Commission**, 1; **Judicial Review**, 1.

ADMINISTRATIVE PROCEDURE. See **Federal Maritime Commission**, 1; **Federal Trade Commission**; **Interstate Commerce Act**; **Judicial Review**, 1–2.

ADVERTISING. See **Federal Trade Commission**; **Obscenity**, 2.

AFFIDAVITS. See **Procedure**, 1.

AGENTS. See **Jones Act.**

ANTITRUST ACTS. See **Federal Maritime Commission**, 2.

APPEALS. See **Federal Maritime Commission**, 1; **Interstate Commerce Act**; **Judicial Review**, 1–3; **Jurisdiction**, 2.

APPORTIONMENT. See **Constitutional Law**, II, 2.

APPRAISALS. See **Procedure**, 1.

ASSISTANCE OF COUNSEL. See **Constitutional Law**, I, 3; **Juvenile Court Act**; **Procedure**, 3.

ASSOCIATIONAL PRIVACY. See **Constitutional Law**, IV.

ATTORNEY GENERAL. See **Constitutional Law**, I, 2; **Judicial Review**, 3; **Voting Rights Act of 1965.**

ATTORNEYS. See **Constitutional Law**, I, 3; **Juvenile Court Act**; **Procedure**, 3.

AUTOMOBILE ACCIDENT. See **Jones Act.**

BANANAS. See **Federal Maritime Commission**, 1; **Judicial Review**, 1.

BANKRUPTCY ACT.

Wage-earner extension plan—Not barred by previous bankruptcy discharge.—Confirmation of a wage-earner extension plan is not barred under § 14 (c)(5) of the Act by a discharge in bankruptcy within the previous six years. Perry v. Commerce Loan Co., p. 392.

BATTERIES. See **Patents**, 3, 5; **Procedure**, 5.

BILL OF ATTAINDER. See **Constitutional Law,** I, 2; **Judicial Review,** 3; **Voting Rights Act of 1965.**

BOOKS. See **Constitutional Law,** IV, 3; **Obscenity,** 1–3.

BRAND NAMES. See **Federal Trade Commission.**

BREACH OF CONTRACT. See **Patents,** 3, 5; **Procedure,** 5.

BREACH OF THE PEACE. See also **Constitutional Law,** I, 4.

Public library protest—Due process—Convictions reversed.—Convictions of Negro petitioners for violation of Louisiana's breach of the peace statute for peaceful and orderly protest in public library to demonstrate objection to segregation reversed. Brown v. Louisiana, p. 131.

BUSINESS EXPENSES. See **Taxes,** 3.

CAPITAL GAINS. See **Taxes,** 1.

CARRIERS. See **Federal Maritime Commission,** 1–2; **Interstate Commerce Act; Judicial Review,** 1–2.

CENSUS DIRECTOR. See **Constitutional Law,** I, 2; III; **Judicial Review,** 3; **Voting Rights Act of 1965.**

CERTIORARI. See **Procedure,** 5.

CHEMICAL PROCESSES. See **Patents,** 4.

CIVIL COMMITMENT. See **Constitutional Law,** II, 1.

CIVIL LIBEL. See **Labor,** 2; **Libel,** 1–2; **Public Officials.**

CIVIL RIGHTS. See also **Conspiracy,** 1; **Constitutional Law,** I, 2; III; **Judicial Review,** 3; **Jurisdiction,** 2; **Voting Rights Act of 1965.**

1. *Conspiracy under 18 U. S. C. § 241—State involvement—Fourteenth Amendment rights.*—The allegation in the indictment of state involvement in the conspiracy charged under § 241 was sufficient to charge a violation of rights protected by the Fourteenth Amendment, as § 241 includes within its coverage Fourteenth Amendment rights, whether arising under the Equal Protection Clause or the Due Process Clause. United States v. Guest, p. 745; United States v. Price, p. 787.

2. *Violations of 18 U. S. C. § 242—State involvement—Under color of law.*—To act under color of law within the meaning of § 242 does not require that the accused be an officer of the State, as it is enough if he is a willful participant in joint activity with the State or its agents. United States v. Price, p. 787.

CIVIL RIGHTS ACT OF 1964. See **Civil Rights,** 1–2; **Conspiracy,** 1; **Jurisdiction,** 2.

CLAYTON ACT. See **Federal Trade Commission.**

COAL MINING. See **Jurisdiction,** 3; **Labor,** 1; **Pre-emption.**

COLLECTIVE BARGAINING AGREEMENT. See **Labor Management Relations Act, 1947; Standing to Sue.**

COLOR OF LAW. See **Civil Rights,** 1–2.

COMBINATION PATENTS. See **Patents,** 3, 5; **Procedure,** 5.

COMMERCIAL EXPLOITATION. See **Obscenity,** 2.

COMMISSIONER OF PATENTS. See **Jurisdiction,** 1; **Patents,** 1, 4.

COMMON CARRIERS. See **Federal Maritime Commission,** 1–2; **Interstate Commerce Act; Judicial Review,** 1–2.

COMMUNIST PARTY. See **Constitutional Law,** IV, 1.

COMPETENCE TO STAND TRIAL. See **Constitutional Law,** I, 1, 3; **Juvenile Court Act; Procedure,** 2–3.

COMPETITION. See **Federal Trade Commission.**

COMPLAINTS. See **Federal Rules of Civil Procedure; Stockholders.**

COMPOSITION PLANS. See **Bankruptcy Act.**

CONFLICT OF INTEREST. See **Constitutional Law,** VII.

CONGRESSMEN. See **Constitutional Law,** VII.

CONSPIRACY. See also **Civil Rights,** 1–2; **Constitutional Law,** VII; **Jurisdiction,** 2; **Procedure,** 4.

1. *Civil rights—18 U. S. C. § 241—Right to travel.*—Section 241 reaches conspiracies specifically directed against the exercise of the constitutional right to travel freely from State to State and to use highways and other instrumentalities for that purpose, and that branch of the indictment should not have been dismissed. United States v. Guest, p. 745.

2. *Liability for substantive offenses—Concessions by Solicitor General.*—Judgment vacated and remanded in view of Solicitor General's concessions that an individual cannot be held criminally liable for substantive offenses committed before he joined or after he withdrew from the conspiracy. Levine v. United States, p. 265.

CONSTITUTIONAL LAW. See also **Breach of the Peace; Civil Rights,** 1–2; **Conspiracy,** 1; **Judicial Review,** 3; **Juvenile Court Act; Libel; Obscenity; Procedure,** 2–3; **Public Officials; Voting Rights Act of 1965.**

I. Due Process.

1. *Competence to stand trial—Sanity hearing.*—The evidence raised sufficient doubt as to respondent's competence to stand trial

CONSTITUTIONAL LAW—Continued.

so that he was deprived of due process of law under the Fourteenth Amendment by the trial court's failure to afford him a hearing on that issue. Pate v. Robinson, p. 375.

2. *Fifth Amendment—Bill of attainder—Challenge by South Carolina.*—A State is not a "person" within the meaning of the Fifth Amendment's Due Process Clause; nor does it have standing to invoke the Bill of Attainder Clause or the principle of separation of powers, which exist only to protect private individuals or groups. South Carolina v. Katzenbach, p. 301.

3. *Juvenile Court Act—Waiver of juvenile to District Court—Hearings.*—The Act entitles a juvenile to a hearing, to access by his counsel to social records and probation or similar reports, and to a statement of the reasons for the Juvenile Court's decision to waive jurisdiction to the District Court. Kent v. United States, p. 541.

4. *Public library protest—Breach of the peace.*—Convictions of Negro petitioners for violation of Louisiana's breach of the peace statute for peaceful and orderly protest in public library to demonstrate objection to segregation reversed. Brown v. Louisiana, p. 131.

II. Equal Protection of the Laws.

1. *Insanity of prisoner—Expiration of sentence.*—Prisoner was denied equal protection of the laws by statutory procedure whereby he was civilly committed at the expiration of his sentence without the jury review available to all others civilly committed in New York, and by his commitment to an institution maintained by the Department of Corrections beyond the expiration of his prison term without the judicial determination that he is dangerously mentally ill such as that afforded to all those so committed except those nearing the end of a penal sentence. Baxstrom v. Herold, p. 107.

2. *Reapportionment of Florida Legislature—Unwarranted delay.*—There is no warrant for perpetuating the unconstitutional apportionment of the Florida Legislature for three more years, and the case is remanded so that a valid plan will be made effective for the 1966 elections. Swann v. Adams, p. 210.

3. *Virginia's poll tax unconstitutional.*—A State's conditioning of the right to vote on the payment of a fee or tax violates the Equal Protection Clause of the Fourteenth Amendment. Harper v. Virginia Bd. of Elections, p. 663.

III. Fifteenth Amendment.

Voting Rights Act of 1965—Constitutional challenge.—The sections of the Act properly before the Supreme Court are a valid

CONSTITUTIONAL LAW—Continued.

effectuation of the Fifteenth Amendment, as Congress, whose power to enforce the Amendment has been upheld repeatedly, is free to use whatever means are appropriate to carry out the objects of the Constitution. South Carolina v. Katzenbach, p. 301.

IV. First Amendment.

1. *Political and associational privacy—State investigation of subversive activities.*—On the record here the State's interest in protecting itself against subversion is too remote to override appellant's First Amendment right to political and associational privacy. DeGregory v. New Hamp. Atty. Gen., p. 825.

2. *Public officials—Defamatory newspaper comment—Applicability to plaintiff.*—An otherwise impersonal attack on governmental operations cannot be used to establish defamation of those administering such operations absent evidence that the implication of wrongdoing was read as specifically directed at plaintiff, whether he is considered as a public official or a member of a group responsible for government operations, and whether or not others were also implicated. Rosenblatt v. Baer, p. 75.

3. *Obscene publications—"Fanny Hill."*—Massachusetts court judgment holding that a patently offensive book which appeals to prurient interest need not be unqualifiedly worthless before it can be deemed obscene is reversed. Memoirs v. Massachusetts, p. 413.

V. Self-Incrimination.

Waiver of immunity—Withdrawal of waiver.—Police officer's effort to withdraw his waiver of immunity was effective, and in the absence of an immunity provision clearly made applicable to him, he could stand on his privilege against self-incrimination. Stevens v. Marks, p. 234.

VI. Sixth Amendment.

Guarantee of speedy trial—Faulty indictments.—Mere passage of 19 months between the original arrests on narcotics charges and the hearings on the later indictments, the convictions having been vacated for faulty indictments on appellees' motions, is not *ipso facto* a violation of the Sixth Amendment's guarantee of a speedy trial. United States v. Ewell, p. 116.

VII. Speech or Debate Clause.

Speech by Congressman no basis for criminal charge—Conflict of interest.—Speech or Debate Clause precludes judicial inquiry into motivation for Congressman's speech to Congress and prevents such speech from being basis of criminal charge against him for conspiracy to defraud the Government. United States v. Johnson, p. 169.

CONTEMPT. See **Constitutional Law**, IV, 1; V.

CORPORATIONS. See **Federal Rules of Civil Procedure; Stockholders.**

COUNSEL. See **Constitutional Law**, I, 3; **Juvenile Court Act; Procedure**, 3.

COURT OF CUSTOMS AND PATENT APPEALS. See **Jurisdiction**, 1; **Patents**, 1, 4; **Procedure**, 1.

COURTS. See **Constitutional Law**, I, 3; **Juvenile Court Act; Procedure**, 3.

CRIMINAL APPEALS ACT. See **Jurisdiction**, 2.

CRIMINAL LAW. See **Breach of the Peace; Civil Rights**, 1–2; **Conspiracy**, 1–2; **Constitutional Law**, I, 1, 3–4; VI–VII; **Jurisdiction**, 2; **Juvenile Court Act; Obscenity**, 1–2; **Procedure**, 2–5; **Taxes**, 3.

CROSS-ACTIONS. See **Federal Maritime Commission**, 1; **Interstate Commerce Act; Judicial Review**, 1–2.

CUSTOMS DUTIES. See **Procedure**, 1.

DAMAGES. See **Libel**, 2; **Public Officials.**

DEATH. See **Jones Act.**

DEBTOR AND CREDITOR. See **Bankruptcy Act.**

DEDUCTIONS. See **Taxes**, 3–4.

DEFAMATION. See **Labor**, 2; **Libel**, 1–2; **Public Officials.**

DEPRECIATION. See **Taxes**, 4.

DERIVATIVE SUITS. See **Federal Rules of Civil Procedure; Stockholders.**

DISCHARGE IN BANKRUPTCY. See **Bankruptcy Act.**

DISCRETION. See **Taxes**, 2.

DISCRIMINATION. See **Breach of the Peace; Civil Rights**, 1, 2; **Conspiracy**, 1; **Constitutional Law**, I, 2, 4; II, 3; **Judicial Review**, 3; **Jurisdiction**, 2; **Voting Rights Act of 1965.**

DISTRICT COURTS. See **Constitutional Law**, I, 3; **Juvenile Court Act; Procedure**, 3.

DISTRICT OF COLUMBIA. See **Constitutional Law**, I, 3; **Juvenile Court Act; Procedure**, 3.

DOUBLE JEOPARDY. See **Constitutional Law**, VI.

DUE PROCESS. See **Breach of the Peace; Civil Rights,** 1–2; **Constitutional Law,** I, 1–4; **Judicial Review,** 3; **Juvenile Court Act; Procedure,** 2–3; **Voting Rights Act of 1965.**

DUTIES. See **Procedure,** 1.

ELECTIONS. See **Constitutional Law,** II, 2–3.

EMPLOYER AND EMPLOYEES. See **Fair Labor Standards Act of 1938; Jones Act; Labor,** 1–2; **Labor Management Relations Act, 1947; Libel,** 1; **Standing to Sue; Veterans.**

ENFORCEMENT ACTIONS. See **Interstate Commerce Act; Judicial Review,** 2.

EQUAL PROTECTION OF THE LAWS. See **Civil Rights,** 1–2; **Conspiracy,** 1; **Constitutional Law,** II, 1–3.

EROTICA. See **Constitutional Law,** IV, 3; **Obscenity.**

ESTATE TAXES. See **Taxes,** 2.

EVAPORATED MILK. See **Federal Maritime Commission,** 2; **Federal Trade Commission.**

EVIDENCE. See **Jurisdiction,** 3; **Labor,** 1; **Pre-emption; Procedure,** 1.

EXTENSION PLANS. See **Bankruptcy Act.**

FAIR LABOR STANDARDS ACT OF 1938.

Exemption for retail or service establishment—Industry usage.—Industry-usage test is not in itself controlling in determining whether business transactions are retail sales under the Act; and Congress intended that the retail exemption extend beyond consumer goods and services to include some nondomestic and nonconsumer products. Idaho Metal Works v. Wirtz, p. 190.

"FANNY HILL." See **Constitutional Law,** IV, 3; **Obscenity,** 3.

FEDERAL EMPLOYERS' LIABILITY ACT. See **Jones Act.**

FEDERAL EXAMINERS. See **Constitutional Law,** I, 2; III; **Judicial Review,** 3; **Voting Rights Act of 1965.**

FEDERAL MARITIME COMMISSION. See also **Judicial Review,** 1.

1. *Judicial review—Reparation orders—Appeal by carrier.*—Court of Appeals had jurisdiction to consider shipper's direct appeal challenging adequacy of Commission's reparation order, and when its jurisdiction had thus been invoked by the shipper, the court also had jurisdiction over the carrier's direct review appeal as to the validity of the order and the amount of reparations. Consolo v. Federal Maritime Comm'n, p. 607.

FEDERAL MARITIME COMMISSION—Continued.

2. *Shipping conferences—Approval of agreements—Antitrust exemption.*—The implementation of shipping conferences' rate-making agreements, which have not been approved by the Commission, is not within the antitrust exemption of § 15 of the Shipping Act, 1916. Carnation Co. v. Pacific Conference, p. 213.

FEDERAL RULES OF CIVIL PROCEDURE. See also **Stockholders.**

Rule 23 (b)—Strike suits—Stockholder's derivative action.—Rule 23 (b) was adopted to discourage "strike suits" but not to bar derivative suits which have played an important part in protecting stockholders from management frauds, especially where, as here, the record shows grave fraud charges based on reasonable beliefs growing out of careful investigation. Surowitz v. Hilton Hotels Corp., p. 363.

FEDERAL-STATE RELATIONS. See **Constitutional Law,** I, 2; III; **Judicial Review,** 3; **Jurisdiction,** 3; **Labor,** 2; **Labor Management Relations Act, 1947; Libel,** 1; **Pre-emption; Standing to Sue; Voting Rights Act of 1965.**

FEDERAL TRADE COMMISSION.

Robinson-Patman Act—Like grade and quality—Labels.—Labels do not differentiate products for the purpose of determining grade or quality under § 2 (a) of the Clayton Act as amended by the Robinson-Patman Act, even though one label may have more customer appeal and command a higher price in the marketplace. FTC v. Borden Co., p. 637.

FEES. See **Constitutional Law,** II, 3.

FIFTEENTH AMENDMENT. See **Constitutional Law,** III; **Judicial Review,** 3; **Voting Rights Act of 1965.**

FIFTH AMENDMENT. See **Constitutional Law,** I, 2–3; **Judicial Review,** 3; **Juvenile Court Act; Procedure,** 3; **Voting Rights Act of 1965.**

FIRST AMENDMENT. See **Breach of the Peace; Constitutional Law,** IV; **Labor,** 2; **Libel; Obscenity; Public Officials.**

FLORIDA. See **Constitutional Law,** II, 2.

FORUM. See **Interstate Commerce Act; Judicial Review,** 2.

FOURTEENTH AMENDMENT. See **Breach of the Peace; Civil Rights,** 1–2; **Conspiracy,** 1; **Constitutional Law,** I–II; **Obscenity,** 1; **Procedure,** 2–3.

FRAUD. See **Federal Rules of Civil Procedure; Stockholders.**

FREEDOM OF SPEECH AND PRESS. See **Constitutional Law**, IV; **Libel**; **Obscenity**; **Public Officials.**

GEORGIA. See **Civil Rights**, 1; **Conspiracy**, 1; **Jurisdiction**, 2.

GOVERNMENT EMPLOYEES. See **Libel**, 2; **Public Officials.**

GRADE AND QUALITY. See **Federal Trade Commission.**

GRAND JURY. See **Constitutional Law**, V.

HEARINGS. See **Constitutional Law**, I, 1, 3; **Juvenile Court Act**; **Procedure**, 2–3.

IMMUNITY. See **Constitutional Law**, V.

IMPORTS. See **Procedure**, 1.

INCOME. See **Taxes**, 2.

INCOME TAXES. See **Taxes**, 3–4.

INDIANA. See **Labor Management Relations Act, 1947**; **Standing to Sue.**

INDICTMENTS. See **Constitutional Law**, VI.

INDUSTRY USAGE. See **Fair Labor Standards Act of 1938.**

INFANTS. See **Constitutional Law**, I, 3; **Juvenile Court Act**; **Procedure**, 3.

INFRINGEMENT. See **Patents**, 2–3, 5; **Procedure**, 5.

INJUNCTIONS. See **Constitutional Law**, I, 2; III; **Judicial Review**, 3; **Voting Rights Act of 1965.**

INJURIES. See **Jones Act.**

INSANITY. See **Constitutional Law**, I, 1, 3; II, 1; **Juvenile Court Act**; **Procedure**, 2–3.

INTERFERENCES. See **Patents**, 1, 4.

INTERNAL REVENUE CODE. See **Taxes**, 1–4.

INTERSTATE COMMERCE. See **Fair Labor Standards Act of 1938.**

INTERSTATE COMMERCE ACT. See also **Judicial Review**, 2.

Reparation orders—Judicial review—Carriers' cross-actions.—Carriers may obtain full review of ICC reparation orders by defending actions brought by shippers under § 16 (2) of the Act to enforce such orders, and although the policy underlying that section precludes carriers from obtaining review in a forum other than that chosen by shippers, there is no obstacle to a cross-proceeding by the carriers under § 17 (9). ICC v. Atlantic Coast Line R. Co., p. 576.

INTER VIVOS TRUSTS. See **Taxes**, 2.

INVENTIONS. See **Patents**, 2–3, 5; **Procedure**, 5.

JOINT VENTURE. See **Taxes**, 1.

JONES ACT.

Injuries to seamen—Liability of employer—Negligence of taxi driver.—Under the standards of the Federal Employers' Liability Act, incorporated into the Jones Act, which render an employer liable for injuries to its employees inflicted through negligence of its "officers, agents, or employees," respondent, who had a duty of transporting the seamen and who selected, as it had done before, the taxi service, bears the responsibility for the negligence of the driver it chose. Hopson v. Texaco, Inc., p. 262.

JUDICIAL REVIEW. See also **Constitutional Law**, I, 2; III; **Federal Maritime Commission**, 1; **Interstate Commerce Act; Jurisdiction**, 1; **Patents**, 1, 4; **Voting Rights Act of 1965.**

1. *Federal Maritime Commission—Reparation orders—Carrier's direct review appeal.*—Court of Appeals had jurisdiction to consider shipper's direct appeal challenging adequacy of Commission's reparation order, and when its jurisdiction had thus been invoked by the shipper, the court also had jurisdiction over the carrier's direct review appeal as to the validity of the order and the amount of reparations. Consolo v. Federal Maritime Comm'n, p. 607.

2. *Interstate Commerce Act—Reparation orders—Carriers' cross-actions.*—Carriers may obtain full review of ICC reparation orders by defending actions brought by shippers under § 16 (2) of the Act to enforce such orders, and although the policy underlying that section precludes carriers from obtaining review in a forum other than that chosen by shippers, there is no obstacle to a cross-proceeding by the carriers under § 17 (9). ICC v. Atlantic Coast Line R. Co., p. 576.

3. *Supreme Court—Voting Rights Act of 1965—Challenge by South Carolina.*—Supreme Court's judicial review does not cover portions of the Act not challenged by plaintiff; nor does it extend to the Act's criminal provisions, as to which the State's challenge is premature. South Carolina v. Katzenbach, p. 301.

JURISDICTION. See also **Civil Rights**, 1–2; **Conspiracy**, 1; **Constitutional Law**, I, 3; **Federal Maritime Commission**, 1; **Interstate Commerce Act; Judicial Review**, 1; **Juvenile Court Act; Labor**, 1; **Patents**, 1, 4; **Pre-emption; Procedure**, 3.

1. *Supreme Court—Court of Customs and Patent Appeals—Petition by Commissioner of Patents.*—The Supreme Court has

JURISDICTION—Continued.

jurisdiction under 28 U. S. C. § 1256 to review upon petition of the Commissioner of Patents patent decisions of the Court of Customs and Patent Appeals. Brenner v. Manson, p. 519.

2. *Supreme Court—Criminal Appeals Act—Pleading defect.*—This Court has no jurisdiction under the Act to review the invalidation of a portion of the indictment since the District Court's ruling thereon was based, at least alternatively, not on a construction of the statute but on what the court conceived to be a pleading defect. United States v. Guest, p. 745.

3. *State law claim—Pre-emption—Pendent jurisdiction.*—State law claim, based in part on violence and intimidation, was not pre-empted by § 303 of the Labor Management Relations Act, 1947, and under the doctrine of pendent jurisdiction it could be considered by the District Court together with the federal claim as one case. Mine Workers v. Gibbs, p. 715.

JUVENILE COURT ACT. See also **Constitutional Law,** I, 3; **Procedure,** 3.

Waiver of jurisdiction—Due process—Latitude of Juvenile Court.—The Juvenile Court's latitude to waive jurisdiction to the District Court is not complete, and assumes procedural regularity sufficient to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a "full investigation." Kent v. United States, p. 541.

LABELS. See **Federal Trade Commission.**

LABOR. See also **Jurisdiction,** 3; **Labor Management Relations Act, 1947; Libel,** 1; **Pre-emption; Standing to Sue.**

1. *Norris-LaGuardia Act—Ratification by international union—Evidence.*—Since international labor union was not clearly proved to have participated in or authorized the violence at the mine, nor to have ratified it or built its picketing campaign upon fear of the violence engendered, the "clear proof" standard of § 6 of the Act was not satisfied and the international union cannot be held liable to respondent under state law. Mine Workers v. Gibbs, p. 715.

2. *Union organizing campaign—False and defamatory statements—State libel laws.*—Where false and defamatory statements are issued during an organizing campaign state libel laws are available if the complainant pleads and proves that the statements were made with malice and injured him; and these remedies are not inconsistent with the administrative remedies under the National Labor Relations Act. Linn v. Plant Guard Workers, p. 53.

LABOR MANAGEMENT RELATIONS ACT, 1947. See also **Jurisdiction,** 3; **Labor,** 1; **Pre-emption; Standing to Sue.**

Timeliness of suit—State statute of limitations.—The timeliness of a suit under § 301 of the Act, there being no governing federal provision, is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations. Auto Workers v. Hoosier Corp., p. 696.

LEGAL FEES. See **Taxes,** 3.

LEGISLATORS. See **Constitutional Law,** VII.

LEGISLATURES. See **Constitutional Law,** II, 2.

LIABILITY. See **Jones Act.**

LIBEL. See also **Labor,** 2; **Public Officials.**

1. *Labor union organizing campaign—Application of state law.*—Where party to a labor dispute circulates false and defamatory statements during organizing campaign the court has jurisdiction to apply state law if the complainant pleads and proves that the statements were made with malice and injured him. Linn v. Plant Guard Workers, p. 53.

2. *Public officials—Defamatory newspaper comment—Applicability to plaintiff.*—An otherwise impersonal attack on governmental operations cannot be used to establish defamation of those administering such operations absent evidence that the implication of wrongdoing was read as specifically directed at plaintiff, whether he is considered as a public official or a member of a group responsible for government operations, and whether or not others were also implicated. Rosenblatt v. Baer, p. 75.

LIBERTY SHIPS. See **Taxes,** 4.

LIBRARIES. See **Breach of the Peace; Constitutional Law,** I, 4.

LIKE GRADE AND QUALITY. See **Federal Trade Commission.**

LOUISIANA. See **Breach of the Peace; Constitutional Law,** I, 4.

MAGAZINES. See **Obscenity,** 2.

MAIL FRAUD ACT. See **Conspiracy,** 2; **Procedure,** 4.

MALICE. See **Labor,** 2; **Libel,** 1–2; **Public Officials.**

MARITIME COMMISSION. See **Federal Maritime Commission; Judicial Review,** 1.

MASSACHUSETTS. See **Constitutional Law,** IV, 3; **Obscenity,** 3.

MENTAL ILLNESS. See **Constitutional Law,** I, 1, 3; II, 1.

MERCHANT SHIPPING. See **Federal Maritime Commission; Jones Act.**

MINORS. See **Constitutional Law,** I, 3; **Juvenile Court Act; Procedure,** 3.

MISSISSIPPI. See **Civil Rights,** 2.

NARCOTICS. See **Constitutional Law,** VI.

NATIONAL LABOR RELATIONS ACT. See **Labor,** 2; **Libel,** 1.

NEGLIGENCE. See **Jones Act.**

NEGROES. See **Breach of the Peace; Civil Rights,** 1–2; **Conspiracy,** 1; **Constitutional Law,** I, 2, 4; III; **Judicial Review,** 3; **Jurisdiction,** 2; **Voting Rights Act of 1965.**

NEW HAMPSHIRE. See **Libel,** 2; **Constitutional Law,** IV, 1–2; **Public Officials.**

NEWSPAPERS. See **Libel,** 2; **Public Officials.**

NEW YORK. See **Constitutional Law,** V; **Obscenity,** 1.

NONOBVIOUS SUBJECT MATTER. See **Patents,** 2–3, 5; **Procedure,** 5.

NORRIS-LaGUARDIA ACT. See **Jurisdiction,** 3; **Labor,** 1; **Pre-emption.**

NOVELTY OF SUBJECT MATTER. See **Patents,** 3, 5; **Procedure,** 5.

OBSCENITY. See also **Constitutional Law,** IV, 3.

1. *Books—Prurient appeal—Sexual deviants.*—Where material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the general public, the prurient-appeal requirement of *Roth* v. *United States,* 354 U. S. 476, is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. Mishkin v. New York, p. 502.

2. *Books and magazines—Commercial exploitation—Pandering.*—Evidence that petitioners deliberately represented the challenged publications as erotically arousing and commercially exploited them as erotica solely for the sake of prurient appeal amply supported the trial court's determination that the material was obscene. Ginzburg v. United States, p. 463.

3. *Freedom of speech and press—Books—"Fanny Hill."*—Massachusetts court judgment holding that a patently offensive book which appeals to prurient interest need not be unqualifiedly worthless before it can be deemed obscene is reversed. Memoirs v. Massachusetts, p. 413.

OFFENSES. See **Conspiracy,** 2; **Procedure,** 4.

PANDERING. See **Obscenity**, 2.

PATENTABILITY. See **Patents**, 1–5; **Procedure**, 5.

PATENTS. See also **Jurisdiction**, 1; **Procedure**, 5.

1. *Declaration of "interference"—Prima facie patentability.*—Patent Office may properly refuse to declare an "interference" on the ground that the application therefor fails to disclose a prima facie case of patentability. Brenner v. Manson, p. 519.

2. *Patentability—Nonobvious subject matter—Ordinary skill in the art.*—Patents which do not meet the test of the "nonobvious" nature of the "subject matter sought to be patented" to a person having ordinary skill in the pertinent art, as set forth in § 103 of the Patent Act of 1952, are invalid. Graham v. John Deere Co., p. 1.

3. *Patentability—Nonobviousness of subject matter—Wet batteries.*—The Adams battery was nonobvious and patentable since the combination used required one reasonably skilled in the art to ignore long-accepted factors, experts had expressed disbelief in the battery, and the Patent Office found no reference to cite against Adams' application. United States v. Adams, p. 39.

4. *Patentability—Utility of product—Chemical process.*—The practical utility of the compound produced by a chemical process is an essential element in establishing a prima facie case for the patentability of the process. Brenner v. Manson, p. 519.

5. *Validity of patent—Novelty and nonobviousness of subject matter.*—Patent which satisfies the statutory tests of novelty, nonobviousness and utility is valid. United States v. Adams, p. 39.

PAYMENT OF DEBTS. See **Bankruptcy Act.**

PENDENT JURISDICTION. See **Jurisdiction**, 3; **Labor**, 1; **Pre-emption.**

PERSONS. See **Constitutional Law**, I, 2; **Judicial Review**, 3; **Voting Rights Act of 1965.**

PETITION FOR CERTIORARI. See **Procedure**, 5.

PHILIPPINES. See **Federal Maritime Commission**, 2.

PICKETING. See **Jurisdiction**, 3; **Labor**, 1; **Pre-emption.**

PLEADINGS. See **Jurisdiction**, 2.

PLOW CLAMPS. See **Patents**, 2.

POLICE OFFICER. See **Constitutional Law**, V.

POLITICAL PRIVACY. See **Constitutional Law**, IV, 1.

POLL TAX. See **Constitutional Law**, II, 3.

PORNOGRAPHY. See **Constitutional Law,** IV, 3; **Obscenity,** 1–3.

POTATO PROCESSING EQUIPMENT. See **Fair Labor Standards Act of 1938.**

POWERS. See **Taxes,** 2.

PRE-EMPTION. See also **Jurisdiction,** 3; **Labor,** 1; **Libel,** 1.

Federal labor laws—State remedies—Violence in labor disputes.—State law remedies against violence arising in labor disputes have been sustained against challenge of pre-emption by federal labor laws, but the scope of such remedies is confined to the direct consequences of such conduct. Mine Workers v. Gibbs, p. 715.

PRICE DIFFERENTIAL. See **Federal Trade Commission.**

PRISONERS. See **Constitutional Law,** II, 1.

PRISON SENTENCES. See **Constitutional Law,** II, 1.

PRIVACY. See **Constitutional Law,** IV, 1.

PRIVILEGE. See **Constitutional Law,** VII.

PROCEDURE. See also **Civil Rights,** 1–2; **Conspiracy,** 1–2; **Constitutional Law,** I, 1–3; III; VI; **Federal Maritime Commission,** 1; **Federal Rules of Civil Procedure; Interstate Commerce Act; Judicial Review,** 1, 3; **Jurisdiction,** 1–2; **Juvenile Court Act; Patents,** 3, 5; **Stockholders; Voting Rights Act of 1965.**

1. *Court of Customs and Patent Appeals—Evidence—Exclusion of affidavits.*—Court of Customs and Patent Appeals, which held that affidavits of petitioner's customers, on the basis of which it sought to obtain reappraisal of imports, had been improperly admitted, erred in failing to remand for further proceedings to enable petitioner to offer evidence to cure the deficiency created by the exclusion of the affidavits. Clayton Chemical v. United States, p. 821.

2. *Criminal law—Competence to stand trial—Time lapse—New trial.*—In view of difficulty of retrospectively determining accused's competence to stand trial where, as here, the time lapse is six years, a hearing limited to that issue will not suffice; respondent must be discharged unless the State gives him a new trial within a reasonable time. Pate v. Robinson, p. 375.

3. *Juvenile Court Act—Waiver to District Court—Hearings.*—Since petitioner is now 21 and beyond the Juvenile Court's jurisdiction, the case is remanded to the District Court for a hearing *de novo* on whether waiver of jurisdiction was appropriate when ordered, and if it finds waiver was inappropriate, petitioner's conviction must be vacated. Kent v. United States, p. 541.

PROCEDURE—Continued.

4. *Supreme Court—Conspiracy convictions—Concessions by Solicitor General.*—In view of Solicitor General's concessions that an individual can be held criminally liable for only those substantive offenses committed while he was a member of the conspiracy and that some of the convictions here for substantive offenses must be reversed, the judgment below is vacated and remanded to reverse those convictions the Solicitor General concedes must be reversed and to determine whether petitioners are entitled to any further relief. Levine v. United States, p. 265.

5. *Supreme Court—Petition for certiorari—Filing period—Service of petition.*—Petition for certiorari was timely, since the 90-day filing period started, not with the initial judgment on patent validity, but with the judgment on the breach of contract issue following the motion to amend the judgment; nor did failure to comply with Supreme Court's rules as to service of petition bar review, since service requirements are not jurisdictional. United States v. Adams, p. 39.

PRURIENT INTEREST. See **Constitutional Law**, IV, 3; **Obscenity**, 1–3.

PUBLIC ACCOMMODATIONS. See **Civil Rights**, 1–2; **Conspiracy**, 1.

PUBLICATIONS. See **Constitutional Law**, IV, 3; **Obscenity**, 1–3.

PUBLIC LIBRARIES. See **Breach of the Peace; Constitutional Law**, I, 4.

PUBLIC OFFICIALS. See also **Libel**, 2.

Libel—Defamatory newspaper comment—Malice.—A government employee having or appearing to the public to have substantial responsibility for or control over conduct of government affairs is a "public official" and as such cannot recover damages for defamatory comment about his official conduct unless he proves actual malice, *i. e.*, that such comment is made with knowledge of its falsity or with reckless disregard of whether it is true or false. Rosenblatt v. Baer, p. 75.

PUBLIC POLICY. See **Taxes**, 3.

QUALIFICATIONS FOR VOTING. See **Constitutional Law**, I, 2; III; **Judicial Review**, 3; **Voting Rights Act of 1965.**

RAILROADS. See **Interstate Commerce Act; Judicial Review**, 2; **Veterans.**

RATE-MAKING AGREEMENTS. See **Federal Maritime Commission**, 2.

RATES. See **Interstate Commerce Act; Judicial Review,** 2.

REAL PROPERTY. See **Taxes,** 1.

REAPPORTIONMENT. See **Constitutional Law,** II, 2.

REAPPRAISALS. See **Procedure,** 1.

REGISTRATION. See **Constitutional Law,** I, 2; III; **Judicial Review,** 3; **Voting Rights Act of 1965.**

RELIEF. See **Conspiracy,** 2; **Procedure,** 4.

REMEDIES. See **Jurisdiction,** 3; **Labor,** 1; **Pre-emption.**

REPARATION ORDERS. See **Federal Maritime Commission,** 1–2; **Interstate Commerce Act; Judicial Review,** 1–2.

RETAIL ESTABLISHMENT. See **Fair Labor Standards Act of 1938.**

REVIEW. See **Federal Maritime Commission,** 1–2; **Interstate Commerce Act; Judicial Review,** 1–2.

RIGHT TO VOTE. See **Constitutional Law,** I, 2; III; **Judicial Review,** 3; **Voting Rights Act of 1965.**

ROBINSON-PATMAN ACT. See **Federal Trade Commission.**

RULES. See **Federal Rules of Civil Procedure; Procedure,** 5; **Stockholders.**

SALES. See **Fair Labor Standards Act of 1938; Taxes,** 1.

SALVAGE VALUE. See **Taxes,** 4.

SANITY HEARINGS. See **Constitutional Law,** I, 1; **Procedure,** 2.

SAVINGS AND LOAN ASSOCIATIONS. See **Constitutional Law,** VII.

SEAMEN. See **Jones Act.**

SECRETARY OF LABOR. See **Fair Labor Standards Act of 1938.**

SECURITIES ACT OF 1933. See **Conspiracy,** 2; **Procedure,** 4.

SECURITIES DEALER. See **Taxes,** 3.

SEGREGATION. See **Breach of the Peace; Constitutional Law,** I, 4.

SELECTIVE TRAINING AND SERVICE ACT OF 1940. See **Veterans.**

SELF-INCRIMINATION. See **Constitutional Law,** V.

SENIORITY. See **Veterans.**

SENTENCES. See **Constitutional Law,** II, 1.

SEPARATION ALLOWANCES. See **Veterans.**

SEPARATION OF POWERS. See **Constitutional Law,** I, 2; III; **Judicial Review,** 3; **Voting Rights Act of 1965.**

SERVICE OF PETITION. See **Procedure,** 5.

SEVERANCE PAY. See **Veterans.**

SEXUAL DEVIANTS. See **Obscenity,** 1.

SHAM SUITS. See **Federal Rules of Civil Procedure; Stockholders.**

SHEET METAL PRODUCTS. See **Fair Labor Standards Act of 1938.**

SHIPPERS. See **Federal Maritime Commission,** 1–2; **Interstate Commerce Act; Judicial Review,** 1–2.

SHIPPING ACT, 1916. See **Federal Maritime Commission,** 1–2; **Judicial Review,** 1.

SHIPPING CONFERENCES. See **Federal Maritime Commission,** 2.

SHIPS. See **Taxes,** 4.

"SIT-IN" DEMONSTRATIONS. See **Breach of the Peace; Constitutional Law,** I, 4.

SIXTH AMENDMENT. See **Constitutional Law,** VI.

SOLICITOR GENERAL. See **Conspiracy,** 2; **Procedure,** 4.

SOUTH CAROLINA. See **Constitutional Law,** I, 2; III; **Judicial Review,** 3; **Voting Rights Act of 1965.**

SPEECH OR DEBATE CLAUSE. See **Constitutional Law,** VII.

SPEEDY TRIAL. See **Constitutional Law,** VI.

SPRAY CAPS. See **Patents,** 2.

STANDING TO SUE. See also **Labor Management Relations Act, 1947.**

Labor Management Relations Act, 1947—Collective bargaining agreement—Suit by union.—A union may properly sue under § 301 of the Act to recover wages or vacation pay claimed by its members pursuant to a collective bargaining agreement. Auto Workers v. Hoosier Corp., p. 696.

STATE OFFICERS. See **Civil Rights,** 2.

STATES RIGHTS. See **Constitutional Law,** I, 2; III; **Judicial Review,** 3; **Voting Rights Act of 1965.**

STATUTE OF LIMITATIONS. See **Labor Management Relations Act, 1947; Standing to Sue.**

STEROIDS. See **Patents,** 1, 4.

STOCKHOLDERS. See also **Federal Rules of Civil Procedure.**

Derivative suits—Management fraud—Federal Rules of Civil Procedure.—Rule 23 (b) which requires verification of the complaint by plaintiff does not bar derivative suit by small stockholder who did not understand complaint, but relied in good faith on advice of counsel and financial advisor and where record shows grave fraud charges based on reasonable beliefs growing out of careful investigation. Surowitz v. Hilton Hotels Corp., p. 363.

STRIKES. See **Jurisdiction,** 3; **Labor,** 1; **Pre-emption.**

STRIKE SUITS. See **Federal Rules of Civil Procedure; Stockholders.**

SUBSTANTIVE OFFENSES. See **Conspiracy,** 2; **Procedure,** 4.

SUBVERSIVE ACTIVITIES. See **Constitutional Law,** IV, 1.

SUFFRAGE. See **Constitutional Law,** I, 2; III; **Judicial Review,** 3; **Voting Rights Act of 1965.**

SUPREME COURT.

Amendments to Rules.

(a) Civil Procedure, p. 1039.

(b) Criminal Procedure, p. 1095.

SUPREME COURT RULES. See **Procedure,** 5.

TAXES. See also **Constitutional Law,** II, 3.

1. *Capital gains—Sale by joint venture—Realty held "primarily" for sale to customers.*—In determining whether realty sold by joint venture was held "primarily" for sale to customers in the ordinary course of business within the meaning of 26 U. S. C. § 1221 (1), the word "primarily" means "of first importance" or "principally." Malat v. Riddell, p. 569.

2. *Estate taxes—Power of trustee—Accumulation of income.*—When the grantor of an *inter vivos* trust exercised the right reserved in the instrument to accumulate trust income he made a "transfer" of accumulated income under § 811 (c)(1)(B)(ii) of the Internal Revenue Code of 1939, and the accumulated income was properly included in the grantor's gross estate. United States v. O'Malley, p. 627.

3. *Income taxes—Business expenses—Deduction of legal fees for criminal defense.*—The federal income tax is a tax on income and

TAXES--Continued.

not a sanction against wrongdoing, and where an accused exercises his constitutional right to employ counsel to defend against criminal charges, there is no offense to public policy and the deduction of the expenses of his defense is proper. Commissioner v. Tellier, p. 687.

4. *Income taxes—Deduction of depreciation in year of sale—Salvage value.*—The sale of a depreciable asset for an amount in excess of its adjusted basis at the beginning of the year of sale does not bar deduction of depreciation for that year on federal income tax return. Fribourg Nav. Co. v. Commissioner, p. 272.

TAXI SERVICE. See **Jones Act.**

TENNESSEE. See **Jurisdiction,** 3; **Labor,** 1; **Pre-emption.**

TESTS OR DEVICES. See **Constitutional Law,** I, 2; III; **Judicial Review,** 3; **Voting Rights Act of 1965.**

TIRE DEALERS. See **Fair Labor Standards Act of 1938.**

TITILLATION. See **Obscenity,** 2.

TRANSFER. See **Taxes,** 2.

TRANSPORTATION. See **Federal Maritime Commission,** 1–2; **Interstate Commerce Act; Judicial Review,** 1–2.

TRAVEL. See **Civil Rights,** 1–2; **Conspiracy,** 1; **Jurisdiction,** 2.

TRIAL. See **Constitutional Law,** I, 1, 3; **Juvenile Court Act; Procedure,** 2–3.

TRUSTS. See **Taxes,** 2.

TUGBOAT FIREMEN. See **Veterans.**

UNIONS. See **Jurisdiction,** 3; **Labor,** 1–2; **Labor Management Relations Act, 1947; Libel,** 1; **Pre-emption; Standing to Sue.**

VACATION PAY. See **Labor Management Relations Act, 1947; Standing to Sue.**

VALIDITY OF PATENTS. See **Patents,** 2–3, 5; **Procedure,** 5.

VENUE. See **Interstate Commerce Act; Judicial Review,** 2.

VETERANS.

Selective Training and Service Act of 1940—Seniority—Separation allowances.—Failure to credit petitioners' "compensated service" time with the period spent in the armed forces does not accord them the right to be reinstated "without loss of seniority" guaranteed by §§ 8 (b)(B) and (c) of the Act; and the seniority status continues beyond the first year of their re-employment. Accardi v. Pennsylvania R. Co., p. 225.

VIOLENCE. See **Jurisdiction,** 3; **Labor,** 1; **Pre-emption.**

VIRGINIA. See **Constitutional Law,** II, 3.

VOTING. See **Constitutional Law,** I, 2; II, 3; III.

VOTING RIGHTS ACT OF 1965. See also **Constitutional Law,** I, 2; III; **Judicial Review,** 3.

Elimination of voting discrimination—Powers of the States—Geographic areas.—Congress, as against the reserved powers of the States, may use any rational means to effectuate the constitutional prohibition of racial voting discrimination, and has ample authority to prescribe remedies not requiring prior adjudication and may focus upon geographic areas where substantial racial voting discrimination has occurred. South Carolina v. Katzenbach, p. 301.

WAGE-EARNER EXTENSION PLANS. See **Bankruptcy Act.**

WAGE-HOUR ACT. See **Fair Labor Standards Act of 1938.**

WAIVER. See **Constitutional Law,** I, 3; **Juvenile Court Act; Procedure,** 3.

WAIVER OF IMMUNITY. See **Constitutional Law,** V.

WET BATTERIES. See **Patents,** 3, 5; **Procedure,** 5.

WORDS.

1. *"Like grade and quality."*—§ 2 (a), Clayton Act, 15 U. S. C. § 13 (a). FTC v. Borden Co., p. 637.

2. *"Officers, agents, or employees."*—§ 1, Federal Employers' Liability Act, 45 U. S. C. § 51. Hopson v. Texaco, Inc., p. 262.

3. *"Primarily."*—§ 1221 (1), Internal Revenue Code, 26 U. S. C. § 1221 (1). Malat v. Riddell, p. 569.

4. *"Retail or service establishment."*—§ 13 (a)(2), Fair Labor Standards Act of 1938, 29 U. S. C. § 213 (a)(2). Idaho Metal Works v. Wirtz, p. 190.

5. *"Test or device."*—§ 4 (c), Voting Rights Act of 1965, 42 U. S. C. § 1973b (c) (1964 ed., Supp. I). South Carolina v. Katzenbach, p. 301.

6. *"Transfer."*—§ 811 (c)(1), Internal Revenue Code of 1939, 26 U. S. C. § 811 (c)(1)(1952 ed.). United States v. O'Malley, p. 627.

7. *"Under color of law."*—18 U. S. C. § 242. United States v. Price, p. 787.

8. *"Without loss of seniority."*—§ 8 (c), Selective Training and Service Act of 1940, 50 U. S. C. App. § 459 (c)(1). Accardi v. Pennsylvania R. Co., p. 225.