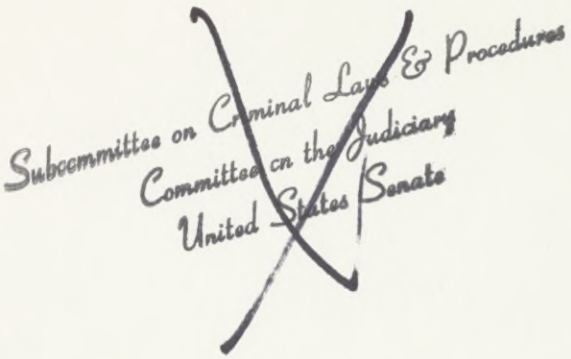


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UNITED STATES REPORTS

VOLUME 410

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1972

JANUARY 22 THROUGH (IN PART) MARCH 21, 1973

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1974

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OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM O. DOUGLAS, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.

RETIRED

EARL WARREN, Chief Justice.
STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

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ERWIN N. GRISWOLD, Solicitor General.
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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, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

January 7, 1972.

(For next previous allotment, see 403 U. S., p. IV.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1972

UNITED STATES *v.* DIONISIO

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

No. 71–229. Argued November 6, 1972—Decided January 22, 1973

A grand jury subpoenaed about 20 persons, including respondent, to give voice exemplars for identification purposes. Respondent, on Fourth and Fifth Amendment grounds, refused to comply. The District Court rejected both claims and adjudged respondent in contempt. The Court of Appeals agreed in rejecting respondent's Fifth Amendment claim but reversed on the ground that the Fourth Amendment required a preliminary showing of reasonableness before a grand jury witness could be compelled to furnish a voice exemplar and that here the proposed "seizures" would be unreasonable because of the large number of witnesses subpoenaed to produce the exemplars. *Held:*

1. The compelled production of the voice exemplars would not violate the Fifth Amendment privilege against compulsory self-incrimination, since they were to be used only for identification purposes, and not for the testimonial or communicative content of the utterances. Pp. 5–7.

2. Respondent's Fourth Amendment claim is also invalid. Pp. 8–18.

(a) A subpoena to compel a person to appear before a grand jury does not constitute a "seizure" within the meaning of the Fourth Amendment, and the fact that many others besides respondent were ordered to give voice recordings did not render

the subpoena unconstitutional. *Davis* v. *Mississippi*, 394 U. S. 721, distinguished. Pp. 8–13.

(b) The grand jury's directive to make the voice recording infringed no valid Fourth Amendment interest. Pp. 13–15.

(c) Since neither the summons to appear before the grand jury nor its directive to give a voice exemplar contravened the Fourth Amendment, the Court of Appeals erred in requiring a preliminary showing of reasonableness before respondent could be compelled to furnish the exemplar. Pp. 15–16.

442 F. 2d 276, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 22. DOUGLAS, J., *post*, p. 23, and MARSHALL, J., *post*, p. 31, filed dissenting opinions.

Philip A. Lacovara argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Petersen, Wm. Bradford Reynolds, Beatrice Rosenberg,* and *Sidney M. Glazer.*

John Powers Crowley argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

A special grand jury was convened in the Northern District of Illinois in February 1971, to investigate possible violations of federal criminal statutes relating to gambling. In the course of its investigation, the grand jury received in evidence certain voice recordings that had been obtained pursuant to court orders.[1]

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[1] The court orders were issued pursuant to 18 U. S. C. § 2518, a statute authorizing the interception of wire communications upon a judicial determination that "(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter [including the transmission of wagering information];

The grand jury subpoenaed approximately 20 persons, including the respondent Dionisio, seeking to obtain from them voice exemplars for comparison with the recorded conversations that had been received in evidence. Each witness was advised that he was a potential defendant in a criminal prosecution. Each was asked to examine a transcript of an intercepted conversation, and to go to a nearby office of the United States Attorney to read the transcript into a recording device. The witnesses were advised that they would be allowed to have their attorneys present when they read the transcripts. Dionisio and other witnesses refused to furnish the voice exemplars, asserting that these disclosures would violate their rights under the Fourth and Fifth Amendments.

The Government then filed separate petitions in the United States District Court to compel Dionisio and the other witnesses to furnish the voice exemplars to the grand jury. The petitions stated that the exemplars were "essential and necessary" to the grand jury investigation, and that they would "be used solely as a standard of comparison in order to determine whether or not the witness is the person whose voice was intercepted . . . ."

Following a hearing, the District Judge rejected the witnesses' constitutional arguments and ordered them to comply with the grand jury's request. He reasoned that voice exemplars, like handwriting exemplars or fingerprints, were not testimonial or communicative evidence, and that consequently the order to produce them would

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(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception; (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

not compel any witness to testify against himself. The District Judge also found that there would be no Fourth Amendment violation, because the grand jury subpoena did not itself violate the Fourth Amendment, and the order to produce the voice exemplars would involve no unreasonable search and seizure within the proscription of that Amendment:

> "The witnesses are lawfully before the grand jury pursuant to subpoena. The Fourth Amendment prohibition against unreasonable search and seizure applies only where identifying physical characteristics, such as fingerprints, are obtained as a result of unlawful detention of a suspect, or when an intrusion into the body, such as a blood test, is undertaken without a warrant, absent an emergency situation. *E. g., Davis* v. *Mississippi,* 394 U. S. 721, 724–728 (1969); *Schmerber* v. *California,* 384 U. S. 757, 770–771 (1966)." [2]

When Dionisio persisted in his refusal to respond to the grand jury's directive, the District Court adjudged him in civil contempt and ordered him committed to custody until he obeyed the court order, or until the expiration of 18 months.[3]

The Court of Appeals for the Seventh Circuit reversed. 442 F. 2d 276. It agreed with the District Court in rejecting the Fifth Amendment claims,[4] but concluded that to compel the voice recordings would violate the Fourth Amendment. In the court's view, the grand

[2] The decision of the District Court is unreported.

[3] The life of the special grand jury was 18 months, but could be extended up to an additional 18 months. 18 U. S. C. § 3331.

[4] The court also rejected the argument that the grand jury procedure violated the witnesses' Sixth Amendment right to counsel. It found the contention particularly without merit in view of the option afforded the witnesses to have their attorneys present while they made the voice recordings. 442 F. 2d 276, 278.

jury was "seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars." *Id.,* at 280. The court found that the Fourth Amendment applied to grand jury process, and that "under the fourth amendment law enforcement officials may not compel the production of physical evidence absent a showing of the reasonableness of the seizure. Davis v. Mississippi, 394 U. S. 721 . . . ." *Ibid.*

In *Davis* this Court held that it was error to admit the petitioner's fingerprints into evidence at his trial for rape, because they had been obtained during a police detention following a lawless wholesale roundup of the petitioner and more than 20 other youths. Equating the procedures followed by the grand jury in the present case to the fingerprint detentions in *Davis,* the Court of Appeals reasoned that "[t]he dragnet effect here, where approximately twenty persons were subpoenaed for purposes of identification, has the same invidious effect on fourth amendment rights as the practice condemned in *Davis.*" *Id.,* at 281.

In view of a clear conflict between this decision and one in the Court of Appeals for the Second Circuit,[5] we granted the Government's petition for certiorari. 406 U. S. 956.

I

The Court of Appeals correctly rejected the contention that the compelled production of the voice exemplars would violate the Fifth Amendment. It has long been held that the compelled display of identifiable physical characteristics infringes no interest protected by

[5] *United States* v. *Doe* (*Schwartz*), 457 F. 2d 895 (affirming civil contempt judgment against grand jury witness for refusal to furnish handwriting exemplars).

the privilege against compulsory self-incrimination. In *Holt* v. *United States,* 218 U. S. 245, 252, Mr. Justice Holmes, writing for the Court, dismissed as an "extravagant extension of the Fifth Amendment" the argument that it violated the privilege to require a defendant to put on a blouse for identification purposes. He explained that "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Id.,* at 252–253.

More recently, in *Schmerber* v. *California,* 384 U. S. 757, we relied on *Holt,* and noted that:

> "[B]oth federal and state courts have usually held that [the privilege] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Id.,* at 764 (footnote omitted).

The Court held that the extraction and chemical analysis of a blood sample involved no "shadow of testimonial compulsion upon or enforced communication by the accused." *Id.,* at 765.

These cases led us to conclude in *Gilbert* v. *California,* 388 U. S. 263, that handwriting exemplars were not protected by the privilege against compulsory self-incrimination. While "[o]ne's voice and handwriting are, of course, means of communication," we held that a "mere handwriting exemplar, in contrast to the content of what

is written, like the voice or body itself, is an identifying physical characteristic outside its protection." *Id.*, at 266–267. And similarly in *United States* v. *Wade,* 388 U. S. 218, we found no error in compelling a defendant accused of bank robbery to utter in a lineup words that had allegedly been spoken by the robber. The accused there was "required to use his voice as an identifying physical characteristic, not to speak his guilt." *Id.*, at 222–223.

Wade and *Gilbert* definitively refute any contention that the compelled production of the voice exemplars in this case would violate the Fifth Amendment. The voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said.[6]

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[6] The Court of Appeals for the Seventh Circuit appears to have recanted somewhat from its clear and correct holding in the present case that the compelled production of voice exemplars would not violate the privilege against compulsory self-incrimination. In subsequently explaining that holding, the Court qualified it:

"Nevertheless, the witnesses were potential defendants, and since the purpose of the voice exemplars was to identify the voices obtained by FBI agents pursuant to a court-ordered wiretap, the self-incriminatory impact of the compelled exemplars was clear. Thus the compelled exemplars were at odds with the spirit of the Fifth Amendment. Because the Fifth Amendment illuminates the Fourth (see . . . Boyd v. United States [116 U. S. 616] . . .), the Fourth Amendment violation appears more readily than where immunity is granted, and in *Dionisio* immunity had not yet been granted." *Fraser* v. *United States,* 452 F. 2d 616, 619 n. 5.

But *Boyd* dealt with the compulsory production of private books and records, testimonial sources, a circumstance in which the "Fourth and Fifth Amendments run almost into each other." 116 U. S., at 630. In the present case, by contrast, no Fifth Amendment interests are jeopardized; there is no hint of testimonial compulsion. The Court of Appeals' subsequent attempt to read the "spirit of the Fifth Amendment" into the production of voice exemplars cannot survive comparison with *Wade, Gilbert,* and *Schmerber.*

II

The Court of Appeals held that the Fourth Amendment required a preliminary showing of reasonableness before a grand jury witness could be compelled to furnish a voice exemplar, and that in this case the proposed "seizures" of the voice exemplars would be unreasonable because of the large number of witnesses summoned by the grand jury and directed to produce such exemplars. We disagree.

The Fourth Amendment guarantees that all people shall be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." Any Fourth Amendment violation in the present setting must rest on a lawless governmental intrusion upon the privacy of "persons" rather than on interference with "property relationships or private papers." *Schmerber* v. *California,* 384 U. S., at 767; see *United States* v. *Doe (Schwartz)*, 457 F. 2d 895, 897. In *Terry* v. *Ohio,* 392 U. S. 1, the Court explained the protection afforded to "persons" in terms of the statement in *Katz* v. *United States,* 389 U. S. 347, that "the Fourth Amendment protects people, not places," *id.,* at 351, and concluded that "wherever an individual may harbor a reasonable 'expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion." *Terry* v. *Ohio, supra,* at 9.

As the Court made clear in *Schmerber, supra,* the obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels—the "seizure" of the "person" necessary to bring him into contact with government agents, see *Davis* v. *Mississippi,* 394 U. S. 721, and the subsequent search for and seizure of the evidence. In *Schmerber,* we found the initial seizure of the accused justified as a lawful arrest, and the subsequent seizure of the blood sample from his body reasonable in light of the exigent cir-

cumstances. And in *Terry,* we concluded that neither the initial seizure of the person, an investigatory "stop" by a policeman, nor the subsequent search, a "patdown" of his outer clothing for weapons, constituted a violation of the Fourth and Fourteenth Amendments. The constitutionality of the compulsory production of exemplars from a grand jury witness necessarily turns on the same dual inquiry—whether either the initial compulsion of the person to appear before the grand jury, or the subsequent directive to make a voice recording is an unreasonable "seizure" within the meaning of the Fourth Amendment.

It is clear that a subpoena to appear before a grand jury is not a "seizure" in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome. Last Term we again acknowledged what has long been recognized,[7] that "[c]itizens generally are not constitutionally immune from grand jury subpoenas . . . ." *Branzburg* v. *Hayes,* 408 U. S. 665, 682. We concluded that:

> "Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, *United States* v. *Bryan,* 339 U. S., at 331; *Blackmer* v. *United States,* 284 U. S. 421, 438 (1932); 8 J. Wigmore, Evidence § 2192 (McNaughton rev. 1961), is particularly applicable to grand jury proceedings." *Id.,* at 688.

These are recent reaffirmations of the historically grounded obligation of every person to appear and give

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[7] See generally *Kastigar* v. *United States,* 406 U. S. 441, 443–444; *Blair* v. *United States,* 250 U. S. 273, 279–281; 8 J. Wigmore, Evidence § 2191 (J. McNaughton rev. 1961).

his evidence before the grand jury. "The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." *Blair* v. *United States,* 250 U. S. 273, 281. See also *Garland* v. *Torre,* 259 F. 2d 545, 549. And while the duty may be "onerous" at times, it is "necessary to the administration of justice." *Blair* v. *United States, supra,* at 281.[8]

The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative "stop" in more than civic obligation. For, as Judge Friendly wrote for the Court of Appeals for the Second Circuit:

> "The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court." *United States* v. *Doe* (*Schwartz*) 457 F. 2d, at 898.

Thus, the Court of Appeals for the Seventh Circuit correctly recognized in a case subsequent to the one now before us, that a "grand jury subpoena to testify is not that kind of governmental intrusion on privacy against which the Fourth Amendment affords protection, once the Fifth Amendment is satisfied." *Fraser* v. *United States,* 452 F. 2d 616, 620; cf. *United States* v. *Weinberg,* 439 F. 2d 743, 748–749.

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[8] The obligation to appear is no different for a person who may himself be the subject of the grand jury inquiry. See *United States* v. *Doe* (*Schwartz*), 457 F. 2d, at 898; *United States* v. *Winter,* 348 F. 2d 204, 207–208.

This case is thus quite different from *Davis* v. *Mississippi, supra,* on which the Court of Appeals primarily relied. For in *Davis* it was the initial seizure—the lawless dragnet detention—that violated the Fourth and Fourteenth Amendments, not the taking of the fingerprints. We noted that "[i]nvestigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention," 394 U. S., at 726, and we left open the question whether, consistently with the Fourth and Fourteenth Amendments, narrowly circumscribed procedures might be developed for obtaining fingerprints from people when there was no probable cause to arrest them. *Id.,* at 728.[9] *Davis* is plainly inapposite to a case where the initial restraint does not itself infringe the Fourth Amendment.

This is not to say that a grand jury subpoena is some talisman that dissolves all constitutional protections. The grand jury cannot require a witness to testify against himself. It cannot require the production by a person of private books and records that would incriminate him. See *Boyd* v. *United States,* 116 U. S. 616, 633–635.[10] The Fourth Amendment provides protection against a grand jury subpoena *duces tecum* too sweeping in its terms "to be regarded as reasonable." *Hale* v.

[9] Judge Weinfeld correctly characterized *Davis* as "but another application of the principle that the Fourth Amendment applies to all searches and seizures of the person no matter what the scope or duration. It held that in the circumstances there presented the detention for the sole purpose of fingerprinting was in violation of the Fourth Amendment ban against unreasonable search and seizure." *Thom* v. *New York Stock Exchange,* 306 F. Supp. 1002, 1007 (footnote omitted). See also *Allen* v. *Cupp,* 426 F. 2d 756, 760.

[10] While *Boyd* was concerned with a motion to produce invoices at a forfeiture trial, the Court treated it as the equivalent of a subpoena *duces tecum,* and *Hale* v. *Henkel,* 201 U. S. 43, 76, applied *Boyd* in the context of a grand jury subpoena.

Henkel, 201 U. S. 43, 76; cf. *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 208, 217. And last Term, in the context of a First Amendment claim, we indicated that the Constitution could not tolerate the transformation of the grand jury into an instrument of oppression: "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." *Branzburg* v. *Hayes,* 408 U. S., at 707–708. See also, *id.,* at 710 (POWELL, J., concurring).

But we are here faced with no such constitutional infirmities in the subpoena to appear before the grand jury or in the order to make the voice recordings. There is, as we have said, no valid Fifth Amendment claim. There was no order to produce private books and papers, and no sweeping subpoena *duces tecum.* And even if *Branzburg* be extended beyond its First Amendment moorings and tied to a more generalized due process concept, there is still no indication in this case of the kind of harassment that was of concern there.

The Court of Appeals found critical significance in the fact that the grand jury had summoned approximately 20 witnesses to furnish voice exemplars.[11] We think that fact is basically irrelevant to the constitutional issues here. The grand jury may have been attempting to

[11] As noted *supra,* at 11, there is no valid comparison between the detentions of the 24 youths in *Davis,* and the grand jury subpoenas of the witnesses here. While the dragnet detentions by the police did constitute substantial intrusions into the Fourth and Fourteenth Amendment rights of each of the youths in *Davis,* no person has a justifiable expectation of immunity from a grand jury subpoena.

identify a number of voices on the tapes in evidence, or it might have summoned the 20 witnesses in an effort to identify one voice. But whatever the case, "[a] grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed . . . ." *United States* v. *Stone*, 429 F. 2d 138, 140. See also *Wood* v. *Georgia*, 370 U. S. 375, 392. As the Court recalled last Term, "Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad." *Branzburg* v. *Hayes, supra*, at 688.[12] The grand jury may well find it desirable to call numerous witnesses in the course of an investigation. It does not follow that each witness may resist a subpoena on the ground that too many witnesses have been called. Neither the order to Dionisio to appear nor the order to make a voice recording was rendered unreasonable by the fact that many others were subjected to the same compulsion.

But the conclusion that Dionisio's compulsory appearance before the grand jury was not an unreasonable "seizure" is the answer to only the first part of the Fourth Amendment inquiry here. Dionisio argues that the grand jury's subsequent directive to make the voice recording was itself an infringement of his rights

[12] "[The grand jury] is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. *Hendricks* v. *United States*, 223 U. S. 178, 184." *Blair* v. *United States*, 250 U. S., at 282.

under the Fourth Amendment. We cannot accept that argument.

In *Katz* v. *United States, supra,* we said that the Fourth Amendment provides no protection for what "a person knowingly exposes to the public, even in his own home or office . . . ." 389 U. S., at 351. The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world. As the Court of Appeals for the Second Circuit stated:

> "Except for the rare recluse who chooses to live his life in complete solitude, in our daily lives we constantly speak and write, and while the content of a communication is entitled to Fourth Amendment protection . . . the underlying identifying characteristics—the constant factor throughout both public and private communications—are open for all to see or hear. There is no basis for constructing a wall of privacy against the grand jury which does not exist in casual contacts with strangers. Hence no intrusion into an individual's privacy results from compelled execution of handwriting or voice exemplars; nothing is being exposed to the grand jury that has not previously been exposed to the public at large." *United States* v. *Doe* (*Schwartz*), 457 F. 2d, at 898–899.

The required disclosure of a person's voice is thus immeasurably further removed from the Fourth Amendment protection than was the intrusion into the body effected by the blood extraction in *Schmerber.* "The

interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." *Schmerber* v. *California,* 384 U. S., at 769–770. Similarly, a seizure of voice exemplars does not involve the "severe, though brief, intrusion upon cherished personal security," effected by the "patdown" in *Terry*—"surely . . . an annoying, frightening, and perhaps humiliating experience." *Terry* v. *Ohio,* 392 U. S., at 24–25. Rather, this is like the fingerprinting in *Davis,* where, though the initial dragnet detentions were constitutionally impermissible, we noted that the fingerprinting itself "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Davis* v. *Mississippi,* 394 U. S., at 727; cf. *Thom* v. *New York Stock Exchange,* 306 F. Supp. 1002, 1009.

Since neither the summons to appear before the grand jury nor its directive to make a voice recording infringed upon any interest protected by the Fourth Amendment, there was no justification for requiring the grand jury to satisfy even the minimal requirement of "reasonableness" imposed by the Court of Appeals.[13] See *United States* v. *Doe* (*Schwartz*), *supra,* at 899–900. A grand jury has broad investigative powers to determine whether a crime has been committed and who has committed it. The jurors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge. *Branzburg* v. *Hayes,* 408 U. S., at 701. No grand jury witness is "entitled to set limits to the investigation that the grand jury may conduct." *Blair* v. *United States,* 250 U. S., at 282. And a sufficient basis

[13] In *Hale* v. *Henkel,* 201 U. S., at 77, the Court found that such a standard had not been met, but as noted *supra,* at 11–12, that was a case where the Fourth Amendment had been infringed by an overly broad subpoena to produce books and papers.

for an indictment may only emerge at the end of the investigation when all the evidence has been received.

> "It is impossible to conceive that . . . the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted." *Hale* v. *Henkel,* 201 U. S., at 65.

Since Dionisio raised no valid Fourth Amendment claim, there is no more reason to require a preliminary showing of reasonableness here than there would be in the case of any witness who, despite the lack of any constitutional or statutory privilege, declined to answer a question or comply with a grand jury request. Neither the Constitution nor our prior cases justify any such interference with grand jury proceedings.[14]

The Fifth Amendment guarantees that no civilian may be brought to trial for an infamous crime "unless on a presentment or indictment of a Grand Jury." This constitutional guarantee presupposes an investigative body "acting independently of either prosecuting attorney or judge," *Stirone* v. *United States,* 361 U. S. 212, 218, whose mission is to clear the innocent, no less than

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[14] MR. JUSTICE MARSHALL, in dissent, *post,* p. 31, suggests that a preliminary showing of "reasonableness" is required where the grand jury subpoenas a witness to appear and produce handwriting or voice exemplars, but not when it subpoenas him to appear and testify. Such a distinction finds no support in the Constitution. His dissent argues that there is a potential Fourth Amendment violation in the case of a subpoenaed grand jury witness because of the asserted intrusiveness of the initial subpoena to appear—the possible stigma from a grand jury appearance and the inconvenience of the official restraint. But the initial directive to appear is as intrusive if the witness is called simply to testify as it is if he is summoned to produce physical evidence.

to bring to trial those who may be guilty.[15] Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws. Cf. *United States* v. *Ryan,* 402 U. S. 530, 532–533; *Costello* v. *United States,* 350 U. S. 359, 363–364; *Cobbledick* v. *United States,* 309 U. S. 323, 327–328.[16] The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision

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[15] "[T]he institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial." *Ex parte Bain,* 121 U. S. 1, 11 (quoting grand jury charge of Mr. Justice Field). See also *Wood* v. *Georgia,* 370 U. S. 375, 390.

[16] The possibilities for delay caused by requiring initial showings of "reasonableness" are illustrated by the Court of Appeals' subsequent decision in *In re September 1971 Grand Jury,* 454 F. 2d 580, rev'd *sub nom. United States* v. *Mara, post,* p. 19, where the Court held that the Government was required to show in an adversary hearing that its request for exemplars was reasonable, and "reasonableness" included proof that the exemplars could not be obtained from other sources.

so long as it does not trench upon the legitimate rights of any witness called before it.

Since the Court of Appeals found an unreasonable search and seizure where none existed, and imposed a preliminary showing of reasonableness where none was required, its judgment is reversed and this case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

[For separate opinion of MR. JUSTICE BRENNAN, see *post*, p. 22.]

[For dissenting opinion of MR. JUSTICE DOUGLAS, see *post*, p. 23.]

[For dissenting opinion of MR. JUSTICE MARSHALL, see *post*, p. 31.]

UNITED STATES *v.* MARA, AKA MARASOVICH

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

No. 71–850. Argued November 6, 1972—Decided January 22, 1973

Respondent, subpoenaed to furnish handwriting exemplars to enable a grand jury to determine whether he was the author of certain writings, was held in contempt after refusing compliance, the District Court having rejected respondent's contention that such compelled production would constitute an unreasonable search and seizure. The Court of Appeals reversed, holding that the Fourth Amendment applied and that the Government had to make a preliminary showing of reasonableness. *Held:* The specific and narrowly drawn directive to furnish a handwriting specimen, which, like the compelled speech disclosure upheld in *United States* v. *Dionisio, ante,* p. 1, involved production of physical characteristics, violated no legitimate Fourth Amendment interest. Pp. 21–22.

454 F. 2d 580, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., *post,* p. 23, BRENNAN, J., *post,* p. 22, and MARSHALL, J., *post,* p. 31, filed dissenting opinions.

Philip A. Lacovara argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Petersen, Wm. Bradford Reynolds, Beatrice Rosenberg,* and *Sidney M. Glazer.*

Angelo Ruggiero argued the cause and filed a brief for respondent.

Phylis Skloot Bamberger argued the cause for the Federal Community Defender Organization of the Legal Aid Society of New York as *amicus curiae* urging affirmance. With her on the brief was *William E. Hellerstein.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, Richard J. Mara, was subpoenaed to appear before the September 1971 Grand Jury in the Northern District of Illinois that was investigating thefts of interstate shipments. On two separate occasions he was directed to produce handwriting and printing exemplars to the grand jury's designated agent. Each time he was advised that he was a potential defendant in the matter under investigation. On both occasions he refused to produce the exemplars.

The Government then petitioned the United States District Court to compel Mara to furnish the handwriting and printing exemplars to the grand jury. The petition indicated that the exemplars were "essential and necessary" to the grand jury investigation and would be used solely as a standard of comparison to determine whether Mara was the author of certain writings. The petition was accompanied by an affidavit of an FBI agent, submitted *in camera,* which set forth the basis for seeking the exemplars. The District Judge rejected the respondent's contention that the compelled production of such exemplars would constitute an unreasonable search and seizure, and he ordered the respondent to provide them. When the witness continued to refuse to do so, he was adjudged to be in civil contempt and was committed to custody until he obeyed the court order or until the expiration of the grand jury term.

The Court of Appeals for the Seventh Circuit reversed. 454 F. 2d 580. Relying on its earlier decision in *In re Dionisio,* 442 F. 2d 276, rev'd, *ante,* p. 1, the court found that the directive to furnish the exemplars would constitute an unreasonable search and seizure. "[I]t is plain that compelling [Mara] to furnish exemplars of his handwriting and printing is forbidden by the Fourth

Amendment unless the Government has complied with its reasonableness requirement . . . ." 454 F. 2d, at 582.

The court then turned to two issues necessarily generated by its decision in *Dionisio*—the procedure the Government must follow and the substantive showing it must make to establish the reasonableness of the grand jury's directive. It rejected the *in camera* procedure of the District Court, and held that the Government would have to present its affidavit in open court in order that Mara might contest its sufficiency. The court ruled that to establish "reasonableness" the Government would have to make a substantive showing: "that the grand jury investigation was properly authorized, for a purpose Congress can order, that the information sought is relevant to the inquiry, and that . . . the grand jury process is not being abused. . . . [T]he Government's affidavit must also show why satisfactory handwriting and printing exemplars cannot be obtained from other sources without grand jury compulsion." 454 F. 2d, at 584–585.

We granted certiorari, 406 U. S. 956, to consider this case with *United States* v. *Dionisio,* No. 71–229, *ante,* p. 1.

We have held today in *Dionisio,* that a grand jury subpoena is not a "seizure" within the meaning of the Fourth Amendment and, further, that that Amendment is not violated by a grand jury directive compelling production of "physical characteristics" that are "constantly exposed to the public." *Ante,* at 9, 10, 14. Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice. See *United States* v. *Doe (Schwartz),* 457 F. 2d 895, 898–899; *Bradford* v. *United States,* 413 F. 2d 467, 471–472; cf. *Gilbert* v.

California, 388 U. S. 263, 266–267. Consequently the Government was under no obligation here, any more than in *Dionisio,* to make a preliminary showing of "reasonableness."

Indeed, this case lacks even the aspects of an expansive investigation that the Court of Appeals found significant in *Dionisio.* In that case, 20 witnesses were summoned to give exemplars; here there was only one. The specific and narrowly drawn directive requiring the witness to furnish a specimen of his handwriting* violated no legitimate Fourth Amendment interest. The District Court was correct, therefore, in ordering the respondent to comply with the grand jury's request.

Accordingly, the judgment of the Court of Appeals is reversed, and this case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BRENNAN, concurring in part and dissenting in part in No. 71–229, *ante,* p. 1, and dissenting in No. 71–850.

I agree, for the reasons stated by the Court, that respondent Dionisio's Fifth Amendment claims are without merit. I dissent, however, from the Court's rejection

*The respondent contends that because he has seen neither the affidavit nor the writings in the grand jury's possession, the Government may actually be seeking "testimonial" communications—the content as opposed to the physical characteristics of his writing. But the Government's petition for the order to compel production stated: "Such exemplars will be used solely as a standard of comparison in order to determine whether the witness is the author of certain writings." If the Government should seek more than the physical characteristics of the witness' handwriting—if, for example, it should seek to obtain written answers to incriminating questions or a signature on an incriminating statement—then, of course, the witness could assert his Fifth Amendment privilege against compulsory self-incrimination.

of the Fourth Amendment claims of Dionisio and Mara as also without merit. I agree that no unreasonable seizure in violation of the Fourth Amendment is effected by a grand jury subpoena limited to requiring the appearance of a suspect to *testify*. But insofar as the subpoena requires a suspect's appearance in order to obtain voice or handwriting exemplars from him, I conclude, substantially in agreement with Part II of my Brother MARSHALL's dissent, that the reasonableness under the Fourth Amendment of such a seizure cannot simply be presumed. I would therefore affirm the judgments of the Court of Appeals reversing the contempt convictions and remand with directions to the District Court to afford the Government the opportunity to prove reasonableness under the standard fashioned by the Court of Appeals.

MR. JUSTICE DOUGLAS, dissenting.*

Judge William Campbell, who has been on the District Court in Chicago for over 32 years, recently made the following indictment against the grand jury: [1]

> "This great institution of the past has long ceased to be the guardian of the people for which purpose it was created at Runnymede. Today it is but a convenient tool for the prosecutor—too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury."

It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive.

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*This opinion applies also to No. 71–229, *United States* v. *Dionisio*, *ante*, p. 1.

[1] 55 F. R. D. 229, 253 (1972).

The concession by the Court that the grand jury is no longer in a realistic sense "a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor" is reason enough to affirm these judgments.

It is not uncommon for witnesses summoned to appear before the grand jury at a designated room to discover that the room is the room of the prosecutor. The cases before us today are prime examples of this perversion.

Respondent Dionisio and approximately 19 others were subpoenaed by the Special February 1971 Grand Jury for the Northern District of Illinois in an investigation of illegal gambling operations. During the investigation, the grand jury had received as exhibits voice recordings obtained under court orders, on warrants issued under 18 U. S. C. § 2518 authorizing wiretaps. The witnesses were instructed to go to the United States Attorney's office, with their own counsel if they desired, in the company of an FBI agent who had been appointed as an agent of the grand jury by its foreman, and to read the transcript of the wire interception. The readings were recorded. The grand jury then compared the voices taken from the wiretap and the witnesses' record. Dionisio refused to make the voice exemplars on the ground they would violate his rights under the Fourth and Fifth Amendments. The Government filed petitions in the United States District Court for the Northern District of Illinois to compel the witness to furnish the exemplars to the grand jury. The court rejected the constitutional arguments of the respondent and demanded compliance. Dionisio again refused and was adjudged in civil contempt and placed in prison until he obeyed the court order or until the term of the special grand jury expired. The Court of Appeals reversed, concluding that to compel compliance would violate his Fourth Amendment rights. It held that voice exemplars are protected by the Constitution from un-

reasonable seizures and that the Government failed to show the reasonableness of its actions.

The Special September 1971 Grand Jury, also in the Northern District of Illinois, was convened to investigate thefts of interstate shipments of goods that occurred in the State. Respondent Mara was subpoenaed and was requested to submit a sample of his handwriting before the grand jury. Mara refused. The Government went to the District Court for the Northern District of Illinois, asserting to the court that the handwriting exemplars were "essential and necessary" to the investigation. In an *in camera* proceeding, the Court held that the witness must comply with the request of the grand jury. The Court of Appeals reversed on the basis of its decision in *In re Dionisio.* It outlined the procedures the Government must follow in cases of this kind. First, the hearing to determine the constitutionality of the seizure must be held in open court in an adversary manner. Substantially, the Government must show that the grand jury was properly authorized to investigate a matter that Congress had power to regulate, that the information sought was relevant to the inquiry, and that the grand jury's request for exemplars was adequate, but not excessive, for the purposes of the relevant inquiry.

Today, the majority overrules this reasoned opinion of the Seventh Circuit.

Under the Fourth Amendment, law enforcement officers may not compel the production of evidence, absent a showing of the reasonableness of the seizure. *Davis* v. *Mississippi,* 394 U. S. 721; *Boyd* v. *United States,* 116 U. S. 616. The test protects the person's expectation of privacy over the thing. We said in *Katz* v. *United States,* "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth

Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U. S. 347, 351–352. The Government asserts that handwriting and voice exemplars do not invade the privacy of an individual when taken because they are physical characteristics that are exposed to the public. It argues that, unless the person involved is a recluse, these characteristics are not meant to be private to the individual and thus do not qualify for the aid of the Fourth Amendment.

This Court has held that fingerprints are subject to the requirements of the Search and Seizure Clause of the Fourth Amendment, *Davis* v. *Mississippi, supra.* On the other hand, facial scars, birthmarks, and other facial features have been said to be "in plain view" and not protected. *United States* v. *Doe* (*Schwartz*), 457 F. 2d 895.

In *Davis,* the sheriff in Mississippi rounded up 24 blacks when a rape victim described her assailant only as a young Negro. Each was fingerprinted and then released. Davis was presented to the victim but was not identified. He was jailed without probable cause, and only later did the FBI confirm that his fingerprints matched those on the window of the victim's home. The Court held that the fingerprints could not be admitted, as they were seized without reasonable grounds. "Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'" *Davis* v. *Mississippi, supra,* at 726–727. The dragnet effect in *Dionisio,* where approximately 20 people were subpoenaed

for purposes of identification, was just the kind of invasion that the *Davis* case sought to prevent. Facial features can be presented to the public regardless of the cooperation or compulsion of the owner of the features. But to get the exemplars, the individual must be involved. So, although a person's handwriting is used in everyday life and speech is the vehicle of normal social intercourse, when these personal characteristics are sought for purposes of identification, the Government enters the zone of privacy and, in my view, must make a showing of reasonableness before seizures may be made.

The Government contends that since the production was before the grand jury, a different standard of constitutional law exists because the grand jury has broad investigatory powers. *Blair* v. *United States,* 250 U. S. 273. Cf. *United States* v. *Bryan,* 339 U. S. 323. The Government concedes that the Fourth Amendment applies to the grand jury and prevents it from executing subpoenas *duces tecum* that are overly broad. *Hale* v. *Henkel,* 201 U. S. 43, 76. It asserts, however, that that is the limit of its application. But the Fourth Amendment is not so limited, as this Court has held in *Davis, supra,* and reiterated in *Terry* v. *Ohio,* 392 U. S. 1, where it held that the Amendment comes into effect whether or not there is a fullblown search. The essential purpose is to extend its protection "wherever an individual may harbor a reasonable 'expectation of privacy.'" *Id.,* at 9.

Just as the nature of the Amendment rebels against the limits that the Government seeks to impose on its coverage, so does the nature of the grand jury itself. It was secured at Runnymede from King John as a cornerstone of the liberty of the people. It was to serve as a buffer between the state and the offender. For no matter how obnoxious a person may be, the United States cannot prosecute for a felony without an indict-

ment. The individual is therefore protected by a body of his peers who have no axes to grind or any Government agency to serve. It is the only accusatorial body of the Federal Government recognized by the Constitution. "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." [2] *Stirone* v. *United States,* 361 U. S. 212, 218. But here, as the Court of Appeals said, "It is evident that the grand jury is seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars." *In re Dionisio,* 442 F. 2d 276, 280. See

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[2] As Mr. Justice Black said in *In re Groban,* 352 U. S. 330, 346–347:

"The traditional English and American grand jury is composed of 12 to 23 members selected from the general citizenry of the locality where the alleged crime was committed. They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officers' misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury. The witness can call on the grand jurors if need be for their normally unbiased testimony as to what occurred before them."

Although that excerpt is from a dissent on the particular facts of the case, there could be no disagreement as to the accuracy of the description of the grand jury's historical function.

The tendency is for government to use shortcuts in its search for instruments more susceptible to its manipulation than is the historic grand jury. See *Hannah* v. *Larche,* 363 U. S. 420, 505 (DOUGLAS, J., dissenting); *Jenkins* v. *McKeithen,* 395 U. S. 411.

Hannah v. *Larche,* 363 U. S. 420, 497–499 (DOUGLAS, J., dissenting). Are we to stand still and watch the prosecution evade its own constitutional restrictions on its powers by turning the grand jury into its agent? Are we to allow the Government to usurp powers that were granted to the people by the Magna Carta and codified in our Constitution? That will be the result of the majority opinion unless we continue to apply to the grand jury the protection of the Fourth Amendment.

As the Court stated in *Hale* v. *Henkel,* 201 U. S., at 59, "the most valuable function of the grand jury" was "to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will."

The Court held in that case that the Fourth Amendment was applicable to grand jury proceedings and that a sweeping, all-inclusive subpoena was "equally indefensible as a search warrant would be if couched in similar terms." *Id.,* at 77.

Of course, the grand jury can require people to testify. *Hale* v. *Henkel* makes plain that proceedings before the grand jury do not carry all of the impedimenta of a trial before a petit jury. To date, the grand jury cases have involved only testimonial evidence. To say, as the Government suggests, that nontestimonial evidence is free from any restraint imposed by the Fourth Amendment is to give those who today manipulate grand juries vast and uncontrollable power.

The Executive, acting through a prosecutor, could not have obtained these exemplars as it chose, for as stated by the Court of Appeals for the Eighth Circuit, "We conclude that the taking of the handwriting exemplars . . . was a search and seizure under the Fourth Amendment." *United States* v. *Harris,* 453 F. 2d 1317, 1319. As *Katz* v. *United States, supra,* makes plain, the searches that may be made without prior approval by judge or magis-

trate are "subject only to a few specifically established and well-delineated exceptions." 389 U. S., at 357.

The showing required by the Court of Appeals in the *Mara* case was that the Government's showing of need for the exemplars be "reasonable," which "is not necessarily synonymous with probable cause." 454 F. 2d 580, 584. When we come to grand juries, probable cause in the strict Fourth Amendment meaning of the term does not have in it the same ingredients pointing toward guilt as it does in the arrest and trial of people. In terms of probable cause in the setting of the grand jury, the question is whether the exemplar sought is in some way connected with the suspected criminal activity under investigation. Certainly less than that showing would permit the Fourth Amendment to be robbed of all of its vitality.

In the *Mara* case, the prosecutor submitted to the District Court an affidavit of a Government investigator stating the need for the exemplar based on his investigation. The District Court passed on the matter *in camera,* not showing the affidavit to either respondent or his counsel. The Court of Appeals, relying on *Alderman* v. *United States,* 394 U. S. 165, 183, held that in such cases there should be an adversary proceeding. 454 F. 2d, at 582–583. If "reasonable cause" is to play any function in curbing the executive appetite to manipulate grand juries, there must be an opportunity for a showing that there was no "reasonable cause." As we stated in *Alderman:* "Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth

Amendment exclusionary rule demands." 394 U. S., at 184.

The District Court in the *Dionisio* case went part way by allowing the witness to have his counsel present when the voice exemplars were prepared in the prosecutor's office. 442 F. 2d, at 278. The Court of Appeals acted in a traditionally fair way when it ruled that the reasonableness of a prosecutor's request for exemplars be put down for an adversary hearing before the District Court. It would be a travesty of justice to allow the prosecutor to do under the cloak of the grand jury what he could not do on his own.

In view of the disposition which I would make of these cases, I need not reach the Fifth Amendment question. But lest there be any doubt as to where I stand, I adhere to my position in *United States* v. *Wade,* 388 U. S. 218, 243 (separate statement), and in *Schmerber* v. *California,* 384 U. S. 757, 773 (Black, J., dissenting, joined by DOUGLAS, J.), 778 (DOUGLAS, J., dissenting), to the effect that the Fifth Amendment is not restricted to testimonial compulsion.

MR. JUSTICE MARSHALL, dissenting.*

I

The Court considers *United States* v. *Wade,* 388 U. S. 218, 221–223 (1967), and *Gilbert* v. *California,* 388 U. S. 263, 265–267 (1967), dispositive of respondent Dionisio's contention that compelled production of a voice exemplar would violate his Fifth Amendment privilege against compulsory self-incrimination. Respondent Mara also argued below that compelled production of the handwriting and printing exemplars sought from him would

*This opinion applies also to No. 71–229, *United States* v. *Dionisio, ante,* p. 1.

violate his Fifth Amendment privilege. I assume the Court would consider *Wade* and *Gilbert* to be dispositive of that claim as well.[1] The Court reads those cases as holding that voice and handwriting exemplars may be sought for the exclusive purpose of measuring "the physical properties" of the witness' voice or handwriting without running afoul of the Fifth Amendment privilege. *Ante,* at 7. Such identification evidence is not within the purview of the Fifth Amendment, the Court says, for, at least since *Schmerber* v. *California,* 384 U. S. 757, 764 (1966), it has been clear that while "the privilege is a bar against compelling 'communications' or 'testimony,' . . . compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."

I was not a Member of this Court when *Wade* and *Gilbert* were decided. Had I been, I would have found it most difficult to join those decisions insofar as they dealt with the Fifth Amendment privilege. Since, as I discuss in Part II, I consider the Fourth Amendment to require affirmance of the decisions below in these cases, I need not rely at this time upon the Fifth Amendment privilege. Nevertheless, I feel constrained to express here at least my serious reservations concerning the Fifth Amendment portions of *Wade* and *Gilbert,* since those decisions are so central to the Court's result today.

The root of my difficulty with *Wade* and *Gilbert* is the testimonial evidence limitation that has been imposed upon the Fifth Amendment privilege in the decisions of this Court. That limitation is at odds with

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[1] Before this Court, respondent Mara has argued only that the Government may be seeking the handwriting exemplars to obtain not merely identification evidence, but incriminating "testimonial" evidence. I certainly agree with the Court that if respondent's contention proves correct, he will be entitled to assert his Fifth Amendment privilege.

what I have always understood to be the function of the privilege. I would, of course, include testimonial evidence within the privilege, but I have grave difficulty drawing a line there. For I cannot accept the notion that the Government can compel a man to cooperate affirmatively in securing incriminating evidence when that evidence could not be obtained without the cooperation of the suspect. Indeed, until *Wade* and *Gilbert,* the Court had never carried the testimonial limitation so far as to allow law enforcement officials to enlist an individual's overt assistance—that is, to enlist his will—in incriminating himself. And I remain unable to discern any substantial constitutional footing on which to rest that limitation on the reach of the privilege.

Certainly it is difficult to draw very much support for the testimonial limitation from the language of the Amendment itself. The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." Nowhere is the privilege explicitly restricted to testimonial evidence. To read such a limitation into the privilege through its reference to "witness" is just the sort of crabbed construction of the provision that this Court has long eschewed. Thus, some 80 years ago the Court rejected the contention that a grand jury witness could not invoke the privilege because it applied, in terms, only in a "criminal case." *Counselman* v. *Hitchcock,* 142 U. S. 547, 562 (1892). The Court emphasized that the privilege "is as broad as the mischief against which it seeks to guard." *Ibid.* Even earlier, the Court, in holding that the privilege could be invoked in the context of a civil forfeiture proceeding, had warned that:

> "[C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation

> of the right, as if it consisted more in sound than in substance." *Boyd* v. *United States,* 116 U. S. 616, 635 (1886).

Moreover, *Boyd* itself, which involved a subpoena directed at private papers, makes clear that "witness" is not to be restricted to the act of giving oral testimony against oneself. Rather, that decision suggests what I believe to be the most reasonable construction of the protection afforded by the privilege, namely, protection against being "compell[ed] . . . to furnish evidence against" oneself, *id.,* at 637. See also *Schmerber* v. *California,* 384 U. S., at 776–777 (Black, J., dissenting).

Such a construction is dictated by the purpose of the privilege. In part, of course, the privilege derives from the view that certain forms of compelled evidence are inherently unreliable. See, *e. g., In re Gault,* 387 U. S. 1, 47 (1967). But the privilege—as a constitutional guarantee subject to invocation by the individual—is obviously far more than a rule concerned simply with the probative force of certain evidence. Its roots "tap the basic stream of religious and political principle [and reflect] the limits of the individual's attornment to the state . . . ." *Ibid.* Its "constitutional foundation . . . is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load' . . . , to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda* v. *Arizona,* 384 U. S. 436, 460 (1966). Cf. also *Rogers* v. *Richmond,* 365 U. S. 534, 540–541 (1961). It is only by prohibiting the Government from compelling an individual to cooperate

affirmatively in securing incriminating evidence which could not be obtained without his active assistance, that "the inviolability of the human personality" is assured. In my view, the testimonial limitation on the privilege simply fails to take account of this purpose.

The root of the testimonial limitation seems to be Mr. Justice Holmes' opinion for the Court in *Holt* v. *United States,* 218 U. S. 245 (1910). In *Holt,* the defendant challenged the admission at trial of certain testimony that a blouse belonged to the defendant. A witness testified that defendant put on the blouse and that it fitted him. The defendant argued that this testimony violated his Fifth Amendment privilege because he had acted under duress. In the course of disposing of the defendant's argument, Mr. Justice Holmes said that "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Id.,* at 252–253. This remark can only be considered dictum, however, for the case arose before this Court established the rule that illegally seized evidence may not be admitted in federal court, see *Weeks* v. *United States,* 232 U. S. 383 (1914), and thus Holt's claim of privilege was ultimately disposed of simply on the ground that "when [a man] is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent. *Adams* v. *New York,* 192 U. S. 585." 218 U. S., at 253.

With its decision in *Schmerber,* however, the Court elevated the dictum of *Holt* to full constitutional stature. Mr. Justice Holmes' language was central to the Court's conclusion that the taking of a blood sample, over the objection of the individual, to determine alcoholic content was not barred by the Fifth Amendment privilege since

the resulting blood test evidence "was neither [the individual's] testimony nor evidence relating to some communicative act . . . ." 384 U. S., at 765. Indeed, the Court appeared to consider it established since *Holt* that the Fifth Amendment privilege extended only to " 'testimony' " or " 'communications,' " but not to " 'real or physical evidence,' " *id.*, at 764; and this "established" principle was sufficient, for the Court, to dispose of any "loose dicta" in *Miranda* that might suggest a more extensive purpose for the privilege.

After *Schmerber, Wade* and *Gilbert* were relatively easy steps for a Court focusing exclusively on the nature of the evidence compelled. Thus, the Court indicated that "compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber," was "no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse." 388 U. S., at 222. Similarly, in *Gilbert,* 388 U. S., at 266–267, the Court reasoned that "[a] mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the privilege's] protection."

Yet, if we look beyond the testimonial limitation, *Wade* and *Gilbert* clearly were not direct and easy extensions of *Schmerber* and *Holt.* For it is only in *Wade* and *Gilbert* that the Court, for the first time, held in effect that an individual could be compelled to give to the State evidence against himself which could be secured only through his affirmative cooperation—that is, "to accuse himself by a volitional act which differs only in degree from compelling him to act out the crime," *Wade* v. *United States,* 388 U. S., at 261 (Fortas, J., concurring in part and dissenting in part). The voice and handwriting samples sought in *Wade* and *Gilbert* simply could not be obtained without the individ-

ual's active cooperation. *Holt* and *Schmerber* were certainly not such cases. In those instances the individual was required, at most, to submit passively to a blood test or to the fitting of a shirt. Whatever the reasoning of those decisions, I do not understand them to involve the sort of interference with an individual's personality and will that the Fifth Amendment privilege was intended to prevent. To be sure, in situations such as those presented in *Holt* and *Schmerber* the individual may resist and be physically subdued, and in that sense, compulsion may be employed. Or, alternatively, the individual in those situations may elect to yield to the threat of contempt and cooperate affirmatively with his accusers, thus eliminating the need for force and, in that sense, his will may be subverted. But in neither case is the intrusion on an individual's dignity the same or as severe as the affront that occurs when the state secures from him incriminating evidence that can be obtained *only* by enlisting the cooperation of his will. Thus, I do not necessarily consider the results in *Holt* and *Schmerber* to be inconsistent with the purpose and proper reach of the Fifth Amendment privilege.[2]

But so long as we have a Constitution which protects at all costs the integrity of individual volition against subordinating state power, *Wade* and *Gilbert* must be viewed as legal anomalies. As Mr. Justice Fortas, joined by MR. JUSTICE DOUGLAS and the Chief Justice, argued on the day those cases were decided:

> "Our history and tradition teach and command that an accused may stand mute. The privilege means just that; not less than that. According to the

[2] This is not to say that, apart from the Fifth Amendment privilege, there might not be serious due process problems with physical compulsion applied to an individual's person to secure identifying evidence against his will. Cf. *Rochin* v. *California,* 342 U. S. 165 (1952). But cf. *Breithaupt* v. *Abram,* 352 U. S. 432 (1957).

> Court, an accused may be jailed—indefinitely—until he is willing to say, for an identifying audience, whatever was said in the course of the commission of the crime. Presumably this would include, 'Your money or your life'—or perhaps, words of assault in a rape case. This is intolerable under our constitutional system." *United States* v. *Wade,* 388 U. S., at 260.

See also *Gilbert* v. *California,* 388 U. S., at 291–292 (Fortas, J., concurring in part and dissenting in part).

I fear the Court's decisions today are further illustrations of the extent to which the Court has gone astray in defining the reach of the Fifth Amendment privilege and has lost touch with the Constitution's concern for the "inviolability of the human personality." In both these cases, the Government seeks to secure possibly incriminating evidence that can be acquired only with respondents' affirmative cooperation. Thus, even if I did not consider the Fourth Amendment to require affirmance of the decisions of the Court of Appeals, I would nevertheless find it extremely difficult to accept a reversal of those decisions in the face of what seems to me the proper construction of the Fifth Amendment privilege.

II

The Court concludes that the exemplars sought from the respondents are not protected by the Fourth Amendment because respondents have surrendered their expectation of privacy with respect to voice and handwriting by knowingly exposing these to the public, see *Katz* v. *United States,* 389 U. S. 347, 351 (1967). But, even accepting this conclusion, it does not follow that the investigatory seizures of respondents, accomplished through the use of subpoenas ordering them to appear before the grand jury—and thereby necessarily interfer-

ing with their personal liberty—are outside the protection of the Fourth Amendment. To the majority, though, "[i]t is clear that a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome." *Ante,* at 9. With due respect, I find nothing "clear" about so sweeping an assertion.

There can be no question that investigatory seizures effected by the police are subject to the constraints of the Fourth and Fourteenth Amendments. In *Davis* v. *Mississippi,* 394 U. S. 721, 727 (1969), the Court observed that only the Term before, in *Terry* v. *Ohio,* 392 U. S. 1, 19 (1968), it had rejected "the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.' " As a result, the Court held in *Davis* that investigatory seizures for the purpose of obtaining fingerprints are subject to the Fourth Amendment even though fingerprints themselves are not protected by that Amendment.[3] The Court now seems to distinguish *Davis* from the present cases, in part, on the ground that in *Davis* the authorities engaged in a lawless dragnet of a large number of Negro youths. Certainly, the peculiarly offensive exercise of investigatory powers in *Davis* heightened the Court's sensitivity to the dangers inherent in Mississippi's argument that the Fourth Amendment was not applicable to investigatory seizures. But the presence of a dragnet was not the constitutional determinant there; rather, it was police interference with the petitioner's own liberty that brought the Fourth and Four-

[3] We left open the further question whether such an investigatory seizure might, under certain circumstances, be made on information insufficient to establish probable cause to arrest. See 394 U. S., at 727–728.

teenth Amendments into play, as should be evident from the Court's substantial reliance on *Terry,* which involved no dragnet.

Like *Davis,* the present cases involve official investigatory seizures that interfere with personal liberty. The Court considers dispositive, however, the fact that the seizures were effected by the grand jury, rather than the police. I cannot agree.

First, in *Hale* v. *Henkel,* 201 U. S. 43, 76 (1906), the Court held that a subpoena *duces tecum* ordering "the production of books and papers [before a grand jury] may constitute an unreasonable search and seizure within the Fourth Amendment," and on the particular facts of the case, it concluded that the subpoena was "far too sweeping in its terms to be regarded as reasonable." Considered alone, *Hale* would certainly seem to carry a strong implication that a subpoena compelling an individual's personal appearance before a grand jury, like a subpoena ordering the production of private papers, is subject to the Fourth Amendment standard of reasonableness. The protection of the Fourth Amendment is not, after all, limited to personal "papers," but extends also to "persons," "houses," and "effects." It would seem a strange hierarchy of constitutional values that would afford papers more protection from arbitrary governmental intrusion than people.

The Court, however, offers two interrelated justifications for excepting grand jury subpoenas directed at "persons," rather than "papers," from the constraints of the Fourth Amendment. These are a "historically grounded obligation of every person to appear and give his evidence before the grand jury," *ante,* at 9–10, and the relative unintrusiveness of the grand jury subpoena on an individual's liberty.

In my view, the Court makes more of history than is justified. The Court treats the "historically grounded

obligation" which it now discerns as extending to all "evidence," whatever its character. Yet, so far as I am aware, the obligation "to appear and give evidence" has heretofore been applied by this Court only in the context of testimonial evidence, either oral or documentary. Certainly the decisions relied upon by the Court, despite some dicta, have not recognized an obligation of a broader sweep.

Blair v. *United States,* 250 U. S. 273, 281 (1919), indicated only that "the giving of *testimony* and the attendance upon court or grand jury in order to *testify* are public duties which every person . . . is bound to perform upon being properly summoned . . . ." (Emphasis added.) Similarly, just last Term, the Court reaffirmed only that "[t]he power of government to compel persons to *testify* in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence"—nothing more. *Kastigar* v. *United States,* 406 U. S. 441, 443 (1972) (emphasis added). And, Mr. Chief Justice Hughes described "one of the duties which the citizen owes to his government" to be that of "attending its courts and giving his *testimony* whenever he is properly summoned. . . ." *Blackmer* v. *United States,* 284 U. S. 421, 438 (1932). (Emphasis added.) In short, history, at least insofar as heretofore reflected in this Court's cases, does not necessarily establish an obligation to appear before a grand jury for other than testimonial purposes. See *Branzburg* v. *Hayes,* 408 U. S. 665 (1972); *Ullmann* v. *United States,* 350 U. S. 422, 439 n. 15 (1956); *Piemonte* v. *United States,* 367 U. S. 556, 559 n. 2 (1961); *Wilson* v. *United States,* 221 U. S. 361, 372 (1911); *Hale* v. *Henkel,* 201 U. S., at 65. See also *United States* v. *Bryan,* 339 U. S. 323, 331 (1950); *Brown* v. *Walker,* 161 U. S. 591, 600 (1896); *Garland* v. *Torre,* 259 F. 2d 545, 549 (CA2), cert. denied, 358 U. S. 910 (1958).

In the present cases—as the Court itself argues in its discussion of the Fifth Amendment privilege—it was not testimony that the grand juries sought from respondents, but physical evidence. The Court glosses over this important distinction from its prior decisions, however, by artificially bifurcating its analysis of what is taking place in these cases—that is, by effectively treating what is done with individuals once they are before the grand jury as irrelevant in determining what safeguards are to govern the procedures by which they are initially compelled to appear. Nonetheless, the fact remains that the historic exception to which the Court resorts is not necessarily as broad as the context in which it is now employed. Hence, I believe that the question we must consider is whether an extension of that exception is warranted, and if so, under what conditions.

In approaching these questions, we must keep in mind that "[t]his Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment '. . . are to be regarded as of the very essence of constitutional liberty . . . .'" *Harris* v. *United States,* 331 U. S. 145, 150 (1947). As a rule, the Amendment stands as an essential bulwark against arbitrary and unreasonable governmental intrusion—whatever its form, whatever its purpose, see, *e. g., Camara* v. *Municipal Court,* 387 U. S. 523 (1967)—upon the privacy and liberty of the individual, see, *e. g., Terry* v. *Ohio,* 392 U. S., at 9; *Jones* v. *United States,* 362 U. S. 257, 261 (1960). Given the central role of the Fourth Amendment in our scheme of constitutional liberty, we should not casually assume that governmental action which may result in interference with individual liberty is excepted from its requirements. Cf. *Coolidge* v. *New Hampshire,* 403 U. S. 443, 455 (1971); *Katz* v. *United States,* 389 U. S., at 357; *Camara* v. *Municipal Court, supra,* at 528–529. The reason for any exception

to the coverage of the Amendment must be fully understood and the limits of the exception should be defined accordingly. To do otherwise would create a danger of turning the exception into the rule and lead to the "impairment of the rights for the protection of which [the Amendment] was adopted," *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 357 (1931); cf. *Grau* v. *United States,* 287 U. S. 124, 128 (1932).

The Court seems to reason that the exception to the Fourth Amendment for grand jury subpoenas directed at persons is justified by the relative unintrusiveness of the grand jury process on an individual's liberty. The Court, adopting Chief Judge Friendly's analysis in *United States* v. *Doe* (*Schwartz*), 457 F. 2d 895, 898 (CA2 1972), suggests that arrests or even investigatory "stops" are inimical to personal liberty because they may involve the use of force; they may be carried out in demeaning circumstances; and at least an arrest may yield the social stigma of a record. By contrast, we are told, a grand jury subpoena is a simple legal process that is served in an unoffensive manner; it results in no stigma; and a convenient time for appearance may always be arranged. The Court would have us believe, in short, that, unlike an arrest or an investigatory "stop," a grand jury subpoena entails little more inconvenience than a visit to an old friend. Common sense and practical experience indicate otherwise.

It may be that service of a grand jury subpoena does not involve the same potential for momentary embarrassment as does an arrest or investigatory "stop."[4] But this difference seems inconsequential in comparison to the substantial stigma that—contrary to the Court's assertion—may result from a grand jury appearance as well as from an arrest or investigatory seizure. Public

[4] But cf. *Davis* v. *Mississippi,* 394 U. S. 721, 727 (1969).

knowledge that a man has been summoned by a federal grand jury investigating, for instance, organized criminal activity can mean loss of friends, irreparable injury to business, and tremendous pressures on one's family life. Whatever nice legal distinctions may be drawn between police and prosecutor, on the one hand, and the grand jury, on the other, the public often treats an appearance before a grand jury as tantamount to a visit to the station house. Indeed, the former is frequently more damaging than the latter, for a grand jury appearance has an air of far greater gravity than a brief visit "downtown" for a "talk." The Fourth Amendment was placed in our Bill of Rights to protect the individual citizen from such potentially disruptive governmental intrusion into his private life unless conducted reasonably and with sufficient cause.

Nor do I believe that the constitutional problems inherent in such governmental interference with an individual's person are substantially alleviated because one may seek to appear at a "convenient time." In *Davis* v. *Mississippi*, 394 U. S., at 727, it was recognized that an investigatory detention effected by the police "need not come unexpectedly or at an inconvenient time." But this fact did not suggest to the Court that the Fourth Amendment was inapplicable; it was considered to affect, at most, the type of showing a State would have to make to justify constitutionally such a detention. *Ibid.* No matter how considerate a grand jury may be in arranging for an individual's appearance, the basic fact remains that his liberty has been officially restrained for some period of time. In terms of its effect on the individual, this restraint does not differ meaningfully from the restraint imposed on a suspect compelled to visit the police station house. Thus, the nature of the intrusion on personal liberty caused by a grand jury subpoena cannot, without more, be considered sufficient basis for denying

respondents the protection of the Fourth Amendment.

Of course, the Fourth Amendment does not bar all official seizures of the person, but only those that are unreasonable and are without sufficient cause. With this in mind, it is possible, at least, to explain, if not justify, the failure to apply the protection of the Fourth Amendment to grand jury subpoenas requiring individuals to appear and *testify*. Thus, while it is true that we have traditionally given the grand jury broad investigatory powers, particularly in terms of compelling the appearance of persons before it, see, *e. g., Branzburg* v. *Hayes,* 408 U. S., at 688, 701–702; *Blair* v. *United States,* 250 U. S., at 282, it must be understood that we have done so in heavy reliance on certain essential assumptions.

Certainly the most celebrated function of the grand jury is to stand between the government and the citizen and thus to protect the latter from harassment and unfounded prosecution. See, *e. g., Wood* v. *Georgia,* 370 U. S. 375, 390 (1962); *Hoffman* v. *United States,* 341 U. S. 479, 485 (1951); *Ex parte Bain,* 121 U. S. 1, 11 (1887). The grand jury does not shed those characteristics that give it insulating qualities when it acts in its investigative capacity. Properly functioning, the grand jury is to be the servant of neither the Government nor the courts, but of the people. *Hale* v. *Henkel,* 201 U. S., at 61. As such, we assume that it comes to its task without bias or self-interest. Unlike the prosecutor or policeman, it has no election to win or executive appointment to keep. The anticipated neutrality of the grand jury, even when acting in its investigative capacity, may perhaps be relied upon to prevent unwarranted interference with the lives of private citizens and to ensure that the grand jury's subpoena powers over the person are exercised in only a reasonable fashion. Under such circumstances, it may be justifiable to give the grand jury broad personal subpoena powers that are outside the purview

of the Fourth Amendment, for—in contrast to the police—it is not likely that it will abuse those powers.[5] Cf. *Costello* v. *United States,* 350 U. S. 359, 362 (1956); *Stirone* v. *United States,* 361 U. S. 212, 218 (1960).

Whatever the present day validity of the historical assumption of neutrality that underlies the grand jury process,[6] it must at least be recognized that if a grand jury is deprived of the independence essential to the assumption of neutrality—if it effectively surrenders that independence to a prosecutor—the dangers of excessive and unreasonable official interference with personal liberty are exactly those that the Fourth Amendment was intended to prevent. So long as the grand jury carries on its investigatory activities only through the mechanism of testimonial inquiries, the danger of such official usurpation of the grand jury process may not be unreasonably great. Individuals called to testify before the grand jury will have available their Fifth Amendment privilege against self-incrimination. Thus, at least insofar as incriminating information is sought directly from a particular criminal suspect,[7] the grand jury process would not appear to offer law enforcement officials a substantial advantage over ordinary investigative techniques.

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[5] When the grand jury does overstep its power and acts maliciously, courts are certainly not totally without power to control it. See n. 9, *infra.*

[6] Indeed, the Court today acknowledges that "[t]he grand jury may not always serve its historic role as a protective bulwark." *Ante,* at 17.

[7] Of course, the grand jury does provide an important mechanism for investigating possible criminal activity through witnesses who may have first-hand knowledge of the activities of others. But, given the Fifth Amendment privilege, it does not follow that the grand jury is a useful mechanism for securing incriminating testimony from the suspect himself.

But when we move beyond the realm of a grand jury investigation limited to testimonial inquiries, as the Court does today, the danger increases that law enforcement officials may seek to usurp the grand jury process for the purpose of securing incriminating evidence from a particular suspect through the simple expedient of a subpoena. In view of the Court's Fourth Amendment analysis of the respondents' expectations of privacy concerning their handwriting and voice exemplars, and in view of the testimonial evidence limitation on the reach of the Fifth Amendment privilege, there is essentially no objection to be made once a suspect is before the grand jury and exemplars are requested. Thus, if the grand jury may summon criminal suspects for such purposes without complying with the Fourth Amendment, it will obviously present an attractive investigative tool to prosecutor and police. For what law enforcement officers could not accomplish directly themselves after our decision in *Davis* v. *Mississippi,* they may now accomplish indirectly through the grand jury process.

Thus, the Court's decisions today can serve only to encourage prosecutorial exploitation of the grand jury process, at the expense of both individual liberty and the traditional neutrality of the grand jury. Indeed, by holding that the grand jury's power to subpoena these respondents for the purpose of obtaining exemplars is completely outside the purview of the Fourth Amendment, the Court fails to appreciate the essential difference between real and testimonial evidence in the context of these cases, and thereby hastens the reduction of the grand jury into simply another investigative device of law enforcement officials. By contrast, the Court of Appeals, in proper recognition of these dangers, imposed narrow limitations on the subpoena power of the grand jury that are necessary to guard against unreasonable

official interference with individual liberty but that would not impair significantly the traditional investigatory powers of that body.

The Court of Appeals in *Mara,* No. 71–850, did not impose a requirement that the Government establish probable cause to support a grand jury's request for exemplars. It correctly recognized that "examination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual," since the very purpose of the grand jury process is to ascertain probable cause, see, *e. g., Blair* v. *United States,* 250 U. S., at 282; *Hendricks* v. *United States,* 223 U. S. 178, 184 (1912). 454 F. 2d 580, 584. Consistent with this Court's decision in *Hale* v. *Henkel,* the Court of Appeals ruled only that the request for physical evidence such as exemplars should be subject to a showing of reasonableness. See 201 U. S., at 76. This "reasonableness" requirement has previously been explained by this Court, albeit in a somewhat different context, to require a showing by the Government that: (1) "the investigation is authorized by Congress"; (2) the investigation "is for a purpose Congress can order"; (3) the evidence sought is "relevant"; and (4) the request is "adequate, but not excessive, for the purposes of the relevant inquiry." See *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 209 (1946). This was the interpretation of the "reasonableness" requirement properly adopted by the Court of Appeals. See 454 F. 2d, at 584–585. And, in elaborating on the requirement that the request not be "excessive," it added that the Government would bear the burden of showing that it was not conducting "a general fishing expedition under grand jury sponsorship." *Id.,* at 585.

These are not burdensome limitations to impose on the grand jury when it seeks to secure physical evidence,

such as exemplars, that has traditionally been gathered directly by law enforcement officials. The essence of the requirement would be nothing more than a showing that the evidence sought is relevant to the purpose of the investigation and that the particular grand jury is not the subject of prosecutorial abuse—a showing that the Government should have little difficulty making, unless it is in fact acting improperly. Nor would the requirement interfere with the power of the grand jury to call witnesses before it, to take their testimony, and to ascertain their knowledge concerning criminal activity. It would only discourage prosecutorial abuse of the grand jury process.[8] The "reasonableness" requirement would do no more in the context of these cases than the Constitution compels—protect the citizen from unreasonable and arbitrary governmental interference, and ensure that the broad subpoena powers of the grand jury which

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[8] It is, of course, true that a suspect may be called for the dual purposes of testifying and obtaining physical evidence. Obviously, his liberty would be interfered with merely as a result of appearing and testifying, a situation in which the Fourth Amendment has not heretofore been applied. But it does not follow that the application of the Fourth Amendment is inappropriate when a suspect is subpoenaed for these dual purposes. The application of the Fourth Amendment is necessary to discourage unreasonable use of the grand jury process by law enforcement officials. While the Fifth Amendment privilege at least contributes to that goal in the context of a subpoena intended to secure both testimonial and physical evidence, it is essential also to apply the Fourth Amendment when the suspect is requested to give physical evidence. Otherwise, subpoenaing suspects for the purpose of testifying would provide a simple guise by which law enforcement officials might secure physical evidence without complying with the Fourth Amendment, and thus the deterrent effect on such officials sought by applying the Amendment to grand jury subpoenas seeking physical evidence would be lost.

the Court now recognizes are not turned into a tool of prosecutorial oppression.[9]

In *Dionisio*, No. 71–229, the Government has never made any showing that would establish the "reasonableness" of the grand jury's request for a voice sample. In *Mara*, No. 71–850, the Government submitted an affidavit to the District Court to justify the request for the handwriting and printing exemplars. But it was not sufficient to meet the requirements set down by the Court of Appeals. See 454 F. 2d, at 584–585. Moreover, the affidavit in *Mara* was reviewed by the District Court *in camera* in the absence of respondent Mara and his counsel. Such *ex parte* procedures should be the exception, not the rule.

> "Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment . . . demands." [10] *Alderman* v. *United States*, 394 U. S. 165, 184 (1969).

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[9] It may be that my differences with the Court are not as great as may first appear, for despite the Court's rejection of the applicability of the Fourth Amendment to grand jury subpoenas directed at "persons," it clearly recognizes that abuse of the grand jury process is not outside a court's control. See *ante*, at 11–12. Besides the Fourth Amendment, the First Amendment and both the Due Process Clause and the privilege against compulsory self-incrimination contained in the Fifth Amendment erect substantial barriers to "the transformation of the grand jury into an instrument of oppression." *Ante*, at 12. See also *Hale* v. *Henkel*, 201 U. S., at 65; *United States* v. *Doe* (*Schwartz*), 457 F. 2d 895, 899.

[10] As the Court of Appeals observed:

"[D]ifficulties of locating a suspect or possessor of evidence, the problems of apprehension, the destructibility of evidence, the need for promptness to protect the public against violence and to prevent

See also *Dennis* v. *United States*, 384 U. S. 855, 873–875 (1966). Consequently, I agree with the Court of Appeals that the reasonableness of a request for an exemplar should be tested in an adversary context.[11]

I would, therefore, affirm the Court of Appeals' decisions reversing the judgments of contempt against respondents and order the cases remanded to the District Court to allow the Government an opportunity to make the requisite showing of "reasonableness" in each case. To do less is to invite the very sort of unreasonable governmental intrusion on individual liberty that the Fourth Amendment was intended to prevent.

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repetition of criminal conduct necessitate the *ex parte* nature of the warrant issuance proceeding." 454 F. 2d 580, 583.

But these considerations do not apply in the context of a grand jury request for exemplars. Nevertheless, the Government contends that the traditional secrecy of the grand jury process dictates that any preliminary showing required of it should be made in an *ex parte, in camera* proceeding. However, the interests served by the secrecy of the grand jury process can be adequately protected without such a drastic measure. *Id.*, at 584.

[11] The Court suggests that any sort of showing that might be required of the Government in cases such as these "would saddle a grand jury with minitrials" and "would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *Ante*, at 17. But constitutional rights cannot be sacrificed simply for expedition and simplicity in the administration of the criminal laws. Moreover, a requirement that the Government establish the "reasonableness" of the request for an exemplar would hardly be so burdensome as the Court suggests. As matters stand, if the suspect resists the request, the Government must seek a judicial order directing that he comply with the request. Thus, a formal judicial proceeding is already necessary. The question whether the request is "reasonable" would simply be one further matter to consider in such a proceeding.

UNITED STATES *v.* GLAXO GROUP LTD. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 71–666. Argued November 9, 1972—Decided January 22, 1973

Appellees, Imperial Chemical Industries Ltd. and Glaxo Group Ltd., British drug companies engaged in the manufacture and sale of the fungicide griseofulvin, pooled their bulk- and dosage-form patents and sublicensed certain firms in the United States to practice the patents. The pooling agreement contained a covenant to restrict bulk sales and resales, and sublicensing agreements prohibited bulk resales to third parties without the licensors' prior consent. The United States filed a civil antitrust suit against appellees to restrain alleged violations of § 1 of the Sherman Act, and the Government also attacked the validity of the dosage-form patents, and sought the relief of mandatory, nondiscriminatory bulk-form sales and reasonable-royalty licensing of the patents. The District Court held that bulk-sales restrictions were *per se* violations of § 1 and enjoined their future use, but refused the Government's request to order mandatory, nondiscriminatory sales of the bulk form of the drug and reasonable-royalty licensing of appellees' patents as part of the relief. The court also refused to entertain the Government's claim of patent invalidity, since appellees did not rely on their patents in defense of the antitrust claims. *Held:*

1. Where patents are directly involved in antitrust violations and the Government presents a substantial case for relief in the form of restrictions on the patents, the Government may challenge the validity of the patents regardless of whether the owner relies on the patents in defending the antitrust action. Pp. 57–60.

2. In order to "pry open to competition" the market closed by the antitrust violations, an order for mandatory, nondiscriminatory sales to all bona fide applicants is appropriate relief, and where, as in this case, the manufacturer may choose not to make bulk-form sales, and the licensees are not bound by the court's order for mandatory sales, further relief in the form of reasonable-royalty licensing of the patents is also proper. Pp. 60–64.

328 F. Supp. 709, reversed; see also 302 F. Supp. 1.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, MARSHALL, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion in which STEWART and BLACKMUN, JJ., joined, *post,* p. 64.

Deputy Solicitor General Friedman argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Kauper, Acting Assistant Attorney General Comegys, Wm. Terry Bray, Howard E. Shapiro,* and *Richard H. Stern.*

Henry P. Sailer argued the cause for appellee Glaxo Group Ltd. With him on the brief was *Francis D. Thomas, Jr. Sigmund Timberg* argued the cause for appellee Imperial Chemical Industries, Ltd. With him on the brief were *Paul N. Kokulis* and *Lawrence A. Hymo.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The United States appeals pursuant to § 2 of the Expediting Act, as amended, 62 Stat. 989, 15 U. S. C. § 29, from portions of a decision by the United States District Court for the District of Columbia in a civil antitrust suit. We are asked to decide whether the Government may challenge the validity of patents involved in illegal restraints of trade, when the defendants do not rely upon the patents in defense of their conduct, and whether the District Court erred in refusing certain relief requested by the Government.

I

Appellees, Imperial Chemical Industries Ltd. (ICI) and Glaxo Group Ltd. (Glaxo), are British drug companies engaged in the manufacture and sale of griseofulvin. Griseofulvin is an antibiotic compound that may be cut with inert ingredients and adminis-

tered orally in the form of capsules or tablets to humans or animals for the treatment of external fungus infections. There is no substitute for dosage-form griseofulvin in combating certain infections. Griseofulvin itself is unpatented and unpatentable. ICI owns various patents on the dosage form of the drug.[1] Glaxo owns various patents on a method for manufacturing the drug in bulk form, as well as a patent on the finely ground, "microsize" dosage form of the drug.[2]

On April 26, 1960, ICI and Glaxo entered into a formal agreement pooling their griseofulvin patents. At the time of the execution of the agreement, ICI held patents on the dosage form of the drug, and Glaxo held bulk-form manufacturing patents. Pursuant to the agreement, ICI acquired the right to manufacture bulk-form griseofulvin under Glaxo's patents, to sell bulk-form griseofulvin, and to sublicense under Glaxo's patents. Glaxo was authorized to manufacture dosage-form griseofulvin and to sublicense under ICI's patents. As part of the agreement, ICI undertook "not to sell and to use its best endeavors to prevent its subsidiaries and associates from selling any griseofulvin in bulk to any independent third party without Glaxo's express consent in writing."

Subsequent to the pooling of the griseofulvin patents, ICI granted a sublicense to American Home Products

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[1] Specifically at issue in the present litigation is U. S. Patent No. 2,900,304, issued August 18, 1959. The patent embodies two types of claims—(1) a method of curing humans or animals of external fungus diseases by administering "an effective amount of griseofulvin" to them internally and (2) a capsule, tablet, or pill containing an effective amount of griseofulvin.

[2] Specifically at issue in the present litigation is U. S. Patent No. 3,330,727, issued July 11, 1967. This patent covers the improved (finely ground or "microsize") dosage form of griseofulvin. This form has proved more effective and more marketable than other dosage forms of the drug.

Corp. (AMHO), ICI's exclusive distributor in the United States. ICI agreed to sell bulk-form griseofulvin to AMHO. AMHO was authorized to process the bulk form into dosage form and to sell the drug in that form. With respect to bulk sales the agreement stated: "You [AMHO] will not, without first obtaining our [ICI's] consent, resell, or redeliver in bulk supplies of griseofulvin." Glaxo had previously entered into similar sublicensing agreements with two United States companies—Schering Corp. (Schering) and Johnson & Johnson (J & J). The agreements contained a covenant on the part of the licensees "not to sell or to permit its Affiliates to sell any griseofulvin in bulk to any independent third party without Glaxo's express consent in writing." [3]

On March 4, 1968, the United States filed a civil antitrust suit against ICI and Glaxo, pursuant to § 4 of the Sherman Act, 15 U. S. C. § 4, to restrain alleged violations of § 1 of the Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. The Government charged that the restrictions on the sale and resale of bulk-form griseofulvin, contained in the 1960 ICI-Glaxo agreement and the various sublicensing agreements, were unreasonable restraints of trade. The Government also challenged the validity of ICI's dosage-form patent.[4]

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[3] Although AMHO, Schering, and J & J could have manufactured bulk-form griseofulvin under Glaxo's patents, in practice they purchased the bulk form of the drug from ICI and Glaxo and themselves performed the processes to convert the drug to dosage form.

[4] See, *supra,* n. 1. The Government contended that the "method" portion of the patent did not disclose how to practice the invention in that it failed to specify what is an "effective amount" of the drug. See 35 U. S. C. § 112. The Government also argued that ICI's product claims were invalid because the dosage form that they covered did not specify an "effective amount" of the drug, did not specify the diseases that could be cured, and claimed a patent monopoly over a substance long in the public domain. See 35 U. S. C. §§ 100 and 101.

The District Court, citing this Court's decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967), held that the bulk-sales restrictions contained in the ICI-AMHO agreement were *per se* violations of § 1 of the Sherman Act.[5] 302 F. Supp. 1 (DC 1969). Because ICI had filed an affidavit disclaiming any desire to rely on its patent in defense of the antitrust claims, the District Court struck the claims of patent invalidity from the Government's complaint, ruling that the Government could not challenge ICI's patent when it was not relied upon as a defense to the antitrust claims. The District Court also denied the Government's motion to amend its complaint to allege the invalidity of Glaxo's patent on "microsize" griseofulvin.[6]

Subsequently, in separate, unreported orders, the bulk-sales restrictions in the Glaxo-J & J, the Glaxo-Schering, and the Glaxo-ICI agreements were found to be *per se* violations of § 1. The court enjoined future use of the bulk-sales restrictions, but refused the Government's request to order mandatory, nondiscriminatory sales of the bulk form of the drug and reasonable-royalty licensing of the ICI and Glaxo patents as part of the relief. 328 F. Supp. 709 (DC 1971). The United States took a direct appeal under the Expediting Act and we noted probable jurisdiction. 405 U. S. 914.

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[5] The case was decided on the basis of various motions concerning the merits and the relief. Testimony was not received; the facts were developed in affidavits, exhibits, and interrogatories accompanying the motions.

[6] See n. 2. The Government had sought to challenge the patent on the basis that the patent purported to monopolize a product long in the public domain, on the basis of prior disclosure, and on the basis of prior public use. See 35 U. S. C. §§ 100, 101, 102 (a), 102 (b).

II

The major issue before us is whether the District Court erred in ruling that the United States could challenge the validity of a patent in the course of prosecuting an antitrust action only when the patent is relied on as a defense, which was not the case here. We agree with the United States that this was an unduly narrow view of the controlling cases.

United States v. *Bell Telephone Co.*, 167 U. S. 224 (1897), acknowledged prior decisions permitting the United States to sue to set aside a patent for fraud or deceit associated with its issuance, but held that the federal courts should not entertain suits by the Government "to set aside a patent for an invention on the mere ground of error of judgment on the part of the patent officials," at least where the United States "has no proprietary or pecuniary [interest] in the setting aside of the patent [and] is not seeking to discharge its obligations to the public . . . ." 167 U. S., at 269, 265. Subsequently, *United States* v. *United States Gypsum Co.*, 333 U. S. 364 (1948), referred to *Bell Telephone* as holding that the United States was "without standing to bring a suit in equity to cancel a patent on the ground of invalidity," *id.*, at 387, but went on to declare that, to vindicate the public interest in enjoining violations of the Sherman Act, the United States is entitled to attack the validity of patents relied upon to justify anticompetitive conduct otherwise violative of the law. The Court noted that, because of the public interest in free competition, it had repeatedly held that the private licensee-plaintiff in an antitrust suit may attack the validity of the patent under which he is licensed even though he has agreed not to do so in his license. The authorities for this proposition were *Sola Electric Co.* v. *Jefferson Electric*

Co., 317 U. S. 173 (1942); *Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.*, 329 U. S. 394 (1947); and *MacGregor* v. *Westinghouse Electric & Mfg. Co.*, 329 U. S. 402 (1947). The essence of those cases is best revealed in *Katzinger* where the Court held that, although a patent licensee (under the then-controlling law) was normally foreclosed from questioning the validity of a patent he is privileged to use, the bar is removed when he alleges conduct by the patentee that would be illegal under the antitrust laws, absent the patent. The licensee was free to challenge the patent in these circumstances because the "federal courts must, in the public interest, keep the way open for the challenge of patents which are utilized for price-fixing . . . ." *Id.*, at 399. *Katzinger* and *Gypsum* were much in the tradition of *Pope Mfg. Co.* v. *Gormully*, 144 U. S. 224, 234 (1892): "It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly . . . ," a view most recently echoed in *Lear, Inc.* v. *Adkins*, 395 U. S. 653, 670 (1969).

We think that the principle of these cases is sufficient authority for permitting the Government to raise and litigate the validity of the ICI-Glaxo patents in this antitrust case. According to the record, appellees had issued licenses under their patents that unreasonably restrained trade by prohibiting the licensees from selling or reselling bulk-form griseofulvin and had included in the pooling agreement a covenant to impose such restrictions on licensees. These charges were sustained, the court concluding that the covenant and the patent license provisions were *per se* restraints of trade in the griseofulvin product market.

The District Court was then faced with the Government's attack on the pertinent patents as well as its

demand for mandatory sales and reasonable-royalty licensing, the latter being well-established forms of relief when necessary to an effective remedy, particularly where patents have provided the leverage for or have contributed to the antitrust violation adjudicated. See for example, *Besser Mfg. Co.* v. *United States,* 343 U. S. 444 (1952); *United States* v. *United States Gypsum Co.,* 340 U. S. 76 (1950); *International Salt Co.* v. *United States,* 332 U. S. 392 (1947); *Hartford-Empire Co.* v. *United States,* 323 U. S. 386 (1945). Appellees opposed mandatory sales and compulsory licensing, asserting that the Government would "deny defendants an essential ingredient of their rights under the patent system," and that there was no warrant for "such a drastic forfeiture of their rights." In this context, where the court would necessarily be dealing with the future enforceability of the patents, we think it would have been appropriate, if it appeared that the Government's claims for further relief were substantial, for the court to have also entertained the Government's challenge to the validity of those patents.

In arriving at this conclusion, we do not recognize unlimited authority in the Government to attack a patent by basing an antitrust claim on the simple assertion that the patent is invalid. Cf. *Walker Process Equipment* v. *Food Machinery & Chemical Corp.,* 382 U. S. 172 (1965). Nor do we invest the Attorney General with a roving commission to question the validity of any patent lurking in the background of an antitrust case. But the district courts have jurisdiction to entertain and decide antitrust suits brought by the Government and, where a violation is found, to fashion effective relief. This often involves a substantial question as to whether it is necessary to limit the rights normally vested in the owners of patents, which in itself can be a complex

and difficult issue. The litigation would usually proceed on the assumption that valid patents are involved, but if this basic assumption is itself challenged, we perceive no good reason, either in terms of the patent system or of judicial administration, for refusing to hear and decide it.

The District Court, therefore, erred in striking the allegations of the Government's complaint dealing with the patent validity issue and in refusing to permit the Government to amend its complaint with respect to this issue. On remand, the District Court should consider the validity of the ICI dosage-form patent and the Glaxo microsize patent.

III

The question remains whether the Government's case for additional relief was sufficient to provide the appropriate predicate for a consideration of its challenge to the validity of these patents. For this purpose, as we have said, its case need not be conclusive, but only substantial enough to warrant the court's undertaking what could be a large inquiry, one which could easily obviate other questions of remedy if the patent is found invalid and which, if the patent is not invalidated, would lend substance to a defendant's claim that a valid patent should not be limited, absent the necessity to provide effective relief for an antitrust violation to which the patent has contributed. Here, we think not only that the United States presented a substantial case for additional relief, but that it was sufficiently convincing that the District Court, wholly aside from the question of patent validity, should have ruled favorably on the demand for mandatory sales and compulsory licensing.

In the first place, it is clear from the evidence that the ICI dosage-form patent, along with other ICI and Glaxo patents, gave the appellees the economic leverage with which to insist upon and enforce the bulk-sales

restrictions imposed on the licensees.[7] Glaxo apparently considered the bulk-sales restriction to be a prerequisite to the granting of a sublicense, for it rejected a draft of the ICI-AMHO agreement because, among other things, it would have permitted AMHO to sell griseofulvin in bulk form. There are indications, also, that Glaxo refused a sublicense to others than Schering and J & J because of fears that the companies would sell in bulk form or pressure Glaxo to allow such sales. The

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[7] The Government argued in the District Court:

"We submit that [*United States* v.] *Gypsum* [333 U. S. 364 (1948)] should be understood more broadly to support challenge to any patent used by antitrust defendants in furtherance of their illegal program. The importance of the Imperial patent to the defendants' scheme to violate the antitrust laws is plain. It was, according to ICI's contentions, the reason for the patent pool agreement in the first place; Glaxo's grant of rights to ICI was paid for with the Imperial patent. Without the Imperial patent the defendants could not maintain their monopoly in the United States over the drug, for then anyone who could secure bulk form griseofulvin could make it up into pills and sell them without a patent to stop him; bulk form griseofulvin is, as ICI points out, unpatented. The Imperial patent thus bolsters the effectiveness of the illegal restraint on alienation ICI imposes on the resale of bulk form griseofulvin: if a small drug company somehow manages to get the unpatented bulk form drug despite ICI's restraint on alienation designed to prevent it or anyone else from doing so, the defendants may still suppress the manufacture of the drug by threat of patent infringement suit. In this context, vindication of the public interest in competition in unpatentable goods is doubly important—for there is a double impediment to commerce—the patent and the conspiracy."

The Government, throughout its brief in this Court, emphasizes the importance of the patents to the antitrust violation.

"In cases like this, the patents involved generally are of major importance in furthering the allegedly unlawful patent licensing practices; they give the defendants the power which enables them to impose the restraints of trade. That is the situation here. The patents were essential to the appellees' scheme to violate the antitrust laws."

source of the patent-pooling agreement pursuant to which such licenses were permitted and which contained the bulk-sales restriction was simple: Glaxo needed the ICI dosage-form patent to assure its licensees the right to use the patent and sell in dosage form. Pooling permitted ICI to engage in bulk manufacture, and, in exchange, ICI imposed the bulk-sales restrictions upon its licensees. There can be little question that the patents involved here were intimately associated with and contributed to effectuating the conduct that the District Court held to be a *per se* restraint of trade in griseofulvin.

Secondly, we think that ICI and Glaxo should have been required to sell bulk-form griseofulvin on reasonable and nondiscriminatory terms and to grant patent licenses at reasonable-royalty rates to all bona fide applicants in order to "pry open to competition" the griseofulvin market that "has been closed by defendants' illegal restraints." *International Salt Co.*, 332 U. S., at 401.

The United States griseofulvin market consists of three wholesalers, all licensees of appellees, that account for nearly 100% of United States sales totaling approximately eight million dollars. Glaxo and ICI have never sold in bulk to others than the licensees and have prohibited bulk sales and resales by the licensees. In practice, the licensees have not manufactured griseofulvin under the bulk-form patents, preferring instead to purchase in bulk form from ICI and Glaxo. The licensees sell the drug in dosage and microsize form to retail outlets at virtually identical prices. The effect of appellees' refusal to sell in bulk and prohibition of such sales by the licensees has been that bulk griseofulvin has not been available to any but appellees' three licensees and that these three are the only sources of dosage-form griseofulvin in the United States.

There is little reason to think that the appellees or their licensees, now that the bulk-sales restrictions have been declared illegal, will begin selling in bulk. It is in

their economic self-interest to maintain control of the bulk form of the drug in order to keep the dosage-form, wholesale market competition-free. Bulk sales would create new competition among wholesalers, by enabling other companies to convert the bulk drug into dosage and microsize forms and sell to retail outlets, and would presumably lead to price reductions as the result of normal competitive forces. There is, in fact, substantial evidence in the record to the effect that other drug companies would not only have entered the market, had they been able to make bulk purchases, but also would have charged substantially lower wholesale prices for the dosage and microsize forms of the drug. Only by requiring the appellees to sell bulk-form griseofulvin on nondiscriminatory terms to all bona fide applicants will the dosage-form, wholesale market become competitive.

Relief in the form of compulsory sales may not, however, alone insure a competitive market. Glaxo and ICI could choose to discontinue bulk-form manufacturing or the sale of griseofulvin in bulk form. The patent licensees might then begin to practice the bulk-form manufacturing patents pursuant to the patent licenses to fill their needs for the bulk drug. The licensees, of course, are not parties to this action, and a mandatory-sales order would not affect them. They would not be required to make the economically less advantageous bulk sales. The bulk form of the drug would be controlled by the licensees, and the appellees, because they would be required under the Government's proposed relief to sell to all applicants only so long as they sell to any United States purchasers, could easily avoid the mandatory-sales requirement. Unless other American firms are licensed to manufacture griseofulvin, competition in the United States market will depend entirely upon appellees' willingness to continue to supply their present licensees with the bulk form of the drug.

This Court has repeatedly recognized that "[t]he framing of decrees should take place in the District rather than in Appellate Courts" and has generally followed the principle that district courts "are invested with large discretion to model their judgments to fit the exigencies of the particular case." *International Salt Co., supra,* at 400–401; accord, *Ford Motor Co.* v. *United States,* 405 U. S. 562, 573 (1972). The Court has not, however, treated that power as one of discretion, subject only to reversal for gross abuse, but has recognized "an obligation to intervene in this most significant phase of the case" when necessary to assure that the relief will be effective. *United States* v. *United States Gypsum Co.,* 340 U. S., at 89. Accordingly, we have ordered the affirmative relief that the District Court refused to implement. See, *e. g., United States* v. *United States Gypsum Co.* The purpose of relief in an antitrust case is "so far as practicable, [to] cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *Id.,* at 88. Mandatory selling on specified terms and compulsory patent licensing at reasonable charges are recognized antitrust remedies. See, *e. g., Besser Mfg. Co.* v. *United States,* 343 U. S. 444 (1952); *International Salt Co.* v. *United States,* 332 U. S. 392 (1947); *Hartford-Empire Co.* v. *United States,* 323 U. S. 386 (1945). The District Court should have ordered those remedies in this case.

To the extent indicated in this opinion, the judgment of the District Court is reversed.

So ordered.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN concur, dissenting.

The Court has undertaken to substitute its judgment for that of Congress in the initiation of novel procedures for the determination of patent validity, and in so doing

has blandly disregarded the procedural history of this case.

I

There is neither statutory nor case authority for the existence of a general right of either private individuals or the Government to collaterally challenge the validity of issued patents. In the Patent Act of 1790, Congress provided that private citizens could, upon motion alleging fraudulent procurement, prompt a district court to issue to a patentee an order to show cause why his letters patent should not be repealed.[1] A substantially identical provision was carried over in the Patent Act of 1793.[2] But the Patent Act of 1836 contained no provision for such individual actions although it increased the number of statutory defenses in infringement actions.[3] The effect of this omission was determined by *Mowry* v. *Whitney,* 14 Wall. 434 (1872), to be the preclusion of private actions to cancel patents, even when fraudulently procured.

As part of the rationale in *Mowry,* the Court reasoned that the equitable suit for cancellation of a patent because it was fraudulently procured was a substitute for the writ of *scire facias* and, accordingly, it should have the same limitations. In dictum, the Court stated: "The fraud, if one exists, has been practiced on the government, and as the party injured, it is the appropriate party to assert the remedy or seek relief." *Id.,* at 441. When the United States later sued to set aside two patents issued to Alexander Graham Bell subsequent to several pur-

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[1] 1 Stat. 109. For an excellent review of the history briefly summarized here, see Cullen & Vickers, Fraud in the Procurement of a Patent, 29 Geo. Wash. L. Rev. 110 (1960).

[2] 1 Stat. 318.

[3] 5 Stat. 117.

ported acts of fraud by him on the Patent Office, this Court relied heavily on the dictum in *Mowry, supra,* in recognizing the right of the Federal Government to sue for the cancellation of letters patent obtained by fraud:

> "That the government, authorized both by the Constitution and the statutes to bring suits at law and in equity, should find it to be its duty to correct this evil, to recall these patents, to get a remedy for this fraud, is so clear that it needs no argument . . . ." *United States* v. *Bell Telephone Co.,* 128 U. S. 315, 370 (1888) (*Bell I*).

The Government asserts that the breadth of this holding was established in the dictum in *United States* v. *Bell Telephone Co.,* 159 U. S. 548 (1895) (*Bell II*), wherein the Court upheld its appellate jurisdiction in such patent cancellation cases. There, it was stated:

> "In *United States* v. *Telephone Company,* [128 U. S. 315], it was decided that where a patent for a grant of any kind issued by the United States has been obtained by fraud, by mistake or by accident, a suit by the United States against the patentee is the proper remedy for relief, and that in this country, where there is no kingly prerogative but where patents for land and inventions are issued by the authority of the government, and by officers appointed for that purpose who may have been imposed upon by fraud or deceit, or may have erred as to their power, or made mistakes in the instrument itself, the appropriate remedy is by proceedings by the United States against the patentee." *Id.,* at 555.

But in *United States* v. *Bell Telephone Co.,* 167 U. S. 224 (1897) (*Bell III*), the Court characterized the above-quoted language as a "general statement" of the power

of the Government to maintain a suit and, again in dictum, limited its effect, saying:

> "But while there was thus rightfully affirmed the power of the Government to proceed by suit in equity against one who had wrongfully obtained a patent for land or for an invention, there was no attempt to define the character of the fraud, or deceit or mistake, or the extent of the error as to power which must be established before a decree could be entered cancelling the patent. It was not affirmed that proof of any fraud, or deceit, or the existence of any error on the part of the officers as to the extent of their power, or that any mistake in the instrument was sufficient to justify a decree of cancellation. Least of all was it intended to be affirmed that the courts of the United States, sitting as courts of equity, could entertain jurisdiction of a suit by the United States to set aside a patent for an invention on the mere ground of error of judgment on the part of the patent officials. That would be an attempt on the part of the courts in collateral attack to exercise an appellate jurisdiction over the decisions of the Patent Office, although no appellate jurisdiction has been by the statutes conferred. . . ." *Id.*, at 269.

The plain import of the *Bell* cases is that the authority of the Government to bring an independent action to cancel a patent is confined to the traditional equitable grounds of fraud, mistake, and deceit. The Government makes two arguments to support its position that it should not be as limited here. It contends that since this is an antitrust action, its right to attack the validity of the patent is established by the rationale of *United States* v. *United States Gypsum Co.*, 333 U. S. 364 (1948), and is therefore not subject to the limitations of *Bell III*. Alternatively, it argues that *Bell III* has been so under-

cut by subsequent decisions, including *Gypsum,* that it should no longer be followed.

In *Gypsum Co., supra,* the Court stated in "deliberate *dicta*" that the Government may challenge the validity of a patent which has been asserted by an antitrust defendant to be a defense to the Government's claim of antitrust violations. It reasoned that in a suit to vindicate the public interest by enjoining violations of the Sherman Act, the United States should have the opportunity, similar to that afforded licensees in an action for royalties, to show that an asserted shield of patentability does not exist. *Id.,* at 386–388.

The *Bell* cases enunciate the range of the Government's authority, quite independent of any other litigation it may have with a patentee, to attack a governmental grant from the Patent Office obtained by the sort of fraud or mistake there described. The *Gypsum* doctrine, on the other hand, sprang from the right of the Government as a civil plaintiff under the antitrust laws to assert the invalidity of a patent grant set up as a defense to its civil complaint. Since a private licensee may attack the validity of a patent that is made the basis of an action against him for royalties, the Government should, equally, have the right to attack a patent that is set up as a defense by the patentee in the Government's action.

The Government's claim here essentially falls between these two limited grants of authority. A claim of lack of patentability, without more, is not within the Government's authority *qua* government to set aside a patent for fraud or mistake. And since the decision of the merits of the Government's claim of antitrust violation against these appellees in no way required the court to determine the validity of their patents, the reasoning of *Gypsum* is not applicable. The Government may, therefore, prevail only if we are to blur the distinction between

these separate grants of authority, and extend such authority to circumstances that are within the rationale of neither.

Certainly, it is true, as the Court states, that there is a public interest favoring the judicial testing of patent validity and the invalidation of specious patents. See, *e. g., Blonder-Tongue* v. *University Foundation,* 402 U. S. 313, 343–344 (1971); *Lear, Inc.* v. *Adkins,* 395 U. S. 653, 657, 664 (1969). For when a patent is invalid, "the public parts with the monopoly grant for no return, the public has been imposed upon and the patent clause subverted." *United States* v. *Singer Mfg. Co.,* 374 U. S. 174, 197, 199–200 (1963) (WHITE, J., concurring).

Significant recognition is given to this interest by both the *Bell* and *Gypsum* doctrines. Additional authority resides in the Government to obtain judicially decreed restrictions on patent monopoly in appropriate cases where the defendant's antitrust violations have consisted, at least in part, of patent misuse. *International Salt Co.* v. *United States,* 332 U. S. 392 (1947); *Hartford-Empire Co.* v. *United States,* 323 U. S. 386 (1945); *Morton Salt Co.* v. *G. S. Suppiger Co.,* 314 U. S. 488 (1942). But the sort of roving commission that the majority now authorizes whereby the Government may request a court to invalidate any patent owned by an antitrust defendant that in any way related to the factual background of the claimed antitrust violation cannot be regarded as a reasonably necessary extension of any of these principles. It is, therefore, more properly the creature of statute than of judicial innovation.

II

Although the Court purports to limit its holding to avoid giving the Government such a roving commission, the range of the new authority is pointed up by the facts in this case.

The Government submitted its case to the District Court in three motions for partial summary judgment on the very narrow issue that the vertical restrictions on the resale of bulk-form griseofulvin constituted *per se* violations of the antitrust laws under the *Schwinn* doctrine.[4] *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967). Although common bulk-form griseofulvin is the subject of a British manufacturing patent owned by Glaxo, it is neither patented nor patentable in the United States.

The two patents that this Court is now authorizing the Government to challenge bear no relationship whatsoever to the illegal restraint found. The ICI patent relates only to the dosage form of the drug. The majority states that "it is clear from the evidence that the ICI dosage-form patent . . . gave the appellees the economic leverage with which to insist upon and enforce the bulk-sales restrictions imposed on the licensees." *Ante*, at 60–61. But no such evidence was submitted in the Government's statement of undisputed facts that accompanied its motions for partial summary judgment on the restraint-of-alienation issue. And no such fact was included in the District Court's findings of undisputed or ultimate facts. The District Court found precisely the opposite:

> "Plaintiff has not shown on this record that defendants' current licensing practices are related to the adjudged antitrust violation nor are they methods to circumvent the prohibition of restraints on resale. . . ." 328 F. Supp. 709, 713.

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[4] The majority inaccurately states that the lower court sustained the allegations in the complaint that appellees had unreasonably restrained trade by prohibiting the licensee from selling or reselling bulk-form griseofulvin. In fact, the District Court only found that the restraint on reselling bulk-form griseofulvin constituted the *per se* antitrust violations found.

Since the Court's factual assumption as to economic leverage is completely contrary to the finding of the District Court, presumably the Court without saying so is holding that finding to be clearly erroneous. Yet the only support for such a holding, to which the Court refers, is an unverified statement contained in the Government's argument to the District Court on this issue. While the Government has an impressive batting average in this Court as an antitrust litigant, it has not heretofore had the benefit of having unverified assertions of its counsel treated as being of sufficient evidentiary weight to upset a considered factual finding of the District Court in which that argument was made. Nothing in the antitrust laws or in the Federal Rules of Civil Procedure exempts the Government from having to make its case in the trial court in the same manner as any other litigant. The Court's conclusion that there "can be little question that the patents involved here were intimately associated with and contributed to effectuating the conduct that the District Court held to be a *per se* restraint of trade in griseofulvin," *ante,* at 62, is thus reached only by a substantial departure from the settled usages of appellate review.

Similarly, the other patent which the Government may now have declared invalid was not even granted until 1967, and it, too, relates to the dosage form of the drug. Since the restraints on alienation were imposed in the early 1960's, there cannot be a plausible contention that it in any way provided "economic leverage" for the antitrust violations. And there was no other proof of its relationship to the bulk-form market and the antitrust violations.[5] Thus, the scope of the new authority ex-

[5] This total lack of proof of any relationship also defeats for me the granting of compulsory licensing of the United States patents. Compulsory licensing is a recognized remedy in patent misuse cases, see, *e. g., International Salt Co.* v. *United States,* 332 U. S. 392

tends to any patent that happens to be present in a patent-licensing agreement that contains a restraint on alienation in a different market, regardless of its relationship to such restraint.

Since there is no congressional authorization for the challenge by the Government to the validity *vel non* of patents without regard to the relationship to antitrust violations, and since there was no proved relationship between these violations and the patents in question, I would affirm the judgment and orders of the District Court. I therefore dissent.

(1947), *Hartford-Empire Co.* v. *United States,* 323 U. S. 386 (1945), but here the District Court specifically found there was no patent misuse or other abuse of patent rights.

Syllabus

ENVIRONMENTAL PROTECTION AGENCY ET AL. *v.* MINK ET AL.

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

No. 71–909. Argued November 9, 1972—Decided January 22, 1973

Respondent Members of Congress brought suit under the Freedom of Information Act of 1966 to compel disclosure of nine documents that various officials had prepared for the President concerning a scheduled underground nuclear test. All but three were classified as Top Secret or Secret under E. O. 10501, and petitioners represented that all were inter-agency or intra-agency documents used in the Executive Branch's decisionmaking processes. The District Court granted petitioners' motion for summary judgment on the grounds that each of the documents was exempt from compelled disclosure by 5 U. S. C. § 552 (b)(1) (hereafter Exemption 1), excluding matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," and § 552 (b)(5) (hereafter Exemption 5), excluding "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." The Court of Appeals reversed, concluding (a) that Exemption 1 permits nondisclosure of only the secret portions of classified documents but requires disclosure of the nonsecret components if separable, and (b) that Exemption 5 shields only governmental "decisional processes" and not factual information unless "inextricably intertwined with policy-making processes." The District Court was ordered to examine the documents *in camera* to determine both aspects of separability. *Held:*

1. Exemption 1 does not permit compelled disclosure of the six classified documents or *in camera* inspection to sift out "non-secret components," and petitioners met their burden of demonstrating that the documents were entitled to protection under that exemption. Pp. 79–84.

2. Exemption 5 does not require that otherwise confidential documents be made available for a district court's *in camera* inspection regardless of how little, if any, purely factual material they contain. In implying that such inspection be automatic, the Court of Appeals order was overly rigid; and petitioners should be afforded the opportunity of demonstrating by means short of

in camera inspection that the documents sought are clearly beyond the range of material that would be available to a private party in litigation with a Government agency. Pp. 85–94.

150 U. S. App. D. C. 233, 464 F. 2d 742, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed a concurring opinion, *post*, p. 94. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 95. DOUGLAS, J., filed a dissenting opinion, *post*, p. 105. REHNQUIST, J., took no part in the consideration or decision of the case.

Assistant Attorney General Cramton argued the cause for petitioners. With him on the briefs were *Solicitor General Griswold, Acting Assistant Attorney General Wood, Harry R. Sachse, Walter H. Fleischer,* and *William Kanter.*

Ramsey Clark argued the cause and filed a brief for respondents.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The Freedom of Information Act of 1966, 5 U. S. C. § 552, provides that Government agencies shall make available to the public a broad spectrum of information, but exempts from its mandate certain specified categories of information, including matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," § 552 (b)(1), or are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," § 552 (b)(5). It is the construction and scope of these exemptions that are at issue here.

*Briefs of *amici curiae* urging affirmance were filed by *Norman Dorsen, Melvin L. Wulf,* and *Sanford Jay Rosen* for the American Civil Liberties Union, and by *Marvin M. Karpatkin* and *Michael N. Pollet* for the Consumers Union of United States, Inc.

I

Respondents' lawsuit began with an article that appeared in a Washington, D. C., newspaper in late July 1971. The article indicated that the President had received conflicting recommendations on the advisability of the underground nuclear test scheduled for that coming fall and, in particular, noted that the "latest recommendations" were the product of "a departmental under-secretary committee named to investigate the controversy." Two days later, Congresswoman Patsy Mink, a respondent, sent a telegram to the President urgently requesting the "immediate release of recommendations and report by inter-departmental committee . . . ." When the request was denied, an action under the Freedom of Information Act was commenced by Congresswoman Mink and 32 of her colleagues in the House.[1]

Petitioners immediately moved for summary judgment on the ground that the materials sought were specifically exempted from disclosure under subsections (b)(1) and (b)(5) of the Act.[2] In support of the motion, petitioners filed an affidavit of John N. Irwin II, the Under Secretary

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[1] A separate action was brought to enjoin the test itself. *Committee for Nuclear Responsibility* v. *Seaborg* (DC, Civ. Action No. 1346–71). After adverse decisions below, plaintiffs in that case applied for an injunction in this Court. On November 6, 1971, we denied the application, *Committee for Nuclear Responsibility* v. *Schlesinger*, 404 U. S. 917, and the test was conducted that same day.

It should be noted that in the District Court respondents stated that they "have exhausted their administrative remedies [and] . . . have complied with all applicable regulations." Petitioners did not contest those assertions.

[2] Petitioners also moved for dismissal of the suit insofar as respondents sought disclosure of the documents in their official capacities as Members of Congress. The District Court granted this motion, but the Court of Appeals did not reach the issue. Accordingly, the issue is not before this Court.

of State. Briefly, the affidavit states that Mr. Irwin was appointed by President Nixon as Chairman of an "Under Secretaries Committee," which was a part of the National Security Council system organized by the President "so that he could use it as an instrument for obtaining advice on important questions relating to our national security." The Committee was directed by the President in 1969 "to review the annual underground nuclear test program and to encompass within this review requests for authorization of specific scheduled tests." Results of the Committee's reviews were to be transmitted to the President "in time to allow him to give them full consideration before the scheduled events." In ¶ 5 of the affidavit, Mr. Irwin stated that pursuant to "the foregoing directions from the President," the Under Secretaries Committee had prepared and transmitted to the President a report on the proposed underground nuclear test known as "Cannikin," scheduled to take place at Amchitka Island, Alaska. The report was said to have consisted of a covering memorandum from Mr. Irwin, the report of the Under Secretaries Committee, five documents attached to that report, and three additional letters separately sent to Mr. Irwin.[3] Of the

[3] According to the Irwin affidavit, the report contained the following documents:

A. A covering memorandum from Mr. Irwin to the President, dated July 17, 1971. This memorandum is classified Top Secret pursuant to Executive Order 10501.

B. The Report of the Under Secretaries Committee. This report was also classified Top Secret. Attached to the report were additional documents:

1. A letter, classified Secret, from the Chairman of the Atomic Energy Commission (AEC) to Mr. Irwin.

2. A report, classified Top Secret, from the Defense Program Review Committee, of which Dr. Henry Kissinger was the Chairman.

3. The Environmental Impact Statement on the proposed Cannikin test, prepared by the AEC in 1971, pursuant to § 102 (C) of the

total of 10 documents, one, an Environmental Impact Statement prepared by AEC, was publicly available and was not in dispute. Each of the other nine was claimed in the Irwin affidavit to have been

> "prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of the individuals and agencies preparing the documents so that the President might be fully apprised of varying viewpoints and have been used for no other purpose."

In addition, at least eight (by now reduced to six) of the nine remaining documents were said to involve highly sensitive matter vital to the national defense and foreign policy and were described as having been classified Top Secret or Secret pursuant to Executive Order 10501.[4]

National Environmental Policy Act of 1969, 83 Stat. 853, 42 U. S. C. § 4332 (C). This document had always been "publicly available" and a copy was attached to the Irwin affidavit.

4. A transcript of an oral briefing given by the AEC to the Committee. This document was classified Secret.

5. A memorandum from the Council on Environmental Quality to Mr. Irwin. This memorandum was separately unclassified.

C. In addition to the covering memorandum and the Committee's report (with attached documents), were three letters that had been transmitted to Mr. Irwin:

1. A letter from Mr. William Ruckelshaus, for the Environmental Protection Agency. This letter was classified Top Secret, but has now been declassified.

2. A letter from Mr. Russell Train, for the Council on Environmental Quality. Although the Irwin affidavit states that this letter was classified Top Secret, petitioners concede that it was so classified "only because it was to be attached to the Undersecretary's Report." Brief for Petitioners 6 n. 5.

3. A letter of Dr. Edward E. David, Jr., for the Office of Science and Technology. This letter is classified Top Secret.

[4] These eight documents were also described as having been classified as "Restricted Data . . . pursuant to the Atomic Energy Act of 1954, as amended. (42 U. S. C. [§§ 2014 (y)], 2161 and 2162.)" Petitioners have not asserted that these provisions, standing alone,

On the strength of this showing by petitioners, the District Court granted summary judgment in their favor on the ground that each of the nine documents sought was exempted from compelled disclosure by §§ (b)(1) and (b)(5) of the Act. The Court of Appeals reversed, concluding that subsection (b)(1) of the Act permits the withholding of only the secret portions of those documents bearing a separate classification under Executive Order 10501: "If the nonsecret components [of such documents] are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed." 150 U. S. App. D. C. 233, 237, 464 F. 2d 742, 746. The court instructed the District Judge to examine the classified documents "looking toward their possible separation for purposes of disclosure or nondisclosure." *Ibid.*

In addition, the Court of Appeals concluded that all nine contested documents fell within subsection (b)(5) of the Act, but construed that exemption as shielding only the "decisional processes" reflected in internal Government memoranda, not "factual information" unless that information is "inextricably intertwined with policymaking processes." The court then ordered the District Judge to examine the documents *in camera* (including, presumably, any "nonsecret components" of the six classified documents) to determine if "factual data" could be separated out and disclosed "without impinging on the policymaking decisional processes intended to be protected by this exemption." We granted certiorari, 405 U. S. 974, and now reverse the judgment of the Court of Appeals.

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would justify withholding the documents in this case. But see 5 U. S. C. § 552 (b)(3), relating to matters "specifically exempted from disclosure by statute."

II

The Freedom of Information Act, 5 U. S. C. § 552,[5] is a revision of § 3, the public disclosure section, of the Administrative Procedure Act, 5 U. S. C. § 1002 (1964 ed.). Section 3 was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute. See S. Rep. No. 813, 89th Cong., 1st Sess., 5 (1965) (hereinafter S. Rep. No. 813); H. R. Rep. No. 1497, 89th Cong., 2d Sess., 5–6 (1966) (hereinafter H. R. Rep. No. 1497). The section was plagued with vague phrases, such as that exempting from disclosure "any function of the United States requiring secrecy in the public interest." Moreover, even "matters of official record" were only to be made available to "persons properly and directly concerned" with the information. And the section provided no remedy for wrongful withholding of information. The provisions of the Freedom of Information Act stand in sharp relief against those of § 3. The Act eliminates the "properly and directly concerned" test of access, stating repeatedly that official information shall be made available "to the public," "for public inspection." Subsection (b) of the Act creates nine exemptions from compelled disclosures. These exemptions are explicitly made exclusive, 5 U. S. C. § 552 (c), and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed. Aggrieved citizens are given a speedy remedy in district courts, where "the court shall determine the matter de novo and the burden is on the agency to sustain its action." 5 U. S. C. § 552 (a)(3). Noncompliance with court orders may be punished by contempt. *Ibid.*

[5] The Act was passed in 1966, 80 Stat. 383, and codified in its present form in 1967. 81 Stat. 54.

Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands. Subsection (b) is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses. As the Senate Committee explained, it was not "an easy task to balance the opposing interests, but it is not an impossible one either. . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S. Rep. No. 813, p. 3.[6]

It is in the context of the Act's attempt to provide a "workable formula" that "balances, and protects all interests," that the conflicting claims over the documents in this case must be considered.

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[6] The Report states (*ibid.*):

"It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language . . . .

"At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.

"It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."

See also H. R. Rep. No. 1497, p. 6.

A

Subsection (b)(1) of the Act exempts from forced disclosure matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." According to the Irwin affidavit, the six documents for which Exemption 1 is now claimed were all duly classified Top Secret or Secret, pursuant to Executive Order 10501, 3 CFR 280 (Jan. 1, 1970). That order was promulgated under the authority of the President in 1953, 18 Fed. Reg. 7049, and, since that time, has served as the basis for the classification by the Executive Branch of information "which requires protection in the interests of national defense." [7] We do not believe that Exemption 1 permits compelled disclosure of documents, such as the six here that were classified pursuant to this Executive Order. Nor does the Exemption permit *in camera* inspection of such documents to sift out so-called "nonsecret components." Obviously, this test was not the only alternative available. But Congress chose to follow the Executive's determination in these matters and that choice must be honored.

The language of Exemption 1 was chosen with care. According to the Senate Committee, "[t]he change of standard from 'in the public interest' is made both to delimit more narrowly the exception and to give it a more precise definition. The phrase 'public interest' in section 3 (a) of the Administrative Procedure Act has been sub-

[7] Executive Order 10501 has been superseded, as of June 1, 1972, by Executive Order 11652, 37 Fed. Reg. 5209, which similarly provides for the classification of material "in the interest of the national defense or foreign relations."

Portions of two documents for which Exemption 1 is claimed were ordered disclosed in connection with the action brought to enjoin the test (see n. 1, *supra*). Petitioners seek no relief with respect to any matters already disclosed.

ject to conflicting interpretations, often colored by personal prejudices and predilections. It admits of no clear delineations." S. Rep. No. 813, p. 8. The House Committee similarly pointed out that Exemption 1 "both limits the present vague phrase, 'in the public interest,' and gives the area of necessary secrecy a more precise definition." H. R. Rep. No. 1497, p. 9. Manifestly, Exemption 1 was intended to dispel uncertainty with respect to public access to material affecting "national defense or foreign policy." Rather than some vague standard, the test was to be simply whether the President has determined by Executive Order that particular documents are to be kept secret. The language of the Act itself is sufficiently clear in this respect, but the legislative history disposes of any possible argument that Congress intended the Freedom of Information Act to subject executive security classifications to judicial review at the insistence of anyone who might seek to question them. Thus, the House Report stated with respect to subsection (b)(1) that "citizens both in and out of Government can agree to restrictions on categories of information which the President has determined must be kept secret to protect the national defense or to advance foreign policy, such as matters classified pursuant to Executive Order 10501." H. R. Rep. No. 1497, pp. 9–10.[8] Similarly, Representative

[8] The House Report, it is true, indicates that *the President* must determine that the exempted matter be kept secret. Clearly, however, Executive Order 10501 is based on presidential authority and specifically delegates that authority to "the departments, agencies, and other units of the executive branch *as hereinafter specified.*" 3 CFR § 281 (Jan. 1, 1970) (emphasis added). One may disagree with the scope of the delegation or with how the delegated authority is exercised in particular cases, but the authority itself nevertheless remains the President's and it is his judgment that the first exemption was designed to respect.

Moss, Chairman of the House Subcommittee that considered the bill, stated that the exemption "was intended to specifically recognize that Executive order [No. 10501]" and was drafted "in conformity with that Executive order." Hearings on Federal Public Records Law before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess., 52, 55 (1965) (hereinafter 1965 House Hearings). And a member of the Committee, Representative Gallagher, stated that the legislation and the Committee Report make it "crystal clear that the bill in no way affects categories of information which the President . . . has determined must be classified to protect the national defense or to advance foreign policy. These areas of information most generally are classified under Executive Order No. 10501." 112 Cong. Rec. 13659.

These same sources make untenable the argument that classification of material under Executive Order 10501 is somehow insufficient for Exemption 1 purposes, or that the exemption contemplates the issuance of orders, under some other authority, for each document the Executive may want protected from disclosure under the Act. Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering. Cf. *United States* v. *Reynolds,* 345 U. S. 1 (1953). But Exemption 1 does neither. It states with the utmost directness that the Act exempts matters "specifically required by Executive order to be kept secret." Congress was well aware of the Order and obviously accepted determinations pursuant to that Order as qualifying for exempt status under § (b)(1). In this context it is patently unrealistic to

argue that the "Order has nothing to do with the first exemption." [9]

What has been said thus far makes wholly untenable any claim that the Act intended to subject the soundness of executive security classifications to judicial review at the insistence of any objecting citizen. It also negates the proposition that Exemption 1 authorizes or permits *in camera* inspection of a contested document bearing a single classification so that the court may separate the secret from the supposedly nonsecret and order disclosure of the latter. The Court of Appeals was thus in error. The Irwin affidavit stated that each of the six documents for which Exemption 1 is now claimed "are and have been classified" Top Secret and Secret "pursuant to Executive Order No. 10501" and as involving "highly sensitive matter that is vital to our national defense and foreign policy." The fact of those classifications and the documents' characterizations have never been disputed by respondents. Accordingly, upon such a showing and in such circumstances, petitioners had met their burden of demonstrating that the documents were entitled to protection under Exemption 1, and the duty of the District Court under § 552 (a)(3) was therefore at an end.[10]

[9] Brief for Respondents 18. Respondents note that the preamble of the new Executive Order 11652 (see n. 7, *supra*), specifies that material classified pursuant to its provisions "is expressly exempted from public disclosure by Section 552 (b)(1) of Title 5, United States Code." Executive Order 10501 has no comparable recital, but only the sheerest ritualism would distinguish the effect of the two orders on any such basis. Indeed, respondents' apparent acceptance of the new order as a justifiable ground for resisting disclosure under Exemption 1 points to the absurdity of maintaining that Executive Order 10501 is irrelevant to the Act.

[10] This conclusion is not undermined by the new Executive Order 11652, which calls for the separation of documents into classified

B

Disclosure of the three documents conceded to be "unclassified" is resisted solely on the basis of subsection (b)(5) of the Act (hereafter Exemption 5).[11] That Exemption was also invoked, alternatively, to support withholding the six documents for which Exemption 1 was claimed. It is beyond question that the Irwin affidavit, standing alone, is sufficient to establish that all of the documents involved in this litigation are "inter-agency or intra-agency" memoranda or "letters" that were used in the decisionmaking processes of the Executive Branch. By its terms, however, Exemption 5 creates an exemption for such documents only insofar as they "would not be available by law to a party . . . in litigation with the

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and unclassified portions, where practicable. 37 Fed. Reg. 5212. On the contrary, that new order provides that the separating be done by the Executive, not the Judiciary, and, like its predecessor, permits declassification of material only in accordance with its procedures. More importantly, the very existence of the new order demonstrates that the Executive exercises a continuing responsibility for determining the need for secrecy in matters that affect national defense and foreign policy. Exemption 1 recognizes that responsibility by leaving to the Executive, under such orders as shall be developed, the decision of what may be disclosed and what must be kept secret.

[11] Title 5 U. S. C. § 552 reads in part as follows:

"(a) Each agency shall make available to the public information as follows:

. . . . . .

"(b) This section does not apply to matters that are—

. . . . . .

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

The three documents are: the CEQ memorandum to Mr. Irwin, the Train letter, and the Ruckelshaus letter, which has now been declassified.

agency." This language clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency. Drawing such a line between what may be withheld and what must be disclosed is not without difficulties. In many important respects, the rules governing discovery in such litigation have remained uncertain from the very beginnings of the Republic.[12] Moreover, at best, the discovery rules can only be applied under Exemption 5 by way of rough analogies. For example, we do not know whether the Government is to be treated as though it were a prosecutor, a civil plaintiff, or a defendant.[13] Nor does the Act, by its terms, permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant. Still, the legislative history of Exemption 5 demonstrates that Congress intended to incorporate generally the recognized rule that "confidential intra-agency advisory opinions . . . are privileged from inspection." *Kaiser Aluminum & Chemical Corp.* v. *United States,* 141 Ct.

[12] See generally 4 J. Moore, Federal Practice ¶ 26.61 (1972) and authorities collected (*id.,* at ¶ 26.61 [1] n. 2) (hereinafter Moore); 8 J. Wigmore, Evidence §§ 2378, 2379 (McNaughton rev. 1961) (hereinafter Wigmore).

There were early disputes over the issue of Executive privilege. See Chief Justice Marshall's decisions in the trial of *United States* v. *Burr,* 25 F. Cas. 30 (No. 14,692d) and 25 F. Cas. 187, 191–192 (No. 14,694) (CCD Va. 1807), discussed in 8 Wigmore § 2371, pp. 739–741 (3d ed. 1940) and 4 Moore ¶ 26.61 [6.–4]. See also Wigmore § 2378, p. 805 and n. 21.

[13] Different rules have been held to apply in each situation. See, *e. g., United States* v. *Andolschek,* 142 F. 2d 503, 506 (CA2 1944) (L. Hand, J.) (United States as prosecutor); *Bank Line, Ltd.* v. *United States,* 76 F. Supp. 801 (SDNY 1948) (United States as defendant). Moreover, in actions under the Freedom of Information Act, courts are not given the option to impose alternative sanctions—short of compelled disclosure—such as striking a particular defense or dismissing the Government's action.

Cl. 38, 49, 157 F. Supp. 939, 946 (1958) (Reed, J.). As Mr. Justice Reed there stated:

> "There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action." *Id.*, at 48, 157 F. Supp., at 946.

The importance of this underlying policy was echoed again and again during legislative analysis and discussions of Exemption 5:

> "It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl.' The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation." S. Rep. No. 813, p. 9.

See also H. R. Rep. No. 1497, p. 10. But the privilege that has been held to attach to intragovernmental memoranda clearly has finite limits, even in civil litigation. In each case, the question was whether production of the contested document would be "injurious to the consultative functions of government that the privilege of nondisclosure protects." *Kaiser Aluminum & Chemical Corp., supra.*, at 49, 157 F. Supp., at 946. Thus, in the absence of a claim that disclosure would jeopardize state secrets, see *United States* v. *Reynolds,* 345 U. S. 1 (1953), memoranda consisting only of compiled factual material

or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government.[14] Moreover, in applying the privilege, courts often were required to examine the disputed documents *in camera,* in order to determine which should be turned over or withheld.[15] We must

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[14] See, *e. g., Machin* v. *Zuckert,* 114 U. S. App. D. C. 335, 316 F. 2d 336, cert. denied, 375 U. S. 896 (1963) (Air Force Aircraft Accident Investigation Report); *Boeing Airplane Co.* v. *Coggeshall,* 108 U. S. App. D. C. 106, 112–113, 280 F. 2d 654, 660–661 (1960) (Renegotiation Board documents); *Olson Rug Co.* v. *NLRB,* 291 F. 2d 655, 662 (CA7 1961) (no claim that NLRB documents are "exclusively policy recommendations"); *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena,* 40 F. R. D. 318, 327 (DC 1966), aff'd, 128 U. S. App. D. C. 10, 384 F. 2d 979, cert. denied, 389 U. S. 952 (1967) (discovery denied because documents "wholly of opinions, recommendations and deliberations"); *McFadden* v. *Avco Corp.,* 278 F. Supp. 57, 59–60 (MD Ala. 1967), and cases cited therein.

In *United States* v. *Cotton Valley Operators Comm.,* 9 F. R. D. 719, 720 (WD La. 1949), aff'd by equally divided court, 339 U. S. 940 (1950), the United States offered to file "an abstract of factual information" contained in the contested documents (FBI reports).

[15] See, *e. g., Machin* v. *Zuckert, supra,* at 340, 316 F. 2d, at 341 (private tort action; discovery of Air Force Aircraft Accident Investigation Report); *Boeing Airplane Co.* v. *Coggeshall, supra,* at 114, 280 F. 2d, at 662 (excess profits tax redetermination); *Olson Rug Co.* v. *NLRB, supra,* at 662 (discovery for use in defense against contempt proceedings); *O'Keefe* v. *Boeing Co.,* 38 F. R. D. 329, 336 (SDNY 1965) (private tort action; Air Force Investigation Reports); *Rosee* v. *Board of Trade,* 36 F. R. D. 684, 687–688 (ND Ill. 1965); *United States* v. *Cotton Valley Operators Comm., supra* (civil antitrust suit). Cf. *United States* v. *Procter & Gamble Co.,* 25 F. R. D. 485, 492 (NJ 1960) (criminal antitrust prosecution). See Wigmore § 2379, p. 812.

In *Kaiser Aluminum & Chemical Corp.* v. *United States,* 141 Ct. Cl. 38, 157 F. Supp. 939 (1958), where *in camera* inspection of a document was refused because of plaintiff's failure to make a

assume, therefore, that Congress legislated against the backdrop of this case law, particularly since it expressly intended "to delimit the exception [5] as narrowly as consistent with efficient Government operation." S. Rep. No. 813, p. 9. See H. R. Rep. No. 1497, p. 10. Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other.[16]

Nothing in the legislative history of Exemption 5 is contrary to such a construction. When the bill that ultimately became the Freedom of Information Act,

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definite showing of necessity, *id.*, at 50, 157 F. Supp., at 947, the "objective facts" contained in the disputed document were "otherwise available." *Id.*, at 48–49, 157 F. Supp., at 946.

[16] See, *e. g.*, *Soucie* v. *David*, 145 U. S. App. D. C. 144, 448 F. 2d 1067 (1971); *Grumman Aircraft Eng. Corp.* v. *Renegotiation Bd.*, 138 U. S. App. D. C. 147, 151, 425 F. 2d 578, 582 (1970); *Bristol-Myers Co.* v. *FTC*, 138 U. S. App. D. C. 22, 424 F. 2d 935 (1970); *International Paper Co.* v. *FPC*, 438 F. 2d 1349, 1358–1359 (CA2), cert. denied, 404 U. S. 827 (1971); *General Services Admin.* v. *Benson*, 415 F. 2d 878 (CA9 1969), *aff'g* 289 F. Supp. 590 (WD Wash. 1968); *Long Island R. Co.* v. *United States*, 318 F. Supp. 490, 499 n. 9 (EDNY 1970); *Consumers Union* v. *Veterans Admin.*, 301 F. Supp. 796 (SDNY 1969), appeal dismissed as moot, 436 F. 2d 1363 (CA2 1971); *Olsen* v. *Camp*, 328 F. Supp. 728, 731 (ED Mich. 1970); *Reliable Transfer Co.* v. *United States*, 53 F. R. D. 24 (EDNY 1971).

The proposed Federal Rules of Evidence appear to recognize this construction of Exemption 5. Proposed Rule 509 (a)(2)(A) defines "official information" to include "intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions." Rule 509 (c) further provides that "[i]n the case of privilege claimed for official information the court may require examination *in camera* of the information itself."

S. 1160, was introduced in the 89th Congress, it contained an exemption that excluded:

> "inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy." [17]

This formulation was designed to permit "[a]ll *factual* material in Government records . . . to be made available to the public." S. Rep. No. 1219, 88th Cong., 2d Sess., 7 (1964). (Emphasis in original.) The formulation was severely criticized, however, on the ground that it would permit compelled disclosure of an otherwise private document simply because the document did not deal "solely" with legal or policy matters. Documents dealing with mixed questions of fact, law, and policy would inevitably, under the proposed exemption, become available to the public.[18] As a result of this criticism,

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[17] Hearings on S. 1160, S. 1336, S. 1758, and S. 1879 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 7 (1965) (hereinafter 1965 Senate Hearings). This exemption itself had been broadened during its course through the Senate in the 88th Congress. The exemption originally applied only to internal memoranda "relating to the consideration and disposition of adjudicatory and rulemaking matters." Section 3 (c) of S. 1666, 88th Cong., 2d Sess. (1964), introduced in 110 Cong. Rec. 17086. That early formulation came under attack for not sufficiently protecting material dealing with general policy matters not directly related to adjudication or rulemaking. See Hearings on S. 1666 and S. 1663 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess., 202–203, 247 (1963).

[18] See 1965 Senate Hearings 36, 94–95, 112–113, 205, 236–237, 244, 366–367, 382–383, 402–403, 406–407, 417, 437, 445–446, 450, 490. See 1965 House Hearings 27–28, 49, 208, 220, 223–224, 229–230, 245–246, 255–257. Examples of these many statements are:

Federal Aviation Administration (1965 Senate Hearings 446):

"Few records would be entirely devoid of factual data, thus leaving papers on law and policy relatively unprotected. Staff

Exemption 5 was changed to substantially its present form. But plainly, the change cannot be read as suggesting that *all* factual material was to be rendered exempt from compelled disclosure. Congress sensibly discarded a wooden exemption that could have meant disclosure of manifestly private and confidential policy recommendations simply because the document containing them also happened to contain factual data. That decision should not be taken, however, to embrace an equally wooden exemption permitting the withholding of factual material otherwise available on discovery merely because it was placed in a memorandum with matters of law, policy, or opinion. It appears to us that Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, commonsense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies. And, as noted, that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents.

Petitioners further argue that, although *in camera* inspection and disclosure of "low-level, routine, factual reports" [19] may be contemplated by Exemption 5, that type of document is not involved in this case. Rather,

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working papers and reports prepared for use within the agency of the executive branch would not be protected by the proposed exemptions."

Department of Commerce (1965 Senate Hearings 406):

"Under this provision, internal memorandums dealing with *mixed questions of fact, law and policy* could well become public information." (Emphasis in original.)

[19] Tr. of Oral Arg. 23.

it is argued, the documents here were submitted directly to the President by top-level Government officials, involve matters of major significance, and contain, by their very nature, a blending of factual presentations and policy recommendations that are necessarily "inextricably intertwined with policymaking processes." 150 U. S. App. D. C., at 237, 464 F. 2d, at 746. For these reasons, the petitioners object both to disclosure of any portions of the documents and to *in camera* inspection by the District Court.

To some extent, this argument was answered by the Court of Appeals, for its remand expressly directed the District Judge to disclose only such factual material that is not "intertwined with policymaking processes" and that may safely be disclosed "without impinging on the policymaking decisional processes intended to be protected by this exemption." We have no reason to believe that, if petitioners' characterization of the documents is accurate, the District Judge would go beyond the limits of the remand and in any way compromise the confidentiality of deliberative information that is entitled to protection under Exemption 5.

We believe, however, that the remand now ordered by the Court of Appeals is unnecessarily rigid. The Freedom of Information Act may be invoked by any member of "the public"—without a showing of need—to compel disclosure of confidential Government documents. The unmistakable implication of the decision below is that any member of the public invoking the Act may require that otherwise confidential documents be brought forward and placed before the District Court for *in camera* inspection—no matter how little, if any, purely factual material may actually be contained therein. Exemption 5 mandates no such result. As was said in

Kaiser Aluminum & Chemical Corp., 141 Ct. Cl., at 50, 157 F. Supp., at 947: "It seems . . . obvious that the very purpose of the privilege, the encouragement of open expression of opinion as to governmental policy is somewhat impaired by a requirement to submit the evidence even [*in camera*]." Plainly, in some situations, *in camera* inspection will be necessary and appropriate. But it need not be automatic. An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency. The burden is, of course, on the agency resisting disclosure, 5 U. S. C. § 552 (a)(3), and if it fails to meet its burden without *in camera* inspection, the District Court may order such inspection. But the agency may demonstrate, by surrounding circumstances, that particular documents are purely advisory and contain no separable, factual information. A representative document of those sought may be selected for *in camera* inspection. And, of course, the agency may itself disclose the factual portions of the contested documents and attempt to show, again by circumstances, that the excised portions constitute the barebones of protected matter. In short, *in camera* inspection of all documents is not a necessary or inevitable tool in every case. Others are available. Cf. *United States* v. *Reynolds*, 345 U. S. 1 (1953). In the present case, the petitioners proceeded on the theory that all of the nine documents were exempt from disclosure in their entirety under Exemption 5 by virtue of their use in the decisionmaking process. On remand, petitioners are entitled to attempt to demonstrate the propriety of withholding any documents, or portions

thereof, by means short of submitting them for *in camera* inspection.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

MR. JUSTICE STEWART, concurring.

This case presents no constitutional claims, and no issues regarding the nature or scope of "Executive privilege." It involves no effort to invoke judicial power to require any documents to be reclassified under the mandate of the new Executive Order 11652. The case before us involves only the meaning of two exemptive provisions of the so-called Freedom of Information Act, 5 U. S. C. § 552.

My Brother DOUGLAS says that the Court makes a "shambles" of the announced purpose of that Act. But it is Congress, not the Court, that in § 552 (b)(1) has ordained unquestioning deference to the Executive's use of the "secret" stamp. As the opinion of the Court demonstrates, the language of the exemption, confirmed by its legislative history, plainly withholds from disclosure matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." In short, once a federal court has determined that the Executive has imposed that requirement, it may go no further under the Act.

One would suppose that a nuclear test that engendered fierce controversy within the Executive Branch of our Government would be precisely the kind of event that should be opened to the fullest possible disclosure consistent with legitimate interests of national defense. Without such disclosure, factual information available to the concerned Executive agencies cannot be considered

by the people or evaluated by the Congress. And with the people and their representatives reduced to a state of ignorance, the democratic process is paralyzed.

But the Court's opinion demonstrates that Congress has conspicuously failed to attack the problem that my Brother DOUGLAS discusses. Instead, it has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document "secret," however cynical, myopic, or even corrupt that decision might have been.

The opinion of my Brother BRENNAN dissenting in part makes an admirably valiant effort to deflect the impact of this rigid exemption. His dissent focuses on the statutory requirement that "the court shall determine the matter de novo . . . ." But the only "matter" to be determined *de novo* under § 552 (b)(1) is whether in fact the President has required by Executive Order that the documents in question are to be kept secret. Under the Act as written, that is the end of a court's inquiry.*

As the Court points out, "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering." But in enacting § 552 (b)(1) Congress chose, instead, to decree blind acceptance of Executive fiat.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in part and dissenting in part.

The Court holds today that the Freedom of Information Act, 5 U. S. C. § 552, authorizes the District

*Similarly rigid is § 552 (b)(3), which forbids disclosure of materials that are "specifically exempted from disclosure by statute." Here, too, the only "matter" to be determined in a district court's *de novo* inquiry is the factual existence of such a statute, regardless of how unwise, self-protective, or inadvertent the enactment might be.

Court to make an *in camera* inspection of documents claimed to be exempt from public disclosure under Exemption 5 of the Act. In addition, the Court concludes that, as an exception to this rule, the Government may, in at least some instances, attempt to avoid *in camera* inspection through use of detailed affidavits or oral testimony. I concur in those aspects of the Court's opinion. In my view, however, those procedures should also govern matters for which Exemption 1 is claimed, and I therefore dissent from the Court's holding to the contrary. I find nothing whatever on the face of the statute or in its legislative history that distinguishes the two Exemptions in this respect, and the Court suggests none. Rather, I agree with my Brother DOUGLAS that the mandate of § 552 (a)(3)—"the court shall determine the matter de novo and the burden is on the agency to sustain its action"—is the procedure that Congress prescribed for both Exemptions.

The Court holds that Exemption 1 immunizes from judicial scrutiny any document classified pursuant to Executive Order 10501, 3 CFR 280 (Jan. 1, 1970).[1] In reaching this result, however, the Court adopts a construction of Exemption 1 that is flatly inconsistent with the legislative history and, indeed, the unambiguous language of the Act itself.[2] In plain words, Exemption 1 exempts from disclosure only material *"specifically required* by Executive order to be kept secret *in the interest of the national defense or foreign policy."* (Emphasis

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[1] Executive Order 10501 was revoked on March 8, 1972, and replaced with Executive Order 11652, 37 Fed. Reg. 5209, which became effective June 1, 1972.

[2] "The policy of the Act requires that the . . . exemptions [be construed narrowly]." *Soucie* v. *David,* 145 U. S. App. D. C. 144, 157, 448 F. 2d 1067, 1080 (1971). "A broad construction of the exemptions would be contrary to the express language of the Act." *Wellford* v. *Hardin,* 444 F. 2d 21, 25 (CA4 1971).

added.) Executive Order 10501, however, which was promulgated 13 years before the passage of the Act, does not require that any *specific* documents be classified. Rather, the Executive Order simply delegates the right to classify to agency heads, who are empowered to classify information as Confidential, Secret, or Top Secret. Thus, the classification decision is left to the sole discretion of these agency heads. Moreover, in exercising this discretion, agency heads are not required to examine each document separately to determine the need for secrecy but, instead, may adopt *blanket* classifications, without regard to the content of any particular document. Thus, as §§ 3 (b) and 3 (c) of the Order make clear, matters for which there is no need for secrecy "in the interest of the national defense or foreign policy" may be indiscriminately classified in conjunction with those matters for which there is a genuine need for secrecy:

> 3 (b) "*Physically Connected Documents.* The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual defense classification."
>
> 3 (c) "*Multiple Classification.* A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document, product, or substance shall bear only one over-all classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications."

Even the petitioners concede,[3] no doubt in response to the "specifically required" standard of § 552 (b)(1)

[3] Petition for Cert. 9 n. 4.

and the "specifically stated" requirement of § 552 (c),[4] that documents classified pursuant to § 3 (b) of Executive Order 10501 cannot qualify under Exemption 1. Indeed, petitioners apparently accept the conclusion of the Court of Appeals that as to § 3 (b):

> "This court sees no basis for withholding on security grounds a document that, although separately unclassified, is regarded secret merely because it has been incorporated into a secret file. To the extent that our position in this respect is inconsistent with the above-quoted paragraph of Section 3 of Executive Order 10501, we deem it required by the terms and purpose of the [Freedom of Information Act], enacted subsequently to the Executive Order." 150 U. S. App. D. C., at 236, 464 F. 2d, at 745.

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[4] Section 552 (c) provides:

"This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress."

The accompanying Senate Report emphasizes that § 552 (c) places a heavy burden on the Government to justify nondisclosure:

"The purpose of [§ 552 (c)] is to make it clear beyond doubt that all materials of the Government are to be made available to the public by publication or otherwise unless *explicitly* allowed to be kept secret by one of the exemptions in [§ 552 (b)]." S. Rep. No. 813, 89th Cong., 1st Sess., 10 (1965) (emphasis added).

A commentator cogently argues that the "pull of the word 'specifically' [in § 552 (c)] is toward emphasis on [the] statutory language" of the nine stated exemptions. The "specifically stated" clause in § 552 (c), he notes, "is often relevant in determining the proper interpretation of particular exemptions." K. Davis, Administrative Law § 3A.15, p. 142 (Supp. 1970). See also Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761 (1967).

For a detailed study of the Freedom of Information Act and its background, see Note, Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill, 40 Notre Dame Law. 417 (1965).

Nevertheless, petitioners maintain that information classified pursuant to § 3 (c) of the Order is exempt from disclosure under Exemption 1. The Court of Appeals rejected that contention, and in my view, correctly. The Court of Appeals stated:

> "The same reasoning applies to this provision as to the one dealing with physically-connected documents. Secrecy by association is not favored. If the non-secret components are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed." 150 U. S. App. D. C., at 237, 464 F. 2d, at 746.

Petitioners' argument, adopted by the Court, is that this construction of the Act imputes to Congress an intent to authorize judges independently to review the Executive's decision to classify documents in the interest of the national defense or foreign policy. That argument simply misconceives the holding of the Court of Appeals. Information classified pursuant to § 3 (c), it must be emphasized, may receive the stamp of secrecy, not because such secrecy is necessary to promote "the national defense or foreign policy," but simply because it constitutes a part of such other information which genuinely merits secrecy. Thus, to rectify this situation, the Court of Appeals ordered only that the District Court *in camera* determine "[i]f the non-secret components are separable from the secret remainder and may be read separately without distortion of meaning . . . ." The determination whether any components are in fact "non-secret" is left exclusively to the agency head representing the Executive Branch. The District Court is not authorized to declassify or to release information that the Executive, in its sound discretion, determines must be classified to "be kept secret in the interest of the national defense or

foreign policy." [5] The District Court's authority stops with the inquiry whether there are components of the documents that would not have been independently classified as secret. If the District Court finds, on *in camera* inspection, that there are such components, and that they can be read separately without distortion of meaning, the District Court may order their release. The District Court's authority to make that determination is unambiguously stated in § 552 (a)(3): "the [district] court shall determine the matter de novo and the burden is on the agency to sustain its action." The Court's contrary holding is in flat defiance of that congressional mandate.[6]

Indeed, only the Court of Appeals' construction is consistent with the congressional plan in enacting the Freedom of Information Act. We have the word of both Houses of Congress that the *de novo* proceeding requirement was enacted expressly "in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion." S. Rep. No. 813, 89th Cong., 1st Sess., 8 (1965) (hereinafter cited as S. Rep. No. 813); H. R. Rep. No. 1497, 89th Cong., 2d Sess., 9 (1966) (hereinafter cited as H. R. Rep. No. 1497). What was granted, and purposely so, was a broad grant

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[5] See Developments in the Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1224–1225 (1972).

[6] "[G]iven the requirement that a file or document is generally classified at the highest level of classification of any information enclosed, it will often be the case that a classified file will contain information that could be released separately to the public. Because it is not 'specifically required by Executive order to be kept secret,' such information is not privileged under the Information Act. To ensure that an overall classification is not being used to protect unprivileged papers, a reviewing court should inspect the documents sought by a litigant." Developments in the Law, *supra*, n. 5, at 1223.

to the District Court of "authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld." H. R. Rep. No. 1497, p. 9. And to underscore its meaning, Congress rejected the traditional rule of deference to administrative determinations by "[p]lacing the burden of proof upon the agency" to justify the withholding. S. Rep. No. 813, p. 8; H. R. Rep. No. 1497, p. 9. The Court's rejection of the Court of Appeals' construction is inexplicable in the face of this overwhelming evidence of the congressional design.

The Court's reliance on isolated references to Executive Order 10501 in the congressional proceedings is erroneous and misleading. The Court points to a single passing reference to the Order in the House Report, which even a superficial reading reveals to be merely suggestive of the kinds of information that the Executive Branch might classify. Nothing whatever in the Report even remotely implies that the Order was to be recognized as immunizing from public disclosure the entire file of documents merely because one or even a single paragraph of one has been stamped secret. The Court also calls to its support some comments out of context of Congressmen Moss and Gallagher on the House floor. But on their face, these comments do no more than confirm that Exemption 1 was written with awareness of the existence of Executive Order 10501. Certainly, whatever significance may be attached to debating points in construing a statute,[7] these comments hardly support the Court's conclusion that a classification pursuant to Executive Order 10501, without more, immunizes an entire document from disclosure under Exemption 1.

[7] See *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 395, 397 (1951) (Jackson, J., concurring) (Frankfurter, J., dissenting).

Executive Order 10501 was promulgated more than a decade before the Freedom of Information Act was debated in Congress. Yet, no reference to the Order can be found in either the language of the Act or the Senate Report. Under these circumstances, it would seem odd, to say the least, to attribute to Congress an intent to incorporate "without reference" Executive Order 10501 into Exemption 1. Indeed, petitioners' concession that "physically connected documents," classified under § 3 (b) of the Order, are not immune from judicial inspection serves only to reinforce the conclusion that the mere fact of classification under § 3 (c) cannot immunize the identical documents from judicial scrutiny.

The Court's rejection of the Court of Appeals' construction of Exemption 1 is particularly insupportable in light of the cogent confirmation of its soundness supplied by the Executive Branch itself. In direct response to the Act, Order 10501 has been revoked and replaced by Order 11652, which expressly requires classification of documents in the manner the Court of Appeals required the District Court to attempt *in camera*. The Order, which was issued on March 8, 1972, and became effective on June 1, 1972, 37 Fed. Reg. 5209 (Mar. 10, 1972), explicitly attributes its form to the Executive's desire to accommodate its procedures to the objectives of the Freedom of Information Act:

> "The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executive branch."

Moreover, in his statement accompanying the promulgation of the new Order, the President stated: "The Executive order I have signed today is based upon . . .

a reexamination of the rationale underlying the Freedom of Information Act." 8 Presidential Documents 542 (Mar. 13, 1972).

The new Order recites that "*some* official information and material . . . bears directly on the effectiveness of our national defense and the conduct of our foreign relations" and that "[*t*]*his* official information or material, referred to as classified information or material in this order, is expressly exempted from public disclosure by Section 552 (b)(1) of [the Freedom of Information Act]." (Emphasis added.) Thus, the Executive clearly recognized that Exemption 1 applies only to matter *specifically* classified "in the interest of the national defense or foreign policy." And in an effort to comply with the Act's mandate that genuinely secret matters be carefully separated from the nonsecret components, § 4 (A) of the new Order provides:

> "*Documents in General.* Each classified document shall . . . to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use."

The President emphasized this requirement in his statement:

> "A major source of unnecessary classification under the old Executive order was the practical impossibility of discerning which *portions* of a classified document actually required classification. Incorporation of any material from a classified paper into another document usually resulted in the classification of the new document, and *innocuous portions of neither paper could be released.*" 8 Presidential Documents 544 (Mar. 13, 1972) (emphasis added).

It is of course true, as the Court observes, that the Order "provides that the separating be done by the Ex-

ecutive, not the Judiciary . . . ." *Ante,* at 85 n. 10. But that fact lends no support to a construction of Exemption 1 precluding judicial inspection to enforce the congressional purpose to effect release of nonsecret components separable from the secret remainder. Rather, the requirement of judicial inspection, made explicit in § 552 (a)(3), is the keystone of the congressional plan, expressly deemed "essential in order that the ultimate decision as to the propriety of the agency's action is made by the court [to] prevent it from becoming meaningless judicial sanctioning of agency discretion." S. Rep. No. 813, p. 8; H. R. Rep. No. 1497, p. 9. It could not be more clear, therefore, that Congress sought to make certain that the ordinary principle of judicial deference to agency discretion was discarded under this Act. The Executive was not to be allowed "to file an affidavit stating [the] conclusion [that documents are exempt] and by so doing foreclose any other determination of the fact." *Cowles Communications* v. *Department of Justice,* 325 F. Supp. 726, 727 (ND Cal. 1971). Accord, *Frankel* v. *SEC,* 336 F. Supp. 675, 677 n. 4 (SDNY 1971), rev'd on other grounds, 460 F. 2d 813 (CA2 1972); *Philadelphia Newspapers* v. *HUD,* 343 F. Supp. 1176, 1180 (ED Pa. 1972).[8]

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[8] In support of their claim that Executive Order 10501 automatically and without judicial review activates the exemption of § 552 (b)(1), petitioners rely upon *Epstein* v. *Resor,* 421 F. 2d 930 (CA9 1970). Rather, *Epstein* confirms the Court of Appeals' interpretation of the Act. The *Epstein* court refused a request to review *in camera* documents classified pursuant to Executive Order 10501, but only because the Government, at the plaintiff's request, had begun a current review of the documents on "a paper-by-paper basis." Moreover, in response to the argument that petitioners advance here—namely, that the mere classification of a document precludes judicial review—*Epstein* states:

"[I]n view of the legislative purpose to make it easier for private citizens to secure Government information, it seems most unlikely that [the Act] was intended to foreclose an (a)(3) judicial review

The Court's interpretation of Exemption 1 as a complete bar to judicial inspection of matters claimed by the Executive to fall within it wholly frustrates the objective of the Freedom of Information Act. That interpretation makes a nullity of the Act's requirement of *de novo* judicial review. The judicial role becomes "meaningless judicial sanctioning of agency discretion," S. Rep. No. 813, p. 8; H. R. Rep. No. 1497, p. 9, the very result Congress sought to prevent by incorporating the *de novo* requirement.

MR. JUSTICE DOUGLAS, dissenting.

The starting point of a decision usually indicates the result. My starting point is what I believe to be the philosophy of Congress expressed in the Freedom of Information Act, 5 U. S. C. § 552.

Henry Steele Commager, our noted historian, recently wrote:

> "The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to. Now almost everything that the Pentagon and the CIA do is shrouded in secrecy. Not only are the American people not permitted to know what they are up to but even the Congress and, one suspects, the President [witness the 'unauthorized' bombing of the North last fall and winter] are kept in darkness." The New York Review of Books, Oct. 5, 1972, p. 7.

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of the circumstances of exemption. Rather it would seem that [subsection] (b) was intended to specify the basis for withholding under (a)(3) and that judicial review de novo with the burden of proof on the agency should be had as to whether the conditions of exemption in truth exist." 421 F. 2d, at 932–933.

Two days after we granted certiorari in the case on March 6, 1972, the President revoked the old Executive Order 10501 and substituted a new one, Executive Order 11652, dated March 8, 1972, and effective June 1, 1972. The new Order states in its first paragraph that: "The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the Executive branch."

While "classified information or material" as used in the Order is exempted from public disclosure, § 4 of the Order states that each classified document shall "to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use." § 4 (A). And it goes on to say: "Material containing references to classified materials, which references do not reveal classified information, shall not be classified." *Ibid.*

The Freedom of Information Act does not clash with the Executive Order. Indeed, the new Executive Order precisely meshes with the Act and with the construction given it by the Court of Appeals. Section 552 (a)(3) of the Act gives the District Court "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." Section 552 (a)(3) goes on to prescribe the procedure to be employed by the District Court. It says "the court shall determine the matter de novo and the burden is on the agency to sustain its action."

The Act and the Executive Order read together mean at the very minimum that the District Court has power

to direct the agency in question to go through the suppressed document and make the portion-by-portion classification to facilitate the excerpting as required by the Executive Order. Section 552 (a)(3) means also that the District Court may in its discretion collaborate with the agency to make certain that the congressional policy of disclosure is effectuated.

The Court of Appeals, in an exceedingly responsible opinion, directed the District Court to proceed as follows:

Where material is separately *unclassified* but nonetheless under the umbrella of a "secret" file, the District Court should make sure that it is disclosed under the Act. This seems clear from § 552 (b) which states: "This section does not apply to matters that are—(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." Unless the *unclassified* appendage to a "secret" file falls under some other exception in § 552 (b) it seems clear that it must be disclosed. The only other exception under which refuge is now sought is subsection (b)(5) which reads that the section does not apply to "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

This exemption was described in the House Report as covering "any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency." H. R. Rep. No. 1497, 89th Cong., 2d Sess., 10. It is clear from the legislative history that while opinions and staff advice are exempt, factual matters are not. *Ibid.;* S. Rep. No. 813, 89th Cong., 1st Sess., 9. And the courts have uniformly agreed on that construction of the Act. See *Soucie* v. *David,* 145 U. S. App. D. C. 144, 448 F. 2d 1067; *Grumman Aircraft Eng. Corp.* v. *Renegotiation Bd.,* 138 U. S.

App. D. C. 147, 425 F. 2d 578; *Long Island R. Co.* v. *United States,* 318 F. Supp. 490; *Consumers Union* v. *Veterans Admin.,* 301 F. Supp. 796.

Facts and opinions may, as the Court of Appeals noted, be "inextricably intertwined with policymaking processes" in some cases. In such an event, secrecy prevails. Yet, where facts and opinions can be separated, the Act allows the full light of publicity to be placed on the facts.

Section 552 (c) seems to seal the case against the Government when it says: "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." Disclosure, rather than secrecy, is the rule, save for the specific exceptions in subsection (b).

The Government seeks to escape from the Act by making the Government stamp of "Top Secret" or "Secret" a barrier to the performance of the District Court's functions under § 552 (a)(3) of the Act. The majority makes the stamp sacrosanct, thereby immunizing stamped documents from judicial scrutiny, whether or not factual information contained in the document is in fact colorably related to interests of the national defense or foreign policy. Yet, anyone who has ever been in the Executive Branch knows how convenient the "Top Secret" or "Secret" stamp is, how easy it is to use, and how it covers perhaps for decades the footprints of a nervous bureaucrat or a wary executive.

I repeat what I said in *Gravel* v. *United States,* 408 U. S. 606, 641–642 (dissenting opinion):

> "[A]s has been revealed by such exposés as the Pentagon Papers, the My Lai massacres, the Gulf of Tonkin 'incident,' and the Bay of Pigs invasion, the Government usually suppresses damaging news but highlights favorable news. In this filtering process the secrecy stamp is the officials' tool of suppression and it has been used to withhold infor-

> mation which in '99½%' of the cases would present no danger to national security. To refuse to publish 'classified' reports would at times relegate a publisher to distributing only the press releases of Government or remaining silent; if it printed only the press releases or 'leaks' it would become an arm of officialdom, not its critic. Rather, in my view, when a publisher obtains a classified document he should be free to print it without fear of retribution, unless it contains material directly bearing on future, sensitive planning of the Government."

The Government is aghast at a federal judge's even looking at the secret files and views with disdain the prospect of responsible judicial action in the area. It suggests that judges have no business declassifying "secrets," that judges are not familiar with the stuff with which these "Top Secret" or "Secret" documents deal.

That is to misconceive and distort the judicial function under § 552 (a)(3) of the Act. The Court of Appeals never dreamed that the trial judge would declassify documents. His first task would be to determine whether nonsecret material was a mere appendage to a "Secret" or "Top Secret" file. His second task would be to determine whether under normal discovery procedures contained in Fed. Rule Civ. Proc. 26, factual material in these "Secret" or "Top Secret" materials is detached from the "Secret" and would, therefore, be available to litigants confronting the agency in ordinary lawsuits.

Unless the District Court can do those things, the much-advertised Freedom of Information Act is on its way to becoming a shambles.[1] Unless federal courts can be

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[1] My Brother STEWART, with all deference, helps make a shambles of the Act by reading § 552 (b)(1) as swallowing all the other eight exceptions. While § 552 (b)(1) exempts matters "specifically required by Executive order to be kept secret in the interest of

trusted, the Executive will hold complete sway and by *ipse dixit* make even the time of day "Top Secret." Certainly, the decision today will upset the "workable formula," at the heart of the legislative scheme, "which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S. Rep. No. 813, p. 3. The Executive Branch now has *carte blanche* to insulate information from public scrutiny whether or not that information bears any discernible relation to the interests sought to be protected by subsection (b)(1) of the Act. We should remember the words of Madison:

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue

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the national defense or foreign policy," § 4 of Executive Order 11652, as I have noted, contemplates that not all portions of a document classified as "secret" are necessarily "secret," for the order contemplates "excerpting" of some material. Refereeing what may properly be excerpted is part of the judicial task. This is made obvious by § 552 (b)(5), which keeps secret "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The bureaucrat who uses the "secret" stamp obviously does not have the final say as to what "memorandums or letters" would be available by law under Exemption 5, for § 552 (a)(3) gives the District Court authority, where agency records are alleged to be "improperly withheld," to "determine the matter de novo," the "burden" being on the agency "to sustain its action." Hence, § 552 (b)(5), behind which the executive agency seeks refuge here, establishes a policy which is served by the fact/opinion distinction long established in federal discovery. The question is whether a private party would routinely be entitled to disclosure through discovery of some or all of the material sought to be excerpted. When the Court answers that no such inquiry can be made under § 552 (b)(1), it makes a shambles of the disclosure mechanism which Congress tried to create. To make obvious the interplay of the nine exemptions listed in § 552 (b), as well as § 552 (c), I have attached them as an Appendix to this dissent.

to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." [2]

I would affirm the judgment below.

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

Sections 552 (b) and (c) of the Freedom of Information Act read as follows:

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

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[2] Letter to W. T. Barry, Aug. 4, 1822, 9 The Writings of James Madison 103 (Hunt ed. 1910).

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

Syllabus

ROE ET AL. *v.* WADE, DISTRICT ATTORNEY OF DALLAS COUNTY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 70–18. Argued December 13, 1971—Reargued October 11, 1972—Decided January 22, 1973

A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health. A three-judge District Court, which consolidated the actions, held that Roe and Hallford, and members of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, though not injunctive, relief was warranted, the court declared the abortion statutes void as vague and overbroadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford. *Held:*

1. While 28 U. S. C. § 1253 authorizes no direct appeal to this Court from the grant or denial of declaratory relief alone, review is not foreclosed when the case is properly before the Court on appeal from specific denial of injunctive relief and the arguments as to both injunctive and declaratory relief are necessarily identical. P. 123.

2. Roe has standing to sue; the Does and Hallford do not. Pp. 123–129.

(a) Contrary to appellee's contention, the natural termination of Roe's pregnancy did not moot her suit. Litigation involving pregnancy, which is "capable of repetition, yet evading review," is an exception to the usual federal rule that an actual controversy

must exist at review stages and not simply when the action is initiated. Pp. 124–125.

(b) The District Court correctly refused injunctive, but erred in granting declaratory, relief to Hallford, who alleged no federally protected right not assertable as a defense against the good-faith state prosecutions pending against him. *Samuels* v. *Mackell,* 401 U. S. 66. Pp. 125–127.

(c) The Does' complaint, based as it is on contingencies, any one or more of which may not occur, is too speculative to present an actual case or controversy. Pp. 127–129.

3. State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term. Pp. 147–164.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. Pp. 163, 164.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. Pp. 163, 164.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. Pp. 163–164; 164–165.

4. The State may define the term "physician" to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined. P. 165.

5. It is unnecessary to decide the injunctive relief issue since the Texas authorities will doubtless fully recognize the Court's ruling

that the Texas criminal abortion statutes are unconstitutional. P. 166.

314 F. Supp. 1217, affirmed in part and reversed in part.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined. BURGER, C. J., *post*, p. 207, DOUGLAS, J., *post*, p. 209, and STEWART, J., *post*, p. 167, filed concurring opinions. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 221. REHNQUIST, J., filed a dissenting opinion, *post*, p. 171.

Sarah Weddington reargued the cause for appellants. With her on the briefs were *Roy Lucas, Fred Bruner, Roy L. Merrill, Jr.*, and *Norman Dorsen.*

Robert C. Flowers, Assistant Attorney General of Texas, argued the cause for appellee on the reargument. *Jay Floyd,* Assistant Attorney General, argued the cause for appellee on the original argument. With them on the brief were *Crawford C. Martin,* Attorney General, *Nola White,* First Assistant Attorney General, *Alfred Walker,* Executive Assistant Attorney General, *Henry Wade,* and *John B. Tolle.**

*Briefs of *amici curiae* were filed by *Gary K. Nelson,* Attorney General of Arizona, *Robert K. Killian,* Attorney General of Connecticut, *Ed W. Hancock,* Attorney General of Kentucky, *Clarence A. H. Meyer,* Attorney General of Nebraska, and *Vernon B. Romney,* Attorney General of Utah; by *Joseph P. Witherspoon, Jr.*, for the Association of Texas Diocesan Attorneys; by *Charles E. Rice* for Americans United for Life; by *Eugene J. McMahon* for Women for the Unborn et al.; by *Carol Ryan* for the American College of Obstetricians and Gynecologists et al.; by *Dennis J. Horan, Jerome A. Frazel, Jr., Thomas M. Crisham,* and *Dolores V. Horan* for Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology; by *Harriet F. Pilpel, Nancy F. Wechsler,* and *Frederic S. Nathan* for Planned Parenthood Federation of America, Inc., et al.; by *Alan F. Charles* for the National Legal Program on Health Problems of the Poor et al.; by *Marttie L. Thompson* for State Communities Aid Assn.; by

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This Texas federal appeal and its Georgia companion, *Doe* v. *Bolton, post,* p. 179, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we

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Alfred L. Scanlan, Martin J. Flynn, and *Robert M. Byrn* for the National Right to Life Committee; by *Helen L. Buttenwieser* for the American Ethical Union et al.; by *Norma G. Zarky* for the American Association of University Women et al.; by *Nancy Stearns* for New Women Lawyers et al.; by the California Committee to Legalize Abortion et al.; and by *Robert E. Dunne* for Robert L. Sassone.

have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in *Lochner* v. *New York,* 198 U. S. 45, 76 (1905):

> "[The Constitution] 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."

I

The Texas statutes that concern us here are Arts. 1191–1194 and 1196 of the State's Penal Code.[1] These make it a crime to "procure an abortion," as therein

[1] "Article 1191. Abortion

"If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

"Art. 1192. Furnishing the means

"Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

"Art. 1193. Attempt at abortion

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result,

defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States.[2]

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and shall be fined not less than one hundred nor more than one thousand dollars.

"Art. 1194. Murder in producing abortion

"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder."

"Art. 1196. By medical advice

"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

The foregoing Articles, together with Art. 1195, compose Chapter 9 of Title 15 of the Penal Code. Article 1195, not attacked here, reads:

"Art. 1195. Destroying unborn child

"Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

[2] Ariz. Rev. Stat. Ann. § 13–211 (1956); Conn. Pub. Act No. 1 (May 1972 special session) (in 4 Conn. Leg. Serv. 677 (1972)), and Conn. Gen. Stat. Rev. §§ 53–29, 53–30 (1968) (or unborn child); Idaho Code § 18–601 (1948); Ill. Rev. Stat., c. 38, § 23–1 (1971); Ind. Code § 35–1–58–1 (1971); Iowa Code § 701.1 (1971); Ky. Rev. Stat. § 436.020 (1962); La. Rev. Stat. § 37:1285 (6) (1964) (loss of medical license) (but see § 14:87 (Supp. 1972) containing no exception for the life of the mother under the criminal statute); Me. Rev. Stat. Ann., Tit. 17, § 51 (1964); Mass. Gen. Laws Ann., c. 272, § 19 (1970) (using the term "unlawfully," construed to exclude an abortion to save the mother's life, *Kudish* v. *Bd. of Registration,* 356 Mass. 98, 248 N. E. 2d 264 (1969)); Mich. Comp. Laws § 750.14 (1948); Minn. Stat. § 617.18 (1971); Mo. Rev. Stat. § 559.100 (1969); Mont. Rev. Codes Ann. § 94–401 (1969); Neb. Rev. Stat. § 28–405 (1964); Nev. Rev. Stat. § 200.220 (1967); N. H. Rev. Stat. Ann. § 585:13 (1955); N. J. Stat. Ann. § 2A:87–1 (1969) ("without lawful justification"); N. D. Cent. Code §§ 12–25–01, 12–25–02 (1960); Ohio Rev. Code Ann. § 2901.16 (1953); Okla. Stat. Ann., Tit. 21, § 861 (1972–1973 Supp.); Pa. Stat. Ann., Tit. 18,

Texas first enacted a criminal abortion statute in 1854. Texas Laws 1854, c. 49, § 1, set forth in 3 H. Gammel, Laws of Texas 1502 (1898). This was soon modified into language that has remained substantially unchanged to the present time. See Texas Penal Code of 1857, c. 7, Arts. 531–536; G. Paschal, Laws of Texas, Arts. 2192–2197 (1866); Texas Rev. Stat., c. 8, Arts. 536–541 (1879); Texas Rev. Crim. Stat., Arts. 1071–1076 (1911). The final article in each of these compilations provided the same exception, as does the present Article 1196, for an abortion by "medical advice for the purpose of saving the life of the mother." [3]

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§§ 4718, 4719 (1963) ("unlawful"); R. I. Gen. Laws Ann. § 11–3–1 (1969); S. D. Comp. Laws Ann. § 22–17–1 (1967); Tenn. Code Ann. §§ 39–301, 39–302 (1956); Utah Code Ann. §§ 76–2–1, 76–2–2 (1953); Vt. Stat. Ann., Tit. 13, § 101 (1958); W. Va. Code Ann. § 61–2–8 (1966); Wis. Stat. § 940.04 (1969); Wyo. Stat. Ann. §§ 6–77, 6–78 (1957).

[3] Long ago, a suggestion was made that the Texas statutes were unconstitutionally vague because of definitional deficiencies. The Texas Court of Criminal Appeals disposed of that suggestion peremptorily, saying only,

"It is also insisted in the motion in arrest of judgment that the statute is unconstitutional and void in that it does not sufficiently define or describe the offense of abortion. We do not concur in respect to this question." *Jackson* v. *State*, 55 Tex. Cr. R. 79, 89, 115 S. W. 262, 268 (1908).

The same court recently has held again that the State's abortion statutes are not unconstitutionally vague or overbroad. *Thompson* v. *State* (Ct. Crim. App. Tex. 1971), appeal docketed, No. 71–1200. The court held that "the State of Texas has a compelling interest to protect fetal life"; that Art. 1191 "is designed to protect fetal life"; that the Texas homicide statutes, particularly Art. 1205 of the Penal Code, are intended to protect a person "in existence by actual birth" and thereby implicitly recognize other human life that is not "in existence by actual birth"; that the definition of human life is for the legislature and not the courts; that Art. 1196 "is more definite than the District of Columbia statute upheld in [*United States* v.] *Vuitch*" (402 U. S. 62); and that the Texas statute "is

II

Jane Roe,[4] a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint Roe purported to sue "on behalf of herself and all other women" similarly situated.

James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In his complaint he alleged that he had been arrested previously for violations of the Texas abortion statutes and

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not vague and indefinite or overbroad." A physician's abortion conviction was affirmed.

In *Thompson,* n. 2, the court observed that any issue as to the burden of proof under the exemption of Art. 1196 "is not before us." But see *Veevers* v. *State,* 172 Tex. Cr. R. 162, 168–169, 354 S. W. 2d 161, 166–167 (1962). Cf. *United States* v. *Vuitch,* 402 U. S. 62, 69–71 (1971).

[4] The name is a pseudonym.

that two such prosecutions were pending against him. He described conditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to determine whether they fell within or outside the exception recognized by Article 1196. He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

John and Mary Doe,[5] a married couple, filed a companion complaint to that of Roe. They also named the District Attorney as defendant, claimed like constitutional deprivations, and sought declaratory and injunctive relief. The Does alleged that they were a childless couple; that Mrs. Doe was suffering from a "neural-chemical" disorder; that her physician had "advised her to avoid pregnancy until such time as her condition has materially improved" (although a pregnancy at the present time would not present "a serious risk" to her life); that, pursuant to medical advice, she had discontinued use of birth control pills; and that if she should become pregnant, she would want to terminate the pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. By an amendment to their complaint, the Does purported to sue "on behalf of themselves and all couples similarly situated."

The two actions were consolidated and heard together by a duly convened three-judge district court. The suits thus presented the situations of the pregnant single woman, the childless couple, with the wife not pregnant,

[5] These names are pseudonyms.

and the licensed practicing physician, all joining in the attack on the Texas criminal abortion statutes. Upon the filing of affidavits, motions were made for dismissal and for summary judgment. The court held that Roe and members of her class, and Dr. Hallford, had standing to sue and presented justiciable controversies, but that the Does had failed to allege facts sufficient to state a present controversy and did not have standing. It concluded that, with respect to the requests for a declaratory judgment, abstention was not warranted. On the merits, the District Court held that the "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment," and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights. The court then held that abstention was warranted with respect to the requests for an injunction. It therefore dismissed the Does' complaint, declared the abortion statutes void, and dismissed the application for injunctive relief. 314 F. Supp. 1217, 1225 (ND Tex. 1970).

The plaintiffs Roe and Doe and the intervenor Hallford, pursuant to 28 U. S. C. § 1253, have appealed to this Court from that part of the District Court's judgment denying the injunction. The defendant District Attorney has purported to cross-appeal, pursuant to the same statute, from the court's grant of declaratory relief to Roe and Hallford. Both sides also have taken protective appeals to the United States Court of Appeals for the Fifth Circuit. That court ordered the appeals held in abeyance pending decision here. We postponed decision on jurisdiction to the hearing on the merits. 402 U. S. 941 (1971).

III

It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief. Our decisions in *Mitchell* v. *Donovan,* 398 U. S. 427 (1970), and *Gunn* v. *University Committee,* 399 U. S. 383 (1970), are to the effect that § 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not foreclose our review of both the injunctive and the declaratory aspects of a case of this kind when it is properly here, as this one is, on appeal under § 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical. See *Carter* v. *Jury Comm'n,* 396 U. S. 320 (1970); *Florida Lime Growers* v. *Jacobsen,* 362 U. S. 73, 80–81 (1960). It would be destructive of time and energy for all concerned were we to rule otherwise. Cf. *Doe* v. *Bolton, post,* p. 179.

IV

We are next confronted with issues of justiciability, standing, and abstention. Have Roe and the Does established that "personal stake in the outcome of the controversy," *Baker* v. *Carr,* 369 U. S. 186, 204 (1962), that insures that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution," *Flast* v. *Cohen,* 392 U. S. 83, 101 (1968), and *Sierra Club* v. *Morton,* 405 U. S. 727, 732 (1972)? And what effect did the pendency of criminal abortion charges against Dr. Hallford in state court have upon the propriety of the federal court's granting relief to him as a plaintiff-intervenor?

A. *Jane Roe.* Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.

Viewing Roe's case as of the time of its filing and thereafter until as late as May, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. *Abele* v. *Markle,* 452 F. 2d 1121, 1125 (CA2 1971); *Crossen* v. *Breckenridge,* 446 F. 2d 833, 838–839 (CA6 1971); *Poe* v. *Menghini,* 339 F. Supp. 986, 990–991 (Kan. 1972). See *Truax* v. *Raich,* 239 U. S. 33 (1915). Indeed, we do not read the appellee's brief as really asserting anything to the contrary. The "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast* v. *Cohen,* 392 U. S., at 102, and the necessary degree of contentiousness, *Golden* v. *Zwickler,* 394 U. S. 103 (1969), are both present.

The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970,[6] or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.

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[6] The appellee twice states in his brief that the hearing before the District Court was held on July 22, 1970. Brief for Appellee 13. The docket entries, App. 2, and the transcript, App. 76, reveal this to be an error. The July date appears to be the time of the reporter's transcription. See App. 77.

The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950); *Golden* v. *Zwickler, supra; SEC* v. *Medical Committee for Human Rights,* 404 U. S. 403 (1972).

But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911). See *Moore* v. *Ogilvie,* 394 U. S. 814, 816 (1969); *Carroll* v. *Princess Anne,* 393 U. S. 175, 178–179 (1968); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632–633 (1953).

We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot.

B. *Dr. Hallford.* The doctor's position is different. He entered Roe's litigation as a plaintiff-intervenor, alleging in his complaint that he:

> "[I]n the past has been arrested for violating the Texas Abortion Laws and at the present time stands charged by indictment with violating said laws in the Criminal District Court of Dallas County, Texas to-wit: (1) The State of Texas vs.

> James H. Hallford, No. C–69–5307–IH, and (2) The State of Texas vs. James H. Hallford, No. C–69–2524–H. In both cases the defendant is charged with abortion . . . ."

In his application for leave to intervene, the doctor made like representations as to the abortion charges pending in the state court. These representations were also repeated in the affidavit he executed and filed in support of his motion for summary judgment.

Dr. Hallford is, therefore, in the position of seeking, in a federal court, declaratory and injunctive relief with respect to the same statutes under which he stands charged in criminal prosecutions simultaneously pending in state court. Although he stated that he has been arrested in the past for violating the State's abortion laws, he makes no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions. Neither is there any allegation of harassment or bad-faith prosecution. In order to escape the rule articulated in the cases cited in the next paragraph of this opinion that, absent harassment and bad faith, a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the State is prosecuting him, Dr. Hallford seeks to distinguish his status as a present state defendant from his status as a "potential future defendant" and to assert only the latter for standing purposes here.

We see no merit in that distinction. Our decision in *Samuels* v. *Mackell,* 401 U. S. 66 (1971), compels the conclusion that the District Court erred when it granted declaratory relief to Dr. Hallford instead of refraining from so doing. The court, of course, was correct in refusing to grant injunctive relief to the doctor. The reasons supportive of that action, however, are those expressed in *Samuels* v. *Mackell, supra,* and in *Younger* v.

Harris, 401 U. S. 37 (1971); *Boyle* v. *Landry,* 401 U. S. 77 (1971); *Perez* v. *Ledesma,* 401 U. S. 82 (1971); and *Byrne* v. *Karalexis,* 401 U. S. 216 (1971). See also *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). We note, in passing, that *Younger* and its companion cases were decided after the three-judge District Court decision in this case.

Dr. Hallford's complaint in intervention, therefore, is to be dismissed.[7] He is remitted to his defenses in the state criminal proceedings against him. We reverse the judgment of the District Court insofar as it granted Dr. Hallford relief and failed to dismiss his complaint in intervention.

C. *The Does.* In view of our ruling as to Roe's standing in her case, the issue of the Does' standing in their case has little significance. The claims they assert are essentially the same as those of Roe, and they attack the same statutes. Nevertheless, we briefly note the Does' posture.

Their pleadings present them as a childless married couple, the woman not being pregnant, who have no desire to have children at this time because of their having received medical advice that Mrs. Doe should avoid pregnancy, and for "other highly personal reasons." But they "fear . . . they may face the prospect of becoming

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[7] We need not consider what different result, if any, would follow if Dr. Hallford's intervention were on behalf of a class. His complaint in intervention does not purport to assert a class suit and makes no reference to any class apart from an allegation that he "and others similarly situated" must necessarily guess at the meaning of Art. 1196. His application for leave to intervene goes somewhat further, for it asserts that plaintiff Roe does not adequately protect the interest of the doctor "and the class of people who are physicians . . . [and] the class of people who are . . . patients . . . ." The leave application, however, is not the complaint. Despite the District Court's statement to the contrary, 314 F. Supp., at 1225, we fail to perceive the essentials of a class suit in the Hallford complaint.

parents." And if pregnancy ensues, they "would want to terminate" it by an abortion. They assert an inability to obtain an abortion legally in Texas and, consequently, the prospect of obtaining an illegal abortion there or of going outside Texas to some place where the procedure could be obtained legally and competently.

We thus have as plaintiffs a married couple who have, as their asserted immediate and present injury, only an alleged "detrimental effect upon [their] marital happiness" because they are forced to "the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy." Their claim is that sometime in the future Mrs. Doe might become pregnant because of possible failure of contraceptive measures, and at that time in the future she might want an abortion that might then be illegal under the Texas statutes.

This very phrasing of the Does' position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. In the Does' estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. *Younger* v. *Harris,* 401 U. S., at 41–42; *Golden* v. *Zwickler,* 394 U. S., at 109–110; *Abele* v. *Markle,* 452 F. 2d, at 1124–1125; *Crossen* v. *Breckenridge,* 446 F. 2d, at 839. The Does' claim falls far short of those resolved otherwise in the cases that the Does urge upon us, namely, *Investment Co. Institute* v. *Camp,* 401 U. S. 617 (1971); *Data Processing Service* v. *Camp,* 397 U. S. 150 (1970);

and *Epperson* v. *Arkansas,* 393 U. S. 97 (1968). See also *Truax* v. *Raich,* 239 U. S. 33 (1915).

The Does therefore are not appropriate plaintiffs in this litigation. Their complaint was properly dismissed by the District Court, and we affirm that dismissal.

V

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see *Griswold* v. *Connecticut,* 381 U. S. 479 (1965); *Eisenstadt* v. *Baird,* 405 U. S. 438 (1972); *id.,* at 460 (WHITE, J., concurring in result); or among those rights reserved to the people by the Ninth Amendment, *Griswold* v. *Connecticut,* 381 U. S., at 486 (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

VI

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.

1. *Ancient attitudes.* These are not capable of precise determination. We are told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished.[8] We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era,[9] and that "it was resorted to without scruple." [10] The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable.[11] Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion.[12]

2. *The Hippocratic Oath.* What then of the famous Oath that has stood so long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)–377(?) B. C.), who has been described

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[8] A. Castiglioni, A History of Medicine 84 (2d ed. 1947), E. Krumbhaar, translator and editor (hereinafter Castiglioni).

[9] J. Ricci, The Genealogy of Gynaecology 52, 84, 113, 149 (2d ed. 1950) (hereinafter Ricci); L. Lader, Abortion 75–77 (1966) (hereinafter Lader); K. Niswander, Medical Abortion Practices in the United States, in Abortion and the Law 37, 38–40 (D. Smith ed. 1967); G. Williams, The Sanctity of Life and the Criminal Law 148 (1957) (hereinafter Williams); J. Noonan, An Almost Absolute Value in History, in The Morality of Abortion 1, 3–7 (J. Noonan ed. 1970) (hereinafter Noonan); Quay, Justifiable Abortion—Medical and Legal Foundations (pt. 2), 49 Geo. L. J. 395, 406–422 (1961) (hereinafter Quay).

[10] L. Edelstein, The Hippocratic Oath 10 (1943) (hereinafter Edelstein). But see Castiglioni 227.

[11] Edelstein 12; Ricci 113–114, 118–119; Noonan 5.

[12] Edelstein 13–14.

as the Father of Medicine, the "wisest and the greatest practitioner of his art," and the "most important and most complete medical personality of antiquity," who dominated the medical schools of his time, and who typified the sum of the medical knowledge of the past? [13] The Oath varies somewhat according to the particular translation, but in any translation the content is clear: "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion," [14] or "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy." [15]

Although the Oath is not mentioned in any of the principal briefs in this case or in *Doe* v. *Bolton, post,* p. 179, it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory: [16] The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, Republic, V, 461; Aristotle, Politics, VII, 1335b 25. For the Pythagoreans, however, it was a matter of dogma. For them the embryo was animate from the moment of conception, and abortion meant destruction of a living being. The abortion clause of the Oath, therefore, "echoes Pythagorean doctrines,"

[13] Castiglioni 148.

[14] *Id.*, at 154.

[15] Edelstein 3.

[16] *Id.*, at 12, 15–18.

and "[i]n no other stratum of Greek opinion were such views held or proposed in the same spirit of uncompromising austerity." [17]

Dr. Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (A. D. 130–200) "give evidence of the violation of almost every one of its injunctions." [18] But with the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Pythagorean ethic. The Oath "became the nucleus of all medical ethics" and "was applauded as the embodiment of truth." Thus, suggests Dr. Edelstein, it is "a Pythagorean manifesto and not the expression of an absolute standard of medical conduct." [19]

This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long-accepted and revered statement of medical ethics.

3. *The common law.* It is undisputed that at common law, abortion performed *before* "quickening"—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy [20]—was not an indictable offense.[21] The ab-

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[17] *Id.*, at 18; Lader 76.

[18] Edelstein 63.

[19] *Id.*, at 64.

[20] Dorland's Illustrated Medical Dictionary 1261 (24th ed. 1965).

[21] E. Coke, Institutes III *50; 1 W. Hawkins, Pleas of the Crown, c. 31, § 16 (4th ed. 1762); 1 W. Blackstone, Commentaries *129–130; M. Hale, Pleas of the Crown 433 (1st Amer. ed. 1847). For discussions of the role of the quickening concept in English common law, see Lader 78; Noonan 223–226; Means, The Law of New

sence of a common-law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became "formed" or recognizably human, or in terms of when a "person" came into being, that is, infused with a "soul" or "animated." A loose consensus evolved in early English law that these events occurred at some point between conception and live birth.[22] This was "mediate animation." Although

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York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality (pt. 1), 14 N. Y. L. F. 411, 418–428 (1968) (hereinafter Means I); Stern, Abortion: Reform and the Law, 59 J. Crim. L. C. & P. S. 84 (1968) (hereinafter Stern); Quay 430–432; Williams 152.

[22] Early philosophers believed that the embryo or fetus did not become formed and begin to live until at least 40 days after conception for a male, and 80 to 90 days for a female. See, for example, Aristotle, Hist. Anim. 7.3.583b; Gen. Anim. 2.3.736, 2.5.741; Hippocrates, Lib. de Nat. Puer., No. 10. Aristotle's thinking derived from his three-stage theory of life: vegetable, animal, rational. The vegetable stage was reached at conception, the animal at "animation," and the rational soon after live birth. This theory, together with the 40/80 day view, came to be accepted by early Christian thinkers.

The theological debate was reflected in the writings of St. Augustine, who made a distinction between *embryo inanimatus*, not yet endowed with a soul, and *embryo animatus*. He may have drawn upon Exodus 21:22. At one point, however, he expressed the view that human powers cannot determine the point during fetal development at which the critical change occurs. See Augustine, De Origine Animae 4.4 (Pub. Law 44.527). See also W. Reany, The Creation of the Human Soul, c. 2 and 83–86 (1932); Huser, The Crime of Abortion in Canon Law 15 (Catholic Univ. of America, Canon Law Studies No. 162, Washington, D. C., 1942).

Galen, in three treatises related to embryology, accepted the thinking of Aristotle and his followers. Quay 426–427. Later, Augustine on abortion was incorporated by Gratian into the Decretum, published about 1140. Decretum Magistri Gratiani 2.32.2.7 to 2.32.2.10,

Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that prior to this point the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40–80-day view, and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening was echoed by later common-law scholars and found its way into the received common law in this country.

Whether abortion of a *quick* fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the 13th century, thought it homicide.[23] But the later and predominant view, following the great common-law scholars, has been that it was, at most, a lesser offense. In a frequently cited

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in 1 Corpus Juris Canonici 1122, 1123 (A. Friedburg, 2d ed. 1879). This Decretal and the Decretals that followed were recognized as the definitive body of canon law until the new Code of 1917.

For discussions of the canon-law treatment, see Means I, pp. 411–412; Noonan 20–26; Quay 426–430; see also J. Noonan, Contraception: A History of Its Treatment by the Catholic Theologians and Canonists 18–29 (1965).

[23] Bracton took the position that abortion by blow or poison was homicide "if the foetus be already formed and animated, and particularly if it be animated." 2 H. Bracton, De Legibus et Consuetudinibus Angliae 279 (T. Twiss ed. 1879), or, as a later translation puts it, "if the foetus is already formed or quickened, especially if it is quickened," 2 H. Bracton, On the Laws and Customs of England 341 (S. Thorne ed. 1968). See Quay 431; see also 2 Fleta 60–61 (Book 1, c. 23) (Selden Society ed. 1955).

passage, Coke took the position that abortion of a woman "quick with childe" is "a great misprision, and no murder." [24] Blackstone followed, saying that while abortion after quickening had once been considered manslaughter (though not murder), "modern law" took a less severe view.[25] A recent review of the common-law precedents argues, however, that those precedents contradict Coke and that even post-quickening abortion was never established as a common-law crime.[26] This is of some importance because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law,[27] others followed Coke in stating that abor-

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[24] E. Coke, Institutes III *50.

[25] 1 W. Blackstone, Commentaries *129–130.

[26] Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?, 17 N. Y. L. F. 335 (1971) (hereinafter Means II). The author examines the two principal precedents cited marginally by Coke, both contrary to his dictum, and traces the treatment of these and other cases by earlier commentators. He concludes that Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law. The author even suggests a reason: Coke's strong feelings against abortion, coupled with his determination to assert common-law (secular) jurisdiction to assess penalties for an offense that traditionally had been an exclusively ecclesiastical or canon-law crime. See also Lader 78–79, who notes that some scholars doubt that the common law ever was applied to abortion; that the English ecclesiastical courts seem to have lost interest in the problem after 1527; and that the preamble to the English legislation of 1803, 43 Geo. 3, c. 58, § 1, referred to in the text, *infra*, at 136, states that "no adequate means have been hitherto provided for the prevention and punishment of such offenses."

[27] *Commonwealth* v. *Bangs*, 9 Mass. 387, 388 (1812); *Commonwealth* v. *Parker*, 50 Mass. (9 Metc.) 263, 265–266 (1845); *State* v. *Cooper*, 22 N. J. L. 52, 58 (1849); *Abrams* v. *Foshee*, 3 Iowa 274, 278–280 (1856); *Smith* v. *Gaffard*, 31 Ala. 45, 51 (1857); *Mitchell* v. *Commonwealth*, 78 Ky. 204, 210 (1879); *Eggart* v. *State*, 40 Fla.

tion of a quick fetus was a "misprision," a term they translated to mean "misdemeanor." [28] That their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common-law prosecutions for post-quickening abortion), makes it now appear doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.

4. *The English statutory law.* England's first criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58, came in 1803. It made abortion of a quick fetus, § 1, a capital crime, but in § 2 it provided lesser penalties for the felony of abortion before quickening, and thus preserved the "quickening" distinction. This contrast was continued in the general revision of 1828, 9 Geo. 4, c. 31, § 13. It disappeared, however, together with the death penalty, in 1837, 7 Will. 4 & 1 Vict., c. 85, § 6, and did not reappear in the Offenses Against the Person Act of 1861, 24 & 25 Vict., c. 100, § 59, that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929, the Infant Life (Preservation) Act, 19 & 20 Geo. 5, c. 34, came into being. Its emphasis was upon the destruction of "the life of a child capable of being born alive." It made a willful act performed with the necessary intent a felony. It contained a proviso that one was not to be

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527, 532, 25 So. 144, 145 (1898); *State* v. *Alcorn,* 7 Idaho 599, 606, 64 P. 1014, 1016 (1901); *Edwards* v. *State,* 79 Neb. 251, 252, 112 N. W. 611, 612 (1907); *Gray* v. *State,* 77 Tex. Cr. R. 221, 224, 178 S. W. 337, 338 (1915); *Miller* v. *Bennett,* 190 Va. 162, 169, 56 S. E. 2d 217, 221 (1949). Contra, *Mills* v. *Commonwealth,* 13 Pa. 631, 633 (1850); *State* v. *Slagle,* 83 N. C. 630, 632 (1880).

[28] See *Smith* v. *State,* 33 Me. 48, 55 (1851); *Evans* v. *People,* 49 N. Y. 86, 88 (1872); *Lamb* v. *State,* 67 Md. 524, 533, 10 A. 208 (1887).

found guilty of the offense "unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."

A seemingly notable development in the English law was the case of *Rex* v. *Bourne,* [1939] 1 K. B. 687. This case apparently answered in the affirmative the question whether an abortion necessary to preserve the life of the pregnant woman was excepted from the criminal penalties of the 1861 Act. In his instructions to the jury, Judge Macnaghten referred to the 1929 Act, and observed that that Act related to "the case where a child is killed by a wilful act at the time when it is being delivered in the ordinary course of nature." *Id.,* at 691. He concluded that the 1861 Act's use of the word "unlawfully," imported the same meaning expressed by the specific proviso in the 1929 Act, even though there was no mention of preserving the mother's life in the 1861 Act. He then construed the phrase "preserving the life of the mother" broadly, that is, "in a reasonable sense," to include a serious and permanent threat to the mother's *health,* and instructed the jury to acquit Dr. Bourne if it found he had acted in a good-faith belief that the abortion was necessary for this purpose. *Id.,* at 693–694. The jury did acquit.

Recently, Parliament enacted a new abortion law. This is the Abortion Act of 1967, 15 & 16 Eliz. 2, c. 87. The Act permits a licensed physician to perform an abortion where two other licensed physicians agree (a) "that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated," or (b) "that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as

to be seriously handicapped." The Act also provides that, in making this determination, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment." It also permits a physician, without the concurrence of others, to terminate a pregnancy where he is of the good-faith opinion that the abortion "is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman."

5. *The American law.* In this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a woman "quick with child." [29] The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860.[30] In 1828, New York enacted legislation [31] that, in two respects, was to serve as a model for early anti-abortion statutes. First, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it "shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose." By 1840, when Texas had received the common law,[32] only eight American States

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[29] Conn. Stat., Tit. 20, § 14 (1821).

[30] Conn. Pub. Acts, c. 71, § 1 (1860).

[31] N. Y. Rev. Stat., pt. 4, c. 1, Tit. 2, Art. 1, § 9, p. 661, and Tit. 6, § 21, p. 694 (1829).

[32] Act of Jan. 20, 1840, § 1, set forth in 2 H. Gammel, Laws of Texas 177–178 (1898); see *Grigsby* v. *Reib,* 105 Tex. 597, 600, 153 S. W. 1124, 1125 (1913).

had statutes dealing with abortion.[33] It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared and the typical law required that the procedure actually be necessary for that purpose.

Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's, a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother.[34] The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health.[35] Three States permitted abortions that were not "unlawfully" performed or that were not "without lawful justification," leaving interpretation of those standards to the courts.[36] In

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[33] The early statutes are discussed in Quay 435–438. See also Lader 85–88; Stern 85–86; and Means II 375–376.

[34] Criminal abortion statutes in effect in the States as of 1961, together with historical statutory development and important judicial interpretations of the state statutes, are cited and quoted in Quay 447–520. See Comment, A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems, 1972 U. Ill. L. F. 177, 179, classifying the abortion statutes and listing 25 States as permitting abortion only if necessary to save or preserve the mother's life.

[35] Ala. Code, Tit. 14, § 9 (1958); D. C. Code Ann. § 22–201 (1967).

[36] Mass. Gen. Laws Ann., c. 272, § 19 (1970); N. J. Stat. Ann. § 2A:87–1 (1969); Pa. Stat. Ann., Tit. 18, §§ 4718, 4719 (1963).

the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, § 230.3,[37] set forth as Appendix B to the opinion in *Doe* v. *Bolton, post,* p. 205.

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the oppor-

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[37] Fourteen States have adopted some form of the ALI statute. See Ark. Stat. Ann. §§ 41–303 to 41–310 (Supp. 1971); Calif. Health & Safety Code §§ 25950–25955.5 (Supp. 1972); Colo. Rev. Stat. Ann. §§ 40–2–50 to 40–2–53 (Cum. Supp. 1967); Del. Code Ann., Tit. 24, §§ 1790–1793 (Supp. 1972); Florida Law of Apr. 13, 1972, c. 72–196, 1972 Fla. Sess. Law Serv., pp. 380–382; Ga. Code §§ 26–1201 to 26–1203 (1972); Kan. Stat. Ann. § 21–3407 (Supp. 1971); Md. Ann. Code, Art. 43, §§ 137–139 (1971); Miss. Code Ann. § 2223 (Supp. 1972); N. M. Stat. Ann. §§ 40A–5–1 to 40A–5–3 (1972); N. C. Gen. Stat. § 14–45.1 (Supp. 1971); Ore. Rev. Stat. §§ 435.405 to 435.495 (1971); S. C. Code Ann. §§ 16–82 to 16–89 (1962 and Supp. 1971); Va. Code Ann. §§ 18.1–62 to 18.1–62.3 (Supp. 1972). Mr. Justice Clark described some of these States as having "led the way." Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola U. (L. A.) L. Rev. 1, 11 (1969).

By the end of 1970, four other States had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements. Alaska Stat. § 11.15.060 (1970); Haw. Rev. Stat. § 453–16 (Supp. 1971); N. Y. Penal Code § 125.05, subd. 3 (Supp. 1972–1973); Wash. Rev. Code §§ 9.02.060 to 9.02.080 (Supp. 1972). The precise status of criminal abortion laws in some States is made unclear by recent decisions in state and federal courts striking down existing state laws, in whole or in part.

tunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

6. *The position of the American Medical Association.* The anti-abortion mood prevalent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period.

An AMA Committee on Criminal Abortion was appointed in May 1857. It presented its report, 12 Trans. of the Am. Med. Assn. 73–78 (1859), to the Twelfth Annual Meeting. That report observed that the Committee had been appointed to investigate criminal abortion "with a view to its general suppression." It deplored abortion and its frequency and it listed three causes of "this general demoralization":

> "The first of these causes is a wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.
>
> "The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life . . . .
>
> "The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it,

> and to its life as yet denies all protection." *Id.*, at 75–76.

The Committee then offered, and the Association adopted, resolutions protesting "against such unwarrantable destruction of human life," calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies "in pressing the subject." *Id.*, at 28, 78.

In 1871 a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation, "We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less." 22 Trans. of the Am. Med. Assn. 258 (1871). It proffered resolutions, adopted by the Association, *id.*, at 38–39, recommending, among other things, that it "be unlawful and unprofessional for any physician to induce abortion or premature labor, without the concurrent opinion of at least one respectable consulting physician, and then always with a view to the safety of the child—if that be possible," and calling "the attention of the clergy of all denominations to the perverted views of morality entertained by a large class of females—aye, and men also, on this important question."

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967. In that year, the Committee on Human Reproduction urged the adoption of a stated policy of opposition to induced abortion, except when there is "documented medical evidence" of a threat to the health or life of the mother, or that the child "may be born with incapacitating physical deformity or mental deficiency," or that a pregnancy "resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the

patient," two other physicians "chosen because of their recognized professional competence have examined the patient and have concurred in writing," and the procedure "is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals." The providing of medical information by physicians to state legislatures in their consideration of legislation regarding therapeutic abortion was "to be considered consistent with the principles of ethics of the American Medical Association." This recommendation was adopted by the House of Delegates. Proceedings of the AMA House of Delegates 40-51 (June 1967).

In 1970, after the introduction of a variety of proposed resolutions, and of a report from its Board of Trustees, a reference committee noted "polarization of the medical profession on this controversial issue"; division among those who had testified; a difference of opinion among AMA councils and committees; "the remarkable shift in testimony" in six months, felt to be influenced "by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available;" and a feeling "that this trend will continue." On June 25, 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee. The preambles emphasized "the best interests of the patient," "sound clinical judgment," and "informed patient consent," in contrast to "mere acquiescence to the patient's demand." The resolutions asserted that abortion is a medical procedure that should be performed by a licensed physician in an accredited hospital only after consultation with two other physicians and in conformity with state law, and that no party to the procedure should be required to violate personally held moral principles.[38] Proceedings

[38] "Whereas, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient

of the AMA House of Delegates 220 (June 1970). The AMA Judicial Council rendered a complementary opinion.[39]

7. *The position of the American Public Health Association.* In October 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number:

"a. Rapid and simple abortion referral must be readily available through state and local public

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since good medical practice requires due consideration for the patient's welfare and not mere acquiescence to the patient's demand; and

"Whereas, The standards of sound clinical judgment, which, together with informed patient consent should be determinative according to the merits of each individual case; therefore be it

"*RESOLVED,* That abortion is a medical procedure and should be performed only by a duly licensed physician and surgeon in an accredited hospital acting only after consultation with two other physicians chosen because of their professional competency and in conformance with standards of good medical practice and the Medical Practice Act of his State; and be it further

"*RESOLVED,* That no physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice." Proceedings of the AMA House of Delegates 220 (June 1970).

[39] "The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion that is performed in accordance with good medical practice and under circumstances that do not violate the laws of the community in which he practices.

"In the matter of abortions, as of any other medical procedure, the Judicial Council becomes involved whenever there is alleged violation of the Principles of Medical Ethics as established by the House of Delegates."

health departments, medical societies, or other nonprofit organizations.

"b. An important function of counseling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services.

"c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services, psychiatric consultation should be sought for definite indications and not on a routine basis.

"d. A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.

"e. Contraception and/or sterilization should be discussed with each abortion patient." Recommended Standards for Abortion Services, 61 Am. J. Pub. Health 396 (1971).

Among factors pertinent to life and health risks associated with abortion were three that "are recognized as important":

"a. the skill of the physician,

"b. the environment in which the abortion is performed, and above all

"c. the duration of pregnancy, as determined by uterine size and confirmed by menstrual history." *Id.*, at 397.

It was said that "a well-equipped hospital" offers more protection "to cope with unforeseen difficulties than an office or clinic without such resources. . . . The factor of gestational age is of overriding importance." Thus, it was recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures. For pregnancies in the first tri-

mester, abortion in the hospital with or without overnight stay "is probably the safest practice." An abortion in an extramural facility, however, is an acceptable alternative "provided arrangements exist in advance to admit patients promptly if unforeseen complications develop." Standards for an abortion facility were listed. It was said that at present abortions should be performed by physicians or osteopaths who are licensed to practice and who have "adequate training." *Id.*, at 398.

8. *The position of the American Bar Association.* At its meeting in February 1972 the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. 58 A. B. A. J. 380 (1972). We set forth the Act in full in the margin.[40] The

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[40] "UNIFORM ABORTION ACT

"SECTION 1. [*Abortion Defined; When Authorized.*]

"(a) 'Abortion' means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.

"(b) An abortion may be performed in this state only if it is performed:

"(1) by a physician licensed to practice medicine [or osteopathy] in this state or by a physician practicing medicine [or osteopathy] in the employ of the government of the United States or of this state, [and the abortion is performed [in the physician's office or in a medical clinic, or] in a hospital approved by the [Department of Health] or operated by the United States, this state, or any department, agency, or political subdivision of either;] or by a female upon herself upon the advice of the physician; and

"(2) within [20] weeks after the commencement of the pregnancy [or after [20] weeks only if the physician has reasonable cause to believe (i) there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, (ii) that the child would be born with grave physical or mental defect, or (iii) that

Conference has appended an enlightening Prefatory Note.[41]

VII

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

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the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years].

"SECTION 2. [*Penalty.*] Any person who performs or procures an abortion other than authorized by this Act is guilty of a [felony] and, upon conviction thereof, may be sentenced to pay a fine not exceeding [$1,000] or to imprisonment [in the state penitentiary] not exceeding [5 years], or both.

"SECTION 3. [*Uniformity of Interpretation.*] This Act shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

"SECTION 4. [*Short Title.*] This Act may be cited as the Uniform Abortion Act.

"SECTION 5. [*Severability.*] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

"SECTION 6. [*Repeal.*] The following acts and parts of acts are repealed:

"(1)

"(2)

"(3)

"SECTION 7. [*Time of Taking Effect.*] This Act shall take effect————————."

[41] "This Act is based largely upon the New York abortion act following a review of the more recent laws on abortion in several states and upon recognition of a more liberal trend in laws on this subject. Recognition was given also to the several decisions in state and federal courts which show a further trend toward liberalization of abortion laws, especially during the first trimester of pregnancy.

"Recognizing that a number of problems appeared in New York, a shorter time period for 'unlimited' abortions was advisable. The

It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously.[42] The appellants and *amici* contend, moreover, that this is not a proper state purpose at all and suggest that, if it were, the Texas statutes are overbroad in protecting it since the law fails to distinguish between married and unwed mothers.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman.[43] This was particularly true prior to the

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time period was bracketed to permit the various states to insert a figure more in keeping with the different conditions that might exist among the states. Likewise, the language limiting the place or places in which abortions may be performed was also bracketed to account for different conditions among the states. In addition, limitations on abortions after the initial 'unlimited' period were placed in brackets so that individual states may adopt all or any of these reasons, or place further restrictions upon abortions after the initial period.

"This Act does not contain any provision relating to medical review committees or prohibitions against sanctions imposed upon medical personnel refusing to participate in abortions because of religious or other similar reasons, or the like. Such provisions, while related, do not directly pertain to when, where, or by whom abortions may be performed; however, the Act is not drafted to exclude such a provision by a state wishing to enact the same."

[42] See, for example, *YWCA* v. *Kugler*, 342 F. Supp. 1048, 1074 (N. J. 1972); *Abele* v. *Markle*, 342 F. Supp. 800, 805–806 (Conn. 1972) (Newman, J., concurring in result), appeal docketed, No. 72–56; *Walsingham* v. *State*, 250 So. 2d 857, 863 (Ervin, J., concurring) (Fla. 1971); *State* v. *Gedicke*, 43 N. J. L. 86, 90 (1881); Means II 381–382.

[43] See C. Haagensen & W. Lloyd, A Hundred Years of Medicine 19 (1943).

development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dilation and curettage were not nearly so safe as they are today. Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellants and various *amici* refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth.[44] Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the areas of health and medical standards do remain.

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[44] Potts, Postconceptive Control of Fertility, 8 Int'l J. of G. & O. 957, 967 (1970) (England and Wales); Abortion Mortality, 20 Morbidity and Mortality 208, 209 (June 12, 1971) (U. S. Dept. of HEW, Public Health Service) (New York City); Tietze, United States: Therapeutic Abortions, 1963–1968, 59 Studies in Family Planning 5, 7 (1970); Tietze, Mortality with Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969) (Japan, Czechoslovakia, Hungary); Tietze & Lehfeldt, Legal Abortion in Eastern Europe, 175 J. A. M. A. 1149, 1152 (April 1961). Other sources are discussed in Lader 17–23.

The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

The third reason is the State's interest—some phrase it in terms of duty—in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception.[45] The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

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[45] See Brief of *Amicus* National Right to Life Committee; R. Drinan, The Inviolability of the Right to Be Born, in Abortion and the Law 107 (D. Smith ed. 1967); Louisell, Abortion, The Practice of Medicine and the Due Process of Law, 16 U. C. L. A. L. Rev. 233 (1969); Noonan 1.

Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life.[46] Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose.[47] The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus.[48] Proponents of this view point out that in many States, including Texas,[49] by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.[50] They claim that adoption of the "quickening" distinction through received common

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[46] See, *e. g.*, *Abele* v. *Markle*, 342 F. Supp. 800 (Conn. 1972), appeal docketed, No. 72–56.

[47] See discussions in Means I and Means II.

[48] See, *e. g.*, *State* v. *Murphy*, 27 N. J. L. 112, 114 (1858).

[49] *Watson* v. *State*, 9 Tex. App. 237, 244–245 (1880); *Moore* v. *State*, 37 Tex. Cr. R. 552, 561, 40 S. W. 287, 290 (1897); *Shaw* v. *State*, 73 Tex. Cr. R. 337, 339, 165 S. W. 930, 931 (1914); *Fondren* v. *State*, 74 Tex. Cr. R. 552, 557, 169 S. W. 411, 414 (1914); *Gray* v. *State*, 77 Tex. Cr. R. 221, 229, 178 S. W. 337, 341 (1915). There is no immunity in Texas for the father who is not married to the mother. *Hammett* v. *State*, 84 Tex. Cr. R. 635, 209 S. W. 661 (1919); *Thompson* v. *State* (Ct. Crim. App. Tex. 1971), appeal docketed, No. 71–1200.

[50] See *Smith* v. *State*, 33 Me., at 55; *In re Vince*, 2 N. J. 443, 450, 67 A. 2d 141, 144 (1949). A short discussion of the modern law on this issue is contained in the Comment to the ALI's Model Penal Code § 207.11, at 158 and nn. 35–37 (Tent. Draft No. 9, 1959).

law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.

It is with these interests, and the weight to be attached to them, that this case is concerned.

VIII

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co.* v. *Botsford,* 141 U. S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley* v. *Georgia,* 394 U. S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry* v. *Ohio,* 392 U. S. 1, 8–9 (1968), *Katz* v. *United States,* 389 U. S. 347, 350 (1967), *Boyd* v. *United States,* 116 U. S. 616 (1886), see *Olmstead* v. *United States,* 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold* v. *Connecticut,* 381 U. S., at 484–485; in the Ninth Amendment, *id.,* at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer* v. *Nebraska,* 262 U. S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko* v. *Connecticut,* 302 U. S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving* v. *Virginia,* 388 U. S. 1, 12 (1967); procreation, *Skinner* v. *Oklahoma,* 316 U. S. 535, 541–542 (1942); contraception, *Eisenstadt* v. *Baird,* 405 U. S., at 453–454; *id.,* at 460, 463–

465 (WHITE, J., concurring in result); family relationships, *Prince* v. *Massachusetts,* 321 U. S. 158, 166 (1944); and child rearing and education, *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925), *Meyer* v. *Nebraska, supra.*

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellant and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. The

Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson* v. *Massachusetts,* 197 U. S. 11 (1905) (vaccination); *Buck* v. *Bell,* 274 U. S. 200 (1927) (sterilization).

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional, at least in part, because of vagueness or because of overbreadth and abridgment of rights. *Abele* v. *Markle,* 342 F. Supp. 800 (Conn. 1972), appeal docketed, No. 72–56; *Abele* v. *Markle,* 351 F. Supp. 224 (Conn. 1972), appeal docketed, No. 72–730; *Doe* v. *Bolton,* 319 F. Supp. 1048 (ND Ga. 1970), appeal decided today, *post,* p. 179; *Doe* v. *Scott,* 321 F. Supp. 1385 (ND Ill. 1971), appeal docketed, No. 70–105; *Poe* v. *Menghini,* 339 F. Supp. 986 (Kan. 1972); *YWCA* v. *Kugler,* 342 F. Supp. 1048 (NJ 1972); *Babbitz* v. *McCann,*

310 F. Supp. 293 (ED Wis. 1970), appeal dismissed, 400 U. S. 1 (1970); *People* v. *Belous,* 71 Cal. 2d 954, 458 P. 2d 194 (1969), cert. denied, 397 U. S. 915 (1970); *State* v. *Barquet,* 262 So. 2d 431 (Fla. 1972).

Others have sustained state statutes. *Crossen* v. *Attorney General,* 344 F. Supp. 587 (ED Ky. 1972), appeal docketed, No. 72–256; *Rosen* v. *Louisiana State Board of Medical Examiners,* 318 F. Supp. 1217 (ED La. 1970), appeal docketed, No. 70–42; *Corkey* v. *Edwards,* 322 F. Supp. 1248 (WDNC 1971), appeal docketed, No. 71–92; *Steinberg* v. *Brown,* 321 F. Supp. 741 (ND Ohio 1970); *Doe* v. *Rampton* (Utah 1971), appeal docketed, No. 71–5666; *Cheaney* v. *State,* — Ind. —, 285 N. E. 2d 265 (1972); *Spears* v. *State,* 257 So. 2d 876 (Miss. 1972); *State* v. *Munson,* 86 S. D. 663, 201 N. W. 2d 123 (1972), appeal docketed, No. 72–631.

Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," *Kramer* v. *Union Free School District,* 395 U. S. 621, 627 (1969); *Shapiro* v. *Thompson,* 394 U. S. 618, 634 (1969), *Sherbert* v. *Verner,* 374 U. S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Griswold* v. *Connecticut,* 381 U. S., at 485; *Aptheker* v. *Secretary of State,* 378 U. S. 500, 508 (1964); *Cantwell* v. *Connecticut,* 310 U. S. 296, 307–308 (1940); see

Eisenstadt v. *Baird*, 405 U. S., at 460, 463–464 (WHITE, J., concurring in result).

In the recent abortion cases, cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interests in protecting health and potential life, and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

IX

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest, and that, although the appellee presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." 314 F. Supp., at 1222–1223. Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

A. The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses,

for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument.[51] On the other hand, the appellee conceded on reargument [52] that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3; [53] in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.[54]

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[51] Tr. of Oral Rearg. 20–21.

[52] Tr. of Oral Rearg. 24.

[53] We are not aware that in the taking of any census under this clause, a fetus has ever been counted.

[54] When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained

All this, together with our observation, *supra,* that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.[55] This is in accord with the results reached in those few cases where the issue has been squarely presented. *McGarvey* v. *Magee-Womens Hospital,* 340 F. Supp. 751 (WD Pa. 1972); *Byrn* v. *New York City Health & Hospitals Corp.,* 31 N. Y. 2d 194, 286 N. E. 2d 887 (1972), appeal docketed, No. 72–434; *Abele* v. *Markle,* 351 F. Supp. 224 (Conn. 1972), appeal docketed, No. 72–730. Cf. *Cheaney* v. *State,* — Ind., at —, 285 N. E. 2d, at 270; *Montana* v. *Rogers,* 278 F. 2d 68, 72 (CA7 1960), aff'd *sub nom. Montana* v. *Kennedy,* 366 U. S. 308 (1961); *Keeler* v. *Superior Court,* 2 Cal. 3d 619, 470 P. 2d 617 (1970); *State* v. *Dickinson,* 28

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in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, n. 49, *supra,* that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

[55] Cf. the Wisconsin abortion statute, defining "unborn child" to mean "a human being from the time of conception until it is born alive," Wis. Stat. § 940.04 (6) (1969), and the new Connecticut statute, Pub. Act No. 1 (May 1972 special session), declaring it to be the public policy of the State and the legislative intent "to protect and preserve human life from the moment of conception."

Ohio St. 2d 65, 275 N. E. 2d 599 (1971). Indeed, our decision in *United States* v. *Vuitch,* 402 U. S. 62 (1971), inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.

This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations.

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478–479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold, Stanley, Loving, Skinner,* and *Pierce* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics.[56] It appears to be the predominant, though not the unanimous, attitude of the Jewish faith.[57] It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family.[58] As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid.[59] Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.[60] The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from

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[56] Edelstein 16.

[57] Lader 97–99; D. Feldman, Birth Control in Jewish Law 251–294 (1968). For a stricter view, see I. Jakobovits, Jewish Views on Abortion, in Abortion and the Law 124 (D. Smith ed. 1967).

[58] Amicus Brief for the American Ethical Union et al. For the position of the National Council of Churches and of other denominations, see Lader 99–101.

[59] L. Hellman & J. Pritchard, Williams Obstetrics 493 (14th ed. 1971); Dorland's Illustrated Medical Dictionary 1689 (24th ed. 1965).

[60] Hellman & Pritchard, *supra*, n. 59, at 493.

the moment of conception.[61] The latter is now, of course, the official belief of the Catholic Church. As one brief *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs.[62]

In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive.[63] That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few

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[61] For discussions of the development of the Roman Catholic position, see D. Callahan, Abortion: Law, Choice, and Morality 409–447 (1970); Noonan 1.

[62] See Brodie, The New Biology and the Prenatal Child, 9 J. Family L. 391, 397 (1970); Gorney, The New Biology and the Future of Man, 15 U. C. L. A. L. Rev. 273 (1968); Note, Criminal Law—Abortion—The "Morning-After Pill" and Other Pre-Implantation Birth-Control Methods and the Law, 46 Ore. L. Rev. 211 (1967); G. Taylor, The Biological Time Bomb 32 (1968); A. Rosenfeld, The Second Genesis 138–139 (1969); Smith, Through a Test Tube Darkly: Artificial Insemination and the Law, 67 Mich. L. Rev. 127 (1968); Note, Artificial Insemination and the Law, 1968 U. Ill. L. F. 203.

[63] W. Prosser, The Law of Torts 335–338 (4th ed. 1971); 2 F. Harper & F. James, The Law of Torts 1028–1031 (1956); Note, 63 Harv. L. Rev. 173 (1949).

courts have squarely so held.[64] In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries.[65] Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*.[66] Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

X

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches

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[64] See cases cited in Prosser, *supra*, n. 63, at 336–338; Annotation, Action for Death of Unborn Child, 15 A. L. R. 3d 992 (1967).

[65] Prosser, *supra*, n. 63, at 338; Note, The Law and the Unborn Child: The Legal and Logical Inconsistencies, 46 Notre Dame Law. 349, 354–360 (1971).

[66] Louisell, Abortion, The Practice of Medicine and the Due Process of Law, 16 U. C. L. A. L. Rev. 233, 235–238 (1969); Note, 56 Iowa L. Rev. 994, 999–1000 (1971); Note, The Law and the Unborn Child, 46 Notre Dame Law. 349, 351–354 (1971).

term and, at a point during pregnancy, each becomes "compelling."

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion

during that period, except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness. See *United States* v. *Vuitch,* 402 U. S., at 67–72.

XI

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life

may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

2. The State may define the term "physician," as it has been employed in the preceding paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.

In *Doe* v. *Bolton, post,* p. 179, procedural requirements contained in one of the modern abortion statutes are considered. That opinion and this one, of course, are to be read together.[67]

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important

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[67] Neither in this opinion nor in *Doe* v. *Bolton, post,* p. 179, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example, N. C. Gen. Stat. § 14–45.1 (Supp. 1971), requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age, 41 N. C. A. G. 489 (1971); if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional.

state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

XII

Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be struck down separately, for then the State would be left with a statute proscribing all abortion procedures no matter how medically urgent the case.

Although the District Court granted appellant Roe declaratory relief, it stopped short of issuing an injunction against enforcement of the Texas statutes. The Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. *Zwickler* v. *Koota,* 389 U. S. 241, 252–255 (1967); *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). We are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under *Dombrowski* and refined in *Younger* v. *Harris,* 401 U. S., at 50.

We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.

The judgment of the District Court as to intervenor Hallford is reversed, and Dr. Hallford's complaint in intervention is dismissed. In all other respects, the judg-

ment of the District Court is affirmed. Costs are allowed to the appellee.

It is so ordered.

[For concurring opinion of MR. CHIEF JUSTICE BURGER, see *post,* p. 207.]

[For concurring opinion of MR. JUSTICE DOUGLAS, see *post,* p. 209.]

[For dissenting opinion of MR. JUSTICE WHITE, see *post,* p. 221.]

MR. JUSTICE STEWART, concurring.

In 1963, this Court, in *Ferguson* v. *Skrupa,* 372 U. S. 726, purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in *Skrupa* put it: "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.,* at 730.[1]

Barely two years later, in *Griswold* v. *Connecticut,* 381 U. S. 479, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in *Skrupa,* the Court's opinion in *Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution.[2] So it was clear

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[1] Only Mr. Justice Harlan failed to join the Court's opinion, 372 U. S., at 733.

[2] There is no constitutional right of privacy, as such. "[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of

to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment.[3] As so understood, *Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such.

"In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents* v. *Roth,* 408 U. S. 564, 572. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. See *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 238–239; *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534–535; *Meyer* v. *Nebraska,* 262 U. S. 390, 399–400. Cf. *Shapiro* v. *Thompson,* 394 U. S. 618, 629–630; *United States* v. *Guest,* 383 U. S. 745, 757–758; *Carrington* v. *Rash,* 380 U. S. 89, 96; *Aptheker* v. *Secretary of State,* 378 U. S. 500, 505; *Kent* v. *Dulles,* 357 U. S. 116, 127; *Bolling* v. *Sharpe,* 347 U. S. 497, 499–500; *Truax* v. *Raich,* 239 U. S. 33, 41.

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the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States." *Katz* v. *United States,* 389 U. S. 347, 350–351 (footnotes omitted).

[3] This was also clear to Mr. Justice Black, 381 U. S., at 507 (dissenting opinion); to Mr. Justice Harlan, 381 U. S., at 499 (opinion concurring in the judgment); and to MR. JUSTICE WHITE, 381 U. S., at 502 (opinion concurring in the judgment). See also Mr. Justice Harlan's thorough and thoughtful opinion dissenting from dismissal of the appeal in *Poe* v. *Ullman,* 367 U. S. 497, 522.

As Mr. Justice Harlan once wrote: "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe* v. *Ullman,* 367 U. S. 497, 543 (opinion dissenting from dismissal of appeal) (citations omitted). In the words of Mr. Justice Frankfurter, "Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *National Mutual Ins. Co.* v. *Tidewater Transfer Co.,* 337 U. S. 582, 646 (dissenting opinion).

Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Loving* v. *Virginia,* 388 U. S. 1, 12; *Griswold* v. *Connecticut, supra; Pierce* v. *Society of Sisters, supra; Meyer* v. *Nebraska, supra.* See also *Prince* v. *Massachusetts,* 321 U. S. 158, 166; *Skinner* v. *Oklahoma,* 316 U. S. 535, 541. As recently as last Term, in *Eisenstadt* v. *Baird,* 405 U. S. 438, 453, we recognized "the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person

as the decision whether to bear or beget a child." That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. "Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in Pierce v. Society of Sisters, 268 U. S. 510 (1925), or the right to teach a foreign language protected in Meyer v. Nebraska, 262 U. S. 390 (1923)." *Abele* v. *Markle,* 351 F. Supp. 224, 227 (Conn. 1972).

Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.

It is evident that the Texas abortion statute infringes that right directly. Indeed, it is difficult to imagine a more complete abridgment of a constitutional freedom than that worked by the inflexible criminal statute now in force in Texas. The question then becomes whether the state interests advanced to justify this abridgment can survive the "particularly careful scrutiny" that the Fourteenth Amendment here requires.

The asserted state interests are protection of the health and safety of the pregnant woman, and protection of the potential future human life within her. These are legitimate objectives, amply sufficient to permit a State to regulate abortions as it does other surgical procedures, and perhaps sufficient to permit a State to regulate abortions more stringently or even to prohibit them in the late stages of pregnancy. But such legislation is not before us, and I think the Court today has thoroughly demonstrated that these state interests cannot constitutionally support the broad abridgment of per-

sonal liberty worked by the existing Texas law. Accordingly, I join the Court's opinion holding that that law is invalid under the Due Process Clause of the Fourteenth Amendment.

MR. JUSTICE REHNQUIST, dissenting.

The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it that invalidate the Texas statute in question, and therefore dissent.

I

The Court's opinion decides that a State may impose virtually no restriction on the performance of abortions during the first trimester of pregnancy. Our previous decisions indicate that a necessary predicate for such an opinion is a plaintiff who was in her first trimester of pregnancy at some time during the pendency of her lawsuit. While a party may vindicate his own constitutional rights, he may not seek vindication for the rights of others. *Moose Lodge* v. *Irvis,* 407 U. S. 163 (1972); *Sierra Club* v. *Morton,* 405 U. S. 727 (1972). The Court's statement of facts in this case makes clear, however, that the record in no way indicates the presence of such a plaintiff. We know only that plaintiff Roe at the time of filing her complaint was a pregnant woman; for aught that appears in this record, she may have been in her *last* trimester of pregnancy as of the date the complaint was filed.

Nothing in the Court's opinion indicates that Texas might not constitutionally apply its proscription of abortion as written to a woman in that stage of pregnancy. Nonetheless, the Court uses her complaint against the Texas statute as a fulcrum for deciding that States may

impose virtually no restrictions on medical abortions performed during the *first* trimester of pregnancy. In deciding such a hypothetical lawsuit, the Court departs from the longstanding admonition that it should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration,* 113 U. S. 33, 39 (1885). See also *Ashwander* v. *TVA,* 297 U. S. 288, 345 (1936) (Brandeis, J., concurring).

II

Even if there were a plaintiff in this case capable of litigating the issue which the Court decides, I would reach a conclusion opposite to that reached by the Court. I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy. *Katz* v. *United States,* 389 U. S. 347 (1967).

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of MR. JUSTICE STEWART in his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth

Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 491 (1955). The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson, supra.* But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

The Court eschews the history of the Fourteenth Amendment in its reliance on the "compelling state interest" test. See *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 179 (1972) (dissenting opinion). But the Court adds a new wrinkle to this test by transposing it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment. Unless I misapprehend the consequences of this transplanting of the "compelling state interest test," the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.

While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner* v. *New York,* 198 U. S. 45, 74 (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts,* 291 U. S. 97, 105 (1934). Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellant would have us believe.

To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature. Conn. Stat., Tit. 22, §§ 14, 16. By the time of the adoption of the Four-

teenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion.[1] While many States have amended or updated

[1] Jurisdictions having enacted abortion laws prior to the adoption of the Fourteenth Amendment in 1868:

1. Alabama—Ala. Acts, c. 6, § 2 (1840).

2. Arizona—Howell Code, c. 10, § 45 (1865).

3. Arkansas—Ark. Rev. Stat., c. 44, div. III, Art. II, § 6 (1838).

4. California—Cal. Sess. Laws, c. 99, § 45, p. 233 (1849–1850).

5. Colorado (Terr.)—Colo. Gen. Laws of Terr. of Colo., 1st Sess., § 42, pp. 296–297 (1861).

6. Connecticut—Conn. Stat., Tit. 20, §§ 14, 16 (1821). By 1868, this statute had been replaced by another abortion law. Conn. Pub. Acts, c. 71, §§ 1, 2, p. 65 (1860).

7. Florida—Fla. Acts 1st Sess., c. 1637, subc. 3, §§ 10, 11, subc. 8, §§ 9, 10, 11 (1868), as amended, now Fla. Stat. Ann. §§ 782.09, 782.10, 797.01, 797.02, 782.16 (1965).

8. Georgia—Ga. Pen. Code, 4th Div., § 20 (1833).

9. Kingdom of Hawaii—Hawaii Pen. Code, c. 12, §§ 1, 2, 3 (1850).

10. Idaho (Terr.)—Idaho (Terr.) Laws, Crimes and Punishments §§ 33, 34, 42, pp. 441, 443 (1863).

11. Illinois—Ill. Rev. Criminal Code §§ 40, 41, 46, pp. 130, 131 (1827). By 1868, this statute had been replaced by a subsequent enactment. Ill. Pub. Laws §§ 1, 2, 3, p. 89 (1867).

12. Indiana—Ind. Rev. Stat. §§ 1, 3, p. 224 (1838). By 1868 this statute had been superseded by a subsequent enactment. Ind. Laws, c. LXXXI, § 2 (1859).

13. Iowa (Terr.)—Iowa (Terr.) Stat., 1st Legis., 1st Sess., § 18, p. 145 (1838). By 1868, this statute had been superseded by a subsequent enactment. Iowa (Terr.) Rev. Stat., c. 49, §§ 10, 13 (1843).

14. Kansas (Terr.)—Kan. (Terr.) Stat., c. 48, §§ 9, 10, 39 (1855). By 1868, this statute had been superseded by a subsequent enactment. Kan. (Terr.) Laws, c. 28, §§ 9, 10, 37 (1859).

15. Louisiana—La. Rev. Stat., Crimes and Offenses § 24, p. 138 (1856).

16. Maine—Me. Rev. Stat., c. 160, §§ 11, 12, 13, 14 (1840).

17. Maryland—Md. Laws, c. 179, § 2, p. 315 (1868).

18. Massachusetts—Mass. Acts & Resolves, c. 27 (1845).

19. Michigan—Mich. Rev. Stat., c. 153, §§ 32, 33, 34, p. 662 (1846).

[*Footnote 1 continued on p. 176*]

their laws, 21 of the laws on the books in 1868 remain in effect today.[2] Indeed, the Texas statute struck down today was, as the majority notes, first enacted in 1857

20. Minnesota (Terr.)—Minn. (Terr.) Rev. Stat., c. 100, §§ 10, 11, p. 493 (1851).

21. Mississippi—Miss. Code, c. 64, §§ 8, 9, p. 958 (1848).

22. Missouri—Mo. Rev. Stat., Art. II, §§ 9, 10, 36, pp. 168, 172 (1835).

23. Montana (Terr.)—Mont. (Terr.) Laws, Criminal Practice Acts § 41, p. 184 (1864).

24. Nevada (Terr.)—Nev. (Terr.) Laws, c. 28, § 42, p. 63 (1861).

25. New Hampshire—N. H. Laws, c. 743, § 1, p. 708 (1848).

26. New Jersey—N. J. Laws, p. 266 (1849).

27. New York—N. Y. Rev. Stat., pt. 4, c. 1, Tit. 2, §§ 8, 9, pp. 12–13 (1828). By 1868, this statute had been superseded. N. Y. Laws, c. 260, §§ 1–6, pp. 285–286 (1845); N. Y. Laws, c. 22, § 1, p. 19 (1846).

28. Ohio—Ohio Gen. Stat. §§ 111 (1), 112 (2), p. 252 (1841).

29. Oregon—Ore. Gen. Laws, Crim. Code, c. 43, § 509, p. 528 (1845–1864).

30. Pennsylvania—Pa. Laws No. 374, §§ 87, 88, 89 (1860).

31. Texas—Tex. Gen. Stat. Dig., c. VII, Arts. 531–536, p. 524 (Oldham & White 1859).

32. Vermont—Vt. Acts No. 33, § 1 (1846). By 1868, this statute had been amended. Vt. Acts No. 57, §§ 1, 3 (1867).

33. Virginia—Va. Acts, Tit. II, c. 3, § 9, p. 96 (1848).

34. Washington (Terr.)—Wash. (Terr.) Stats., c. II, §§ 37, 38, p. 81 (1854).

35. West Virginia—See Va. Acts., Tit. II, c. 3, § 9, p. 96 (1848); W. Va. Const., Art. XI, par. 8 (1863).

36. Wisconsin—Wis. Rev. Stat., c. 133, §§ 10, 11 (1849). By 1868, this statute had been superseded. Wis. Rev. Stat., c. 164, §§ 10, 11; c. 169, §§ 58, 59 (1858).

[2] Abortion laws in effect in 1868 and still applicable as of August 1970:

1. Arizona (1865).
2. Connecticut (1860).
3. Florida (1868).
4. Idaho (1863).
5. Indiana (1838).

[*Footnote 2 continued on p. 177*]

and "has remained substantially unchanged to the present time." *Ante,* at 119.

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

III

Even if one were to agree that the case that the Court decides were here, and that the enunciation of the substantive constitutional law in the Court's opinion were proper, the actual disposition of the case by the Court is still difficult to justify. The Texas statute is struck down *in toto,* even though the Court apparently concedes that at later periods of pregnancy Texas might impose these selfsame statutory limitations on abortion. My understanding of past practice is that a statute found

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6. Iowa (1843).
7. Maine (1840).
8. Massachusetts (1845).
9. Michigan (1846).
10. Minnesota (1851).
11. Missouri (1835).
12. Montana (1864).
13. Nevada (1861).
14. New Hampshire (1848).
15. New Jersey (1849).
16. Ohio (1841).
17. Pennsylvania (1860).
18. Texas (1859).
19. Vermont (1867).
20. West Virginia (1863).
21. Wisconsin (1858).

to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply "struck down" but is, instead, declared unconstitutional as applied to the fact situation before the Court. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Street* v. *New York*, 394 U. S. 576 (1969).

For all of the foregoing reasons, I respectfully dissent.

Syllabus

DOE ET AL. *v.* BOLTON, ATTORNEY GENERAL OF GEORGIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 70–40. Argued December 13, 1971—Reargued October 11, 1972—Decided January 22, 1973

Georgia law proscribes an abortion except as performed by a duly licensed Georgia physician when necessary in "his best clinical judgment" because continued pregnancy would endanger a pregnant woman's life or injure her health; the fetus would likely be born with a serious defect; or the pregnancy resulted from rape. § 26–1202 (a) of Ga. Criminal Code. In addition to a requirement that the patient be a Georgia resident and certain other requirements, the statutory scheme poses three procedural conditions in § 26–1202 (b): (1) that the abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals (JCAH); (2) that the procedure be approved by the hospital staff abortion committee; and (3) that the performing physician's judgment be confirmed by independent examinations of the patient by two other licensed physicians. Appellant Doe, an indigent married Georgia citizen, who was denied an abortion after eight weeks of pregnancy for failure to meet any of the § 26–1202 (a) conditions, sought declaratory and injunctive relief, contending that the Georgia laws were unconstitutional. Others joining in the complaint included Georgia-licensed physicians (who claimed that the Georgia statutes "chilled and deterred" their practices), registered nurses, clergymen, and social workers. Though holding that all the plaintiffs had standing, the District Court ruled that only Doe presented a justiciable controversy. In Doe's case the court gave declaratory, but not injunctive, relief, invalidating as an infringement of privacy and personal liberty the limitation to the three situations specified in § 26–1202 (a) and certain other provisions but holding that the State's interest in health protection and the existence of a *"potential* of independent human existence" justified regulation through § 26–1202 (b) of the "manner of performance as well as the quality of the final decision to abort." The appellants, claiming entitlement to broader relief, directly appealed to this Court. *Held:*

1. Doe's case presents a live, justiciable controversy and she has standing to sue, *Roe* v. *Wade*, *ante*, p. 113, as do the physician-

appellants (who, unlike the physician in *Wade*, were not charged with abortion violations), and it is therefore unnecessary to resolve the issue of the other appellants' standing. Pp. 187–189.

2. A woman's constitutional right to an abortion is not absolute. *Roe* v. *Wade, supra.* P. 189.

3. The requirement that a physician's decision to perform an abortion must rest upon "his best clinical judgment" of its necessity is not unconstitutionally vague, since that judgment may be made in the light of *all* the attendant circumstances. *United States* v. *Vuitch,* 402 U. S. 62, 71–72. Pp. 191–192.

4. The three procedural conditions in § 26–1202 (b) violate the Fourteenth Amendment. Pp. 192–200.

(a) The JCAH-accreditation requirement is invalid, since the State has not shown that only hospitals (let alone those with JCAH accreditation) meet its interest in fully protecting the patient; and a hospital requirement failing to exclude the first trimester of pregnancy would be invalid on that ground alone, see *Roe* v. *Wade, supra.* Pp. 193–195.

(b) The interposition of a hospital committee on abortion, a procedure not applicable as a matter of state criminal law to other surgical situations, is unduly restrictive of the patient's rights, which are already safeguarded by her personal physician. Pp. 195–198.

(c) Required acquiescence by two copractitioners also has no rational connection with a patient's needs and unduly infringes on her physician's right to practice. Pp. 198–200.

5. The Georgia residence requirement violates the Privileges and Immunities Clause by denying protection to persons who enter Georgia for medical services there. P. 200.

6. Appellants' equal protection argument centering on the three procedural conditions in § 26–1202 (b), invalidated on other grounds, is without merit. Pp. 200–201.

7. No ruling is made on the question of injunctive relief. Cf. *Roe* v. *Wade, supra.* P. 201.

319 F. Supp. 1048, modified and affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined. BURGER, C. J., *post,* p. 207, and DOUGLAS, J., *post,* p. 209, filed concurring opinions. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post,* p. 221. REHNQUIST, J., filed a dissenting opinion, *post,* p. 223.

Margie Pitts Hames reargued the cause for appellants. With her on the briefs were *Reber F. Boult, Jr.*, *Charles Morgan, Jr.*, *Elizabeth Roediger Rindskopf*, and *Tobiane Schwartz.*

Dorothy T. Beasley reargued the cause for appellees. With her on the brief were *Arthur K. Bolton*, Attorney General of Georgia, *Harold N. Hill, Jr.*, Executive Assistant Attorney General, *Courtney Wilder Stanton*, Assistant Attorney General, *Joel Feldman*, *Henry L. Bowden*, and *Ralph H. Witt.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In this appeal, the criminal abortion statutes recently enacted in Georgia are challenged on constitutional grounds. The statutes are §§ 26–1201 through 26–1203 of the State's Criminal Code, formulated by Georgia Laws, 1968 Session, pp. 1249, 1277–1280. In *Roe* v. *Wade, ante*, p. 113, we today have struck down, as constitutionally defective, the Texas criminal abortion statutes that are representative of provisions long in effect

*Briefs of *amici curiae* were filed by *Roy Lucas* for the American College of Obstetricians and Gynecologists et al.; by *Dennis J. Horan*, *Jerome A. Frazel, Jr.*, *Thomas M. Crisham*, and *Delores V. Horan* for Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology; by *Harriet F. Pilpel*, *Nancy F. Wechsler*, and *Frederic S. Nathan* for Planned Parenthood Federation of America, Inc., et al.; by *Alan F. Charles* for the National Legal Program on Health Problems of the Poor et al.; by *Marttie L. Thompson* for State Communities Aid Assn.; by *Alfred L. Scanlan*, *Martin J. Flynn*, and *Robert M. Byrn* for the National Right to Life Committee; by *Helen L. Buttenwieser* for the American Ethical Union et al.; by *Norma G. Zarky* for the American Association of University Women et al.; by *Nancy Stearns* for New Women Lawyers et al.; by the California Committee to Legalize Abortion et al.; by *Robert E. Dunne* for Robert L. Sassone; and by *Ferdinand Buckley pro se.*

in a majority of our States. The Georgia legislation, however, is different and merits separate consideration.

I

The statutes in question are reproduced as Appendix A, *post,* p. 202.[1] As the appellants acknowledge,[2] the 1968 statutes are patterned upon the American Law Institute's Model Penal Code, § 230.3 (Proposed Official Draft, 1962), reproduced as Appendix B, *post,* p. 205. The ALI proposal has served as the model for recent legislation in approximately one-fourth of our States.[3] The new Georgia provisions replaced statutory law that had been in effect for more than 90 years. Georgia Laws 1876, No. 130, § 2, at 113.[4] The predecessor statute paralleled

[1] The portions italicized in Appendix A are those held unconstitutional by the District Court.

[2] Brief for Appellants 25 n. 5; Tr. of Oral Arg. 9.

[3] See *Roe* v. *Wade, ante,* p. 113, at 140 n. 37.

[4] The pertinent provisions of the 1876 statute were:

"Section I. *Be it enacted, etc.,* That from and after the passage of this Act, the wilful killing of an unborn child, so far developed as to be ordinarily called 'quick,' by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be guilty of a felony, and punishable by death or imprisonment for life, as the jury trying the case may recommend.

"Sec. II. *Be it further enacted,* That every person who shall administer to any woman pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or mother be thereby produced, be declared guilty of an assault with intent to murder.

"Sec. III. *Be it further enacted,* That any person who shall wilfully administer to any pregnant woman any medicine, drug or substance, or anything whatever, or shall employ any instrument or means whatever, with intent thereby to procure the miscarriage or abortion of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised

the Texas legislation considered in *Roe* v. *Wade, supra,* and made all abortions criminal except those necessary "to preserve the life" of the pregnant woman. The new statutes have not been tested on constitutional grounds in the Georgia state courts.

Section 26–1201, with a referenced exception, makes abortion a crime, and § 26–1203 provides that a person convicted of that crime shall be punished by imprisonment for not less than one nor more than 10 years. Section 26–1202 (a) states the exception and removes from § 1201's definition of criminal abortion, and thus makes noncriminal, an abortion "performed by a physician duly licensed" in Georgia when, "based upon his best clinical judgment . . . an abortion is necessary because:

> "(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or
>
> "(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or
>
> "(3) The pregnancy resulted from forcible or statutory rape." [5]

Section 26–1202 also requires, by numbered subdivisions of its subsection (b), that, for an abortion to be author-

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by two physicians to be necessary for that purpose, shall, upon conviction, be punished as prescribed in section 4310 of the Revised Code of Georgia."

It should be noted that the second section, in contrast to the first, made no specific reference to quickening. The section was construed, however, to possess this line of demarcation. *Taylor* v. *State,* 105 Ga. 846, 33 S. E. 190 (1899).

[5] In contrast with the ALI model, the Georgia statute makes no specific reference to pregnancy resulting from incest. We were assured by the State at reargument that this was because the statute's reference to "rape" was intended to include incest. Tr. of Oral Rearg. 32.

ized or performed as a noncriminal procedure, additional conditions must be fulfilled. These are (1) and (2) residence of the woman in Georgia; (3) reduction to writing of the performing physician's medical judgment that an abortion is justified for one or more of the reasons specified by § 26–1202 (a), with written concurrence in that judgment by at least two other Georgia-licensed physicians, based upon their separate personal medical examinations of the woman; (4) performance of the abortion in a hospital licensed by the State Board of Health and also accredited by the Joint Commission on Accreditation of Hospitals; (5) advance approval by an abortion committee of not less than three members of the hospital's staff; (6) certifications in a rape situation; and (7), (8), and (9) maintenance and confidentiality of records. There is a provision (subsection (c)) for judicial determination of the legality of a proposed abortion on petition of the judicial circuit law officer or of a close relative, as therein defined, of the unborn child, and for expeditious hearing of that petition. There is also a provision (subsection (e)) giving a hospital the right not to admit an abortion patient and giving any physician and any hospital employee or staff member the right, on moral or religious grounds, not to participate in the procedure.

II

On April 16, 1970, Mary Doe,[6] 23 other individuals (nine described as Georgia-licensed physicians, seven as nurses registered in the State, five as clergymen, and two as social workers), and two nonprofit Georgia corporations that advocate abortion reform instituted this federal action in the Northern District of Georgia against the State's attorney general, the district attorney of

[6] Appellants by their complaint, App. 7, allege that the name is a pseudonym.

Fulton County, and the chief of police of the city of Atlanta. The plaintiffs sought a declaratory judgment that the Georgia abortion statutes were unconstitutional in their entirety. They also sought injunctive relief restraining the defendants and their successors from enforcing the statutes.

Mary Doe alleged:

(1) She was a 22-year-old Georgia citizen, married, and nine weeks pregnant. She had three living children. The two older ones had been placed in a foster home because of Doe's poverty and inability to care for them. The youngest, born July 19, 1969, had been placed for adoption. Her husband had recently abandoned her and she was forced to live with her indigent parents and their eight children. She and her husband, however, had become reconciled. He was a construction worker employed only sporadically. She had been a mental patient at the State Hospital. She had been advised that an abortion could be performed on her with less danger to her health than if she gave birth to the child she was carrying. She would be unable to care for or support the new child.

(2) On March 25, 1970, she applied to the Abortion Committee of Grady Memorial Hospital, Atlanta, for a therapeutic abortion under § 26–1202. Her application was denied 16 days later, on April 10, when she was eight weeks pregnant, on the ground that her situation was not one described in § 26–1202 (a).[7]

(3) Because her application was denied, she was forced either to relinquish "her right to decide when and how many children she will bear" or to seek an abortion that was illegal under the Georgia statutes. This invaded her

[7] In answers to interrogatories, Doe stated that her application for an abortion was approved at Georgia Baptist Hospital on May 5, 1970, but that she was not approved as a charity patient there and had no money to pay for an abortion. App. 64.

rights of privacy and liberty in matters related to family, marriage, and sex, and deprived her of the right to choose whether to bear children. This was a violation of rights guaranteed her by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. The statutes also denied her equal protection and procedural due process and, because they were unconstitutionally vague, deterred hospitals and doctors from performing abortions. She sued "on her own behalf and on behalf of all others similarly situated."

The other plaintiffs alleged that the Georgia statutes "chilled and deterred" them from practicing their respective professions and deprived them of rights guaranteed by the First, Fourth, and Fourteenth Amendments. These plaintiffs also purported to sue on their own behalf and on behalf of others similarly situated.

A three-judge district court was convened. An offer of proof as to Doe's identity was made, but the court deemed it unnecessary to receive that proof. The case was then tried on the pleadings and interrogatories.

The District Court, *per curiam,* 319 F. Supp. 1048 (ND Ga. 1970), held that all the plaintiffs had standing but that only Doe presented a justiciable controversy. On the merits, the court concluded that the limitation in the Georgia statute of the "number of reasons for which an abortion may be sought," *id.,* at 1056, improperly restricted Doe's rights of privacy articulated in *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), and of "personal liberty," both of which it thought "broad enough to include the decision to abort a pregnancy," 319 F. Supp., at 1055. As a consequence, the court held invalid those portions of §§ 26–1202 (a) and (b)(3) limiting legal abortions to the three situations specified; § 26–1202 (b)(6) relating to certifications in a rape situation; and § 26–1202 (c) authorizing a court test. Declaratory relief was granted accordingly. The court, however, held

that Georgia's interest in protection of health, and the existence of a "*potential* of independent human existence" (emphasis in original), *id.*, at 1055, justified state regulation of "the manner of performance as well as the quality of the final decision to abort," *id.*, at 1056, and it refused to strike down the other provisions of the statutes. It denied the request for an injunction, *id.*, at 1057.

Claiming that they were entitled to an injunction and to broader relief, the plaintiffs took a direct appeal pursuant to 28 U. S. C. § 1253. We postponed decision on jurisdiction to the hearing on the merits. 402 U. S. 941 (1971). The defendants also purported to appeal, pursuant to § 1253, but their appeal was dismissed for want of jurisdiction. 402 U. S. 936 (1971). We are advised by the appellees, Brief 42, that an alternative appeal on their part is pending in the United States Court of Appeals for the Fifth Circuit. The extent, therefore, to which the District Court decision was adverse to the defendants, that is, the extent to which portions of the Georgia statutes were held to be unconstitutional, technically is not now before us.[8] *Swarb* v. *Lennox,* 405 U. S. 191, 201 (1972).

III

Our decision in *Roe* v. *Wade, ante,* p. 113, establishes (1) that, despite her pseudonym, we may accept as true, for this case, Mary Doe's existence and her pregnant state on April 16, 1970; (2) that the constitutional issue is substantial; (3) that the interim termination of Doe's and all other Georgia pregnancies in existence in 1970 has not rendered the case moot; and (4) that Doe presents a justiciable controversy and has standing to maintain the action.

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[8] What we decide today obviously has implications for the issues raised in the defendants' appeal pending in the Fifth Circuit.

Inasmuch as Doe and her class are recognized, the question whether the other appellants—physicians, nurses, clergymen, social workers, and corporations—present a justiciable controversy and have standing is perhaps a matter of no great consequence. We conclude, however, that the physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes. The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief. *Crossen* v. *Breckenridge,* 446 F. 2d 833, 839–840 (CA6 1971); *Poe* v. *Menghini,* 339 F. Supp. 986, 990–991 (Kan. 1972).

In holding that the physicians, while theoretically possessed of standing, did not present a justiciable controversy, the District Court seems to have relied primarily on *Poe* v. *Ullman,* 367 U. S. 497 (1961). There, a sharply divided Court dismissed an appeal from a state court on the ground that it presented no real controversy justifying the adjudication of a constitutional issue. But the challenged Connecticut statute, deemed to prohibit the giving of medical advice on the use of contraceptives, had been enacted in 1879, and, apparently with a single exception, no one had ever been prosecuted under it. Georgia's statute, in contrast, is recent and not moribund. Furthermore, it is the successor to another

Georgia abortion statute under which, we are told,[9] physicians were prosecuted. The present case, therefore, is closer to *Epperson* v. *Arkansas,* 393 U. S. 97 (1968), where the Court recognized the right of a school teacher, though not yet charged criminally, to challenge her State's anti-evolution statute. See also *Griswold* v. *Connecticut,* 381 U. S., at 481.

The parallel claims of the nurse, clergy, social worker, and corporation-appellants are another step removed and as to them, the Georgia statutes operate less directly. Not being licensed physicians, the nurses and the others are in no position to render medical advice. They would be reached by the abortion statutes only in their capacity as accessories or as counselor-conspirators. We conclude that we need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by Doe and the physician-appellants, and nothing is gained or lost by the presence or absence of the nurses, the clergymen, the social workers, and the corporations. See *Roe* v. *Wade, ante,* at 127.

IV

The appellants attack on several grounds those portions of the Georgia abortion statutes that remain after the District Court decision: undue restriction of a right to personal and marital privacy; vagueness; deprivation of substantive and procedural due process; improper restriction to Georgia residents; and denial of equal protection.

A. *Roe* v. *Wade, supra,* sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand. What is said there is applicable here and need not be repeated.

[9] Tr. of Oral Arg. 21–22.

B. The appellants go on to argue, however, that the present Georgia statutes must be viewed historically, that is, from the fact that prior to the 1968 Act an abortion in Georgia was not criminal if performed to "preserve the life" of the mother. It is suggested that the present statute, as well, has this emphasis on the mother's rights, not on those of the fetus. Appellants contend that it is thus clear that Georgia has given little, and certainly not first, consideration to the unborn child. Yet, it is the unborn child's rights that Georgia asserts in justification of the statute. Appellants assert that this justification cannot be advanced at this late date.

Appellants then argue that the statutes do not adequately protect the woman's right. This is so because it would be physically and emotionally damaging to Doe to bring a child into her poor, "fatherless" [10] family, and because advances in medicine and medical techniques have made it safer for a woman to have a medically induced abortion than for her to bear a child. Thus, "a statute that requires a woman to carry an unwanted pregnancy to term infringes not only on a fundamental right of privacy but on the right to life itself." Brief 27.

The appellants recognize that a century ago medical knowledge was not so advanced as it is today, that the techniques of antisepsis were not known, and that any abortion procedure was dangerous for the woman. To restrict the legality of the abortion to the situation where it was deemed necessary, in medical judgment, for the preservation of the woman's life was only a natural conclusion in the exercise of the legislative judgment of that time. A State is not to be reproached, however, for a past judgmental determination made in the light of then-existing medical knowledge. It is perhaps unfair to argue, as the appellants do, that because the early focus

[10] Brief for Appellants 25.

was on the preservation of the woman's life, the State's present professed interest in the protection of embryonic and fetal life is to be downgraded. That argument denies the State the right to readjust its views and emphases in the light of the advanced knowledge and techniques of the day.

C. Appellants argue that § 26–1202 (a) of the Georgia statutes, as it has been left by the District Court's decision, is unconstitutionally vague. This argument centers on the proposition that, with the District Court's having struck down the statutorily specified reasons, it still remains a crime for a physician to perform an abortion except when, as § 26–1202 (a) reads, it is "based upon his best clinical judgment that an abortion is necessary." The appellants contend that the word "necessary" does not warn the physician of what conduct is proscribed; that the statute is wholly without objective standards and is subject to diverse interpretation; and that doctors will choose to err on the side of caution and will be arbitrary.

The net result of the District Court's decision is that the abortion determination, so far as the physician is concerned, is made in the exercise of his professional, that is, his "best clinical," judgment in the light of *all* the attendant circumstances. He is not now restricted to the three situations originally specified. Instead, he may range farther afield wherever his medical judgment, properly and professionally exercised, so dictates and directs him.

The vagueness argument is set at rest by the decision in *United States* v. *Vuitch,* 402 U. S. 62, 71–72 (1971), where the issue was raised with respect to a District of Columbia statute making abortions criminal "unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine." That statute has been construed to bear upon psychological as

well as physical well-being. This being so, the Court concluded that the term "health" presented no problem of vagueness. "Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." *Id.*, at 72. This conclusion is equally applicable here. Whether, in the words of the Georgia statute, "an abortion is necessary" is a professional judgment that the Georgia physician will be called upon to make routinely.

We agree with the District Court, 319 F. Supp., at 1058, that the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

D. The appellants next argue that the District Court should have declared unconstitutional three procedural demands of the Georgia statute: (1) that the abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals: [11] (2) that the procedure be approved by the hospital staff abortion committee; and (3) that the performing physician's judgment be confirmed by the independent examinations of the patient by two other licensed physicians. The appellants attack these provisions not only on the ground that they unduly restrict the woman's right of privacy, but also on procedural due process and equal protection grounds. The physician-appellants also argue that, by subjecting a doctor's individual medical judgment to

[11] We were advised at reargument, Tr. of Oral Rearg. 10, that only 54 of Georgia's 159 counties have a JCAH-accredited hospital.

committee approval and to confirming consultations, the statute impermissibly restricts the physician's right to practice his profession and deprives him of due process.

1. *JCAH accreditation.* The Joint Commission on Accreditation of Hospitals is an organization without governmental sponsorship or overtones. No question whatever is raised concerning the integrity of the organization or the high purpose of the accreditation process.[12] That process, however, has to do with hospital standards generally and has no present particularized concern with abortion as a medical or surgical procedure.[13] In Georgia, there is no restriction on the performance of non-abortion surgery in a hospital not yet accredited by the JCAH so long as other requirements imposed by the State, such as licensing of the hospital and of the operating surgeon, are met. See Georgia Code §§ 88–1901 (a)

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[12] Since its founding, JCAH has pursued the "elusive goal" of defining the "optimal setting" for "quality of service in hospitals." JCAH, Accreditation Manual for Hospitals, Foreword (Dec. 1970). The Manual's Introduction states the organization's purpose to establish standards and conduct accreditation programs that will afford quality medical care "to give patients the optimal benefits that medical science has to offer." This ambitious and admirable goal is illustrated by JCAH's decision in 1966 "[t]o raise and strengthen the standards from their present level of minimum essential to the level of optimum achievable . . . ." Some of these "optimum achievable" standards required are: disclosure of hospital ownership and control; a dietetic service and written dietetic policies; a written disaster plan for mass emergencies; a nuclear medical services program; facilities for hematology, chemistry, microbiology, clinical microscopy, and sero-immunology; a professional library and document delivery service; a radiology program; a social services plan administered by a qualified social worker; and a special care unit.

[13] "The Joint Commission neither advocates nor opposes any particular position with respect to elective abortions." Letter dated July 9, 1971, from John I. Brewer, M. D., Commissioner, JCAH, to the Rockefeller Foundation. Brief for *amici curiae,* American College of Obstetricians and Gynecologists et al., p. A–3.

and 88–1905 (1971) and 84–907 (Supp. 1971). Furthermore, accreditation by the Commission is not granted until a hospital has been in operation at least one year. The Model Penal Code, § 230.3, Appendix B hereto, contains no requirement for JCAH accreditation. And the Uniform Abortion Act (Final Draft, Aug. 1971),[14] approved by the American Bar Association in February 1972, contains no JCAH-accredited hospital specification.[15] Some courts have held that a JCAH-accreditation requirement is an overbroad infringement of fundamental rights because it does not relate to the particular medical problems and dangers of the abortion operation. *E. g., Poe* v. *Menghini,* 339 F. Supp., at 993–994.

We hold that the JCAH-accreditation requirement does not withstand constitutional scrutiny in the present context. It is a requirement that simply is not "based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey* v. *Doud,* 354 U. S. 457, 465 (1957).

This is not to say that Georgia may not or should not, from and after the end of the first trimester, adopt

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[14] See *Roe* v. *Wade, ante,* at 146–147, n. 40.

[15] Some state statutes do not have the JCAH-accreditation requirement. Alaska Stat. § 11.15.060 (1970); Hawaii Rev. Stat. § 453–16 (Supp. 1971); N. Y. Penal Code § 125.05, subd. 3 (Supp. 1972–1973). Washington has the requirement but couples it with the alternative of "a medical facility approved . . . by the state board of health." Wash. Rev. Code § 9.02.070 (Supp. 1972). Florida's new statute has a similar provision. Law of Apr. 13, 1972, c. 72–196, § 1 (2). Others contain the specification. Ark. Stat. Ann. §§ 41–303 to 41–310 (Supp. 1971); Calif. Health & Safety Code §§ 25950–25955.5 (Supp. 1972); Colo. Rev. Stat. Ann. §§ 40–2–50 to 40–2–53 (Cum. Supp. 1967); Kan. Stat. Ann. § 21–3407 (Supp. 1971); Md. Ann. Code, Art. 43, §§ 137–139 (1971). Cf. Del. Code Ann., Tit. 24, §§ 1790–1793 (Supp. 1972), specifying "a nationally recognized medical or hospital accreditation authority," § 1790 (a).

standards for licensing all facilities where abortions may be performed so long as those standards are legitimately related to the objective the State seeks to accomplish. The appellants contend that such a relationship would be lacking even in a lesser requirement that an abortion be performed in a licensed hospital, as opposed to a facility, such as a clinic, that may be required by the State to possess all the staffing and services necessary to perform an abortion safely (including those adequate to handle serious complications or other emergency, or arrangements with a nearby hospital to provide such services). Appellants and various *amici* have presented us with a mass of data purporting to demonstrate that some facilities other than hospitals are entirely adequate to perform abortions if they possess these qualifications. The State, on the other hand, has not presented persuasive data to show that only hospitals meet its acknowledged interest in insuring the quality of the operation and the full protection of the patient. We feel compelled to agree with appellants that the State must show more than it has in order to prove that only the full resources of a licensed hospital, rather than those of some other appropriately licensed institution, satisfy these health interests. We hold that the hospital requirement of the Georgia law, because it fails to exclude the first trimester of pregnancy, see *Roe* v. *Wade, ante,* at 163, is also invalid. In so holding we naturally express no opinion on the medical judgment involved in any particular case, that is, whether the patient's situation is such that an abortion should be performed in a hospital, rather than in some other facility.

2. *Committee approval.* The second aspect of the appellants' procedural attack relates to the hospital abortion committee and to the pregnant woman's asserted

lack of access to that committee. Relying primarily on *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), concerning the termination of welfare benefits, and *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971), concerning the posting of an alcoholic's name, Doe first argues that she was denied due process because she could not make a presentation to the committee. It is not clear from the record, however, whether Doe's own consulting physician was or was not a member of the committee or did or did not present her case, or, indeed, whether she herself was or was not there. We see nothing in the Georgia statute that explicitly denies access to the committee by or on behalf of the woman. If the access point alone were involved, we would not be persuaded to strike down the committee provision on the unsupported assumption that access is not provided.

Appellants attack the discretion the statute leaves to the committee. The most concrete argument they advance is their suggestion that it is still a badge of infamy "in many minds" to bear an illegitimate child, and that the Georgia system enables the committee members' personal views as to extramarital sex relations, and punishment therefor, to govern their decisions. This approach obviously is one founded on suspicion and one that discloses a lack of confidence in the integrity of physicians. To say that physicians will be guided in their hospital committee decisions by their predilections on extramarital sex unduly narrows the issue to pregnancy outside marriage. (Doe's own situation did not involve extramarital sex and its product.) The appellants' suggestion is necessarily somewhat degrading to the conscientious physician, particularly the obstetrician, whose professional activity is concerned with the physical and mental welfare, the woes, the emotions, and the concern of his female patients. He, perhaps more than anyone else, is knowledgeable in this area of patient care, and he is aware of human frailty,

so-called "error," and needs. The good physician—despite the presence of rascals in the medical profession, as in all others, we trust that most physicians are "good"—will have sympathy and understanding for the pregnant patient that probably are not exceeded by those who participate in other areas of professional counseling.

It is perhaps worth noting that the abortion committee has a function of its own. It is a committee of the hospital and it is composed of members of the institution's medical staff. The membership usually is a changing one. In this way, its work burden is shared and is more readily accepted. The committee's function is protective. It enables the hospital appropriately to be advised that its posture and activities are in accord with legal requirements. It is to be remembered that the hospital is an entity and that it, too, has legal rights and legal obligations.

Saying all this, however, does not settle the issue of the constitutional propriety of the committee requirement. Viewing the Georgia statute as a whole, we see no constitutionally justifiable pertinence in the structure for the advance approval by the abortion committee. With regard to the protection of potential life, the medical judgment is already completed prior to the committee stage, and review by a committee once removed from diagnosis is basically redundant. We are not cited to any other surgical procedure made subject to committee approval as a matter of state criminal law. The woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview. And the hospital itself is otherwise fully protected. Under § 26–1202 (e), the hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee. Further, a physician or any other employee has the right to refrain,

for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital. Section 26–1202 (e) affords adequate protection to the hospital, and little more is provided by the committee prescribed by § 26–1202 (b)(5).

We conclude that the interposition of the hospital abortion committee is unduly restrictive of the patient's rights and needs that, at this point, have already been medically delineated and substantiated by her personal physician. To ask more serves neither the hospital nor the State.

3. *Two-doctor concurrence.* The third aspect of the appellants' attack centers on the "time and availability of adequate medical facilities and personnel." It is said that the system imposes substantial and irrational roadblocks and "is patently unsuited" to prompt determination of the abortion decision. Time, of course, is critical in abortion. Risks during the first trimester of pregnancy are admittedly lower than during later months.

The appellants purport to show by a local study [16] of Grady Memorial Hospital (serving indigent residents in Fulton and DeKalb Counties) that the "mechanics of the system itself forced . . . discontinuance of the abortion process" because the median time for the workup was 15 days. The same study shows, however, that 27% of the candidates for abortion were already 13 or more weeks pregnant at the time of application, that is, they were at the end of or beyond the first trimester when they made their applications. It is too much to say, as appellants do, that these particular persons "were victims of a system over which they [had] no control." If higher risk was incurred because of abortions in the

[16] L. Baker & M. Freeman, Abortion Surveillance at Grady Memorial Hospital Center for Disease Control (June and July 1971) (U. S. Dept. of HEW, Public Health Service).

second rather than the first trimester, much of that risk was due to delay in application, and not to the alleged cumbersomeness of the system. We note, in passing, that appellant Doe had no delay problem herself; the decision in her case was made well within the first trimester.

It should be manifest that our rejection of the accredited-hospital requirement and, more important, of the abortion committee's advance approval eliminates the major grounds of the attack based on the system's delay and the lack of facilities. There remains, however, the required confirmation by two Georgia-licensed physicians in addition to the recommendation of the pregnant woman's own consultant (making under the statute, a total of six physicians involved, including the three on the hospital's abortion committee). We conclude that this provision, too, must fall.

The statute's emphasis, as has been repetitively noted, is on the attending physician's "best clinical judgment that an abortion is necessary." That should be sufficient. The reasons for the presence of the confirmation step in the statute are perhaps apparent, but they are insufficient to withstand constitutional challenge. Again, no other voluntary medical or surgical procedure for which Georgia requires confirmation by two other physicians has been cited to us. If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure and deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice. The attending physician will know when a consultation is advisable—the doubtful situation, the need for assurance when the medical decision is a delicate one, and the like. Physicians have followed this routine historically and

know its usefulness and benefit for all concerned. It is still true today that "[r]eliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he [the physician] possesses the requisite qualifications." *Dent* v. *West Virginia,* 129 U. S. 114, 122–123 (1889). See *United States* v. *Vuitch,* 402 U. S., at 71.

E. The appellants attack the residency requirement of the Georgia law, §§ 26–1202 (b)(1) and (b)(2), as violative of the right to travel stressed in *Shapiro* v. *Thompson,* 394 U. S. 618, 629–631 (1969), and other cases. A requirement of this kind, of course, could be deemed to have some relationship to the availability of post-procedure medical care for the aborted patient.

Nevertheless, we do not uphold the constitutionality of the residence requirement. It is not based on any policy of preserving state-supported facilities for Georgia residents, for the bar also applies to private hospitals and to privately retained physicians. There is no intimation, either, that Georgia facilities are utilized to capacity in caring for Georgia residents. Just as the Privileges and Immunities Clause, Const. Art. IV, § 2, protects persons who enter other States to ply their trade, *Ward* v. *Maryland,* 12 Wall. 418, 430 (1871); *Blake* v. *McClung,* 172 U. S. 239, 248–256 (1898), so must it protect persons who enter Georgia seeking the medical services that are available there. See *Toomer* v. *Witsell,* 334 U. S. 385, 396–397 (1948). A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve.

F. The last argument on this phase of the case is one that often is made, namely, that the Georgia system is violative of equal protection because it discriminates against the poor. The appellants do not urge that abortions

should be performed by persons other than licensed physicians, so we have no argument that because the wealthy can better afford physicians, the poor should have nonphysicians made available to them. The appellants acknowledged that the procedures are "nondiscriminatory in . . . express terms" but they suggest that they have produced invidious discriminations. The District Court rejected this approach out of hand. 319 F. Supp., at 1056. It rests primarily on the accreditation and approval and confirmation requirements, discussed above, and on the assertion that most of Georgia's counties have no accredited hospital. We have set aside the accreditation, approval, and confirmation requirements, however, and with that, the discrimination argument collapses in all significant aspects.

V

The appellants complain, finally, of the District Court's denial of injunctive relief. A like claim was made in *Roe* v. *Wade, ante,* p. 113. We declined decision there insofar as injunctive relief was concerned, and we decline it here. We assume that Georgia's prosecutorial authorities will give full recognition to the judgment of this Court.

In summary, we hold that the JCAH-accredited hospital provision and the requirements as to approval by the hospital abortion committee, as to confirmation by two independent physicians, and as to residence in Georgia are all violative of the Fourteenth Amendment. Specifically, the following portions of § 26–1202 (b), remaining after the District Court's judgment, are invalid:

(1) Subsections (1) and (2).

(2) That portion of Subsection (3) following the words "[s]uch physician's judgment is reduced to writing."

(3) Subsections (4) and (5).

The judgment of the District Court is modified accordingly and, as so modified, is affirmed. Costs are allowed to the appellants.

APPENDIX A TO OPINION OF THE COURT

Criminal Code of Georgia

(The italicized portions are those held unconstitutional by the District Court)

CHAPTER 26–12. ABORTION.

26–1201. Criminal Abortion. Except as otherwise provided in section 26–1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion.

26–1202. Exception. (a) Section 26–1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84–9 or 84–12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary *because:*

(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or

(3) The pregnancy resulted from forcible or statutory rape.

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

(1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties

of false swearing to the physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.

(2) The physician certifies that he believes the woman is a bona fide resident of this State and that he has no information which should lead him to believe otherwise.

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84–9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment, necessary *because of one or more of the reasons enumerated above.*

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals.

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

(6) If the proposed abortion is considered necessary because the woman has been raped, the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made by any law enforcement officer or agency and a statement by the solicitor general of the

judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director of the State Department of Public Health within 10 days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(*c*) *Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior court of the county in which the abortion is to be performed for a declaratory judgment whether the performance of such abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the constitutional or other legal rights of the fetus, the court shall so declare and shall restrain the physician from performing the abortion.*

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

26–1203. Punishment. A person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years.

APPENDIX B TO OPINION OF THE COURT

American Law Institute

MODEL PENAL CODE

Section 230.3. Abortion.

(1) *Unjustified Abortion.* A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(2) *Justifiable Abortion.* A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All

illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]

(3) *Physicians' Certificates; Presumption from Non-Compliance.* No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any of the requirements of this Subsection gives rise to a presumption that the abortion was unjustified.

(4) *Self-Abortion.* A woman whose pregnancy has continued beyond the twenty-sixth week commits a felony of the third degree if she purposely terminates her own pregnancy otherwise than by a live birth, or if she uses instruments, drugs or violence upon herself for that purpose. Except as justified under Subsection (2), a person who induces or knowingly aids a woman to use instruments, drugs or violence upon herself for the purpose of terminating her pregnancy otherwise than by a live birth commits a felony of the third degree whether or not the pregnancy has continued beyond the twenty-sixth week.

(5) *Pretended Abortion.* A person commits a felony of the third degree if, representing that it is his purpose to perform an abortion, he does an act adapted to cause abortion in a pregnant woman although the woman is in fact not pregnant, or the actor does not believe she is.

A person charged with unjustified abortion under Subsection (1) or an attempt to commit that offense may be convicted thereof upon proof of conduct prohibited by this Subsection.

(6) *Distribution of Abortifacients.* A person who sells, offers to sell, possesses with intent to sell, advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor as useful for that purpose, commits a misdemeanor, unless:

(a) the sale, offer or display is to a physician or druggist or to an intermediary in a chain of distribution to physicians or druggists; or

(b) the sale is made upon prescription or order of a physician; or

(c) the possession is with intent to sell as authorized in paragraphs (a) and (b); or

(d) the advertising is addressed to persons named in paragraph (a) and confined to trade or professional channels not likely to reach the general public.

(7) *Section Inapplicable to Prevention of Pregnancy.* Nothing in this Section shall be deemed applicable to the prescription, administration or distribution of drugs or other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at or immediately after fertilization.

MR. CHIEF JUSTICE BURGER, concurring*

I agree that, under the Fourteenth Amendment to the Constitution, the abortion statutes of Georgia and Texas impermissibly limit the performance of abortions necessary to protect the health of pregnant women, using

*[This opinion applies also to No. 70–18, *Roe* v. *Wade*, *ante*, p. 113.]

the term health in its broadest medical context. See *United States* v. *Vuitch,* 402 U. S. 62, 71–72 (1971). I am somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion; however, I do not believe that the Court has exceeded the scope of judicial notice accepted in other contexts.

In oral argument, counsel for the State of Texas informed the Court that early abortion procedures were routinely permitted in certain exceptional cases, such as nonconsensual pregnancies resulting from rape and incest. In the face of a rigid and narrow statute, such as that of Texas, no one in these circumstances should be placed in a posture of dependence on a prosecutorial policy or prosecutorial discretion. Of course, States must have broad power, within the limits indicated in the opinions, to regulate the subject of abortions, but where the consequences of state intervention are so severe, uncertainty must be avoided as much as possible. For my part, I would be inclined to allow a State to require the certification of two physicians to support an abortion, but the Court holds otherwise. I do not believe that such a procedure is unduly burdensome, as are the complex steps of the Georgia statute, which require as many as six doctors and the use of a hospital certified by the JCAH.

I do not read the Court's holdings today as having the sweeping consequences attributed to them by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortions on demand.

MR. JUSTICE DOUGLAS, concurring*

While I join the opinion of the Court,[1] I add a few words.

I

The questions presented in the present cases go far beyond the issues of vagueness, which we considered in *United States* v. *Vuitch,* 402 U. S. 62. They involve the right of privacy, one aspect of which we considered in *Griswold* v. *Connecticut,* 381 U. S. 479, 484, when we held that various guarantees in the Bill of Rights create zones of privacy.[2]

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*[This opinion applies also to No. 70–18, *Roe* v. *Wade, ante,* p. 113.]

[1] I disagree with the dismissal of Dr. Hallford's complaint in intervention in *Roe* v. *Wade, ante,* p. 113, because my disagreement with *Younger* v. *Harris,* 401 U. S. 37, revealed in my dissent in that case, still persists and extends to the progeny of that case.

[2] There is no mention of privacy in our Bill of Rights but our decisions have recognized it as one of the fundamental values those amendments were designed to protect. The fountainhead case is *Boyd* v. *United States,* 116 U. S. 616, holding that a federal statute which authorized a court in tax cases to require a taxpayer to produce his records or to concede the Government's allegations offended the Fourth and Fifth Amendments. Mr. Justice Bradley, for the Court, found that the measure unduly intruded into the "sanctity of a man's home and the privacies of life." *Id.,* at 630. Prior to *Boyd,* in *Kilbourn* v. *Thompson,* 103 U. S. 168, 190, Mr. Justice Miller held for the Court that neither House of Congress "possesses the general power of making inquiry into the private affairs of the citizen." Of *Kilbourn,* Mr. Justice Field later said, "This case will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a congressional committee." *In re Pacific Railway Comm'n,* 32 F. 241, 253 (cited with approval in *Sinclair* v. *United States,* 279 U. S. 263, 293). Mr. Justice Harlan, also speaking for the Court, in *ICC* v. *Brimson,* 154 U. S. 447, 478, thought the same was true of

The *Griswold* case involved a law forbidding the use of contraceptives. We held that law as applied to married people unconstitutional:

> "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Id.*, at 486.

The District Court in *Doe* held that *Griswold* and related cases "establish a Constitutional right to privacy broad enough to encompass the right of a woman to terminate an unwanted pregnancy in its early stages, by obtaining an abortion." 319 F. Supp. 1048, 1054.

The Supreme Court of California expressed the same view in *People* v. *Belous*,[3] 71 Cal. 2d 954, 963, 458 P. 2d 194, 199.

The Ninth Amendment obviously does not create federally enforceable rights. It merely says, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." But a catalogue of these rights includes customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of "the Blessings of Liberty" mentioned in the preamble to the Constitution. Many of them, in my view, come

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administrative inquiries, saying that the Constitution did not permit a "general power of making inquiry into the private affairs of the citizen." In a similar vein were *Harriman* v. *ICC*, 211 U. S. 407; *United States* v. *Louisville & Nashville R. Co.*, 236 U. S. 318, 335; and *FTC* v. *American Tobacco Co.*, 264 U. S. 298.

[3] The California abortion statute, held unconstitutional in the *Belous* case, made it a crime to perform or help perform an abortion "unless the same is necessary to preserve [the mother's] life." 71 Cal. 2d, at 959, 458 P. 2d, at 197.

within the meaning of the term "liberty" as used in the Fourteenth Amendment.

First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality.

These are rights protected by the First Amendment and, in my view, they are absolute, permitting of no exceptions. See *Terminiello* v. *Chicago,* 337 U. S. 1; *Roth* v. *United States,* 354 U. S. 476, 508 (dissent); *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, 697 (concurring); *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 293 (Black, J., concurring, in which I joined). The Free Exercise Clause of the First Amendment is one facet of this constitutional right. The right to remain silent as respects one's own beliefs, *Watkins* v. *United States,* 354 U. S. 178, 196–199, is protected by the First and the Fifth. The First Amendment grants the privacy of first-class mail, *United States* v. *Van Leeuwen,* 397 U. S. 249, 253. All of these aspects of the right of privacy are rights "retained by the people" in the meaning of the Ninth Amendment.

Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.

These rights, unlike those protected by the First Amendment, are subject to some control by the police power. Thus, the Fourth Amendment speaks only of "unreasonable searches and seizures" and of "probable cause." These rights are "fundamental," and we have held that in order to support legislative action the statute must be narrowly and precisely drawn and that a "compelling state interest" must be shown in support of the limitation. *E. g., Kramer* v. *Union Free School District,* 395 U. S. 621; *Shapiro* v. *Thompson,* 394 U. S. 618;

Carrington v. *Rash,* 380 U. S. 89; *Sherbert* v. *Verner,* 374 U. S. 398; *NAACP* v. *Alabama,* 357 U. S. 449.

The liberty to marry a person of one's own choosing, *Loving* v. *Virginia,* 388 U. S. 1; the right of procreation, *Skinner* v. *Oklahoma,* 316 U. S. 535; the liberty to direct the education of one's children, *Pierce* v. *Society of Sisters,* 268 U. S. 510, and the privacy of the marital relation, *Griswold* v. *Connecticut, supra,* are in this category.[4]

[4] My Brother STEWART, writing in *Roe* v. *Wade, supra,* says that our decision in *Griswold* reintroduced substantive due process that had been rejected in *Ferguson* v. *Skrupa,* 372 U. S. 726. *Skrupa* involved legislation governing a business enterprise; and the Court in that case, as had Mr. Justice Holmes on earlier occasions, rejected the idea that "liberty" within the meaning of the Due Process Clause of the Fourteenth Amendment was a vessel to be filled with one's personal choices of values, whether drawn from the *laissez faire* school, from the socialistic school, or from the technocrats. *Griswold* involved legislation touching on the marital relation and involving the conviction of a licensed physician for giving married people information concerning contraception. There is nothing specific in the Bill of Rights that covers that item. Nor is there anything in the Bill of Rights that in terms protects the right of association or the privacy in one's association. Yet we found those rights in the periphery of the First Amendment. *NAACP* v. *Alabama,* 357 U. S. 449, 462. Other peripheral rights are the right to educate one's children as one chooses, *Pierce* v. *Society of Sisters,* 268 U. S. 510, and the right to study the German language, *Meyer* v. *Nebraska,* 262 U. S. 390. These decisions, with all respect, have nothing to do with substantive due process. One may think they are not peripheral to other rights that are expressed in the Bill of Rights. But that is not enough to bring into play the protection of substantive due process.

There are, of course, those who have believed that the reach of due process in the Fourteenth Amendment included all of the Bill of Rights but went further. Such was the view of Mr. Justice Murphy and Mr. Justice Rutledge. See *Adamson* v. *California,* 332 U. S. 46, 123, 124 (dissenting opinion). Perhaps they were right; but it is a bridge that neither I nor those who joined the Court's opinion in *Griswold* crossed.

Only last Term in *Eisenstadt* v. *Baird,* 405 U. S. 438, another contraceptive case, we expanded the concept of *Griswold* by saying:

> "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.,* at 453.

This right of privacy was called by Mr. Justice Brandeis the right "to be let alone." *Olmstead* v. *United States,* 277 U. S. 438, 478 (dissenting opinion). That right includes the privilege of an individual to plan his own affairs, for, " 'outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.' " *Kent* v. *Dulles,* 357 U. S. 116, 126.

Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.

These rights, though fundamental, are likewise subject to regulation on a showing of "compelling state interest." We stated in *Papachristou* v. *City of Jacksonville,* 405 U. S. 156, 164, that walking, strolling, and wandering "are historically part of the amenities of life as we have known them." As stated in *Jacobson* v. *Massachusetts,* 197 U. S. 11, 29:

> "There is, of course, a sphere within which the individual may assert the supremacy of his own will

> and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will."

In *Union Pacific R. Co.* v. *Botsford,* 141 U. S. 250, 252, the Court said, "The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow."

In *Terry* v. *Ohio,* 392 U. S. 1, 8–9, the Court, in speaking of the Fourth Amendment stated, "This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs."

Katz v. *United States,* 389 U. S. 347, 350, emphasizes that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion."

In *Meyer* v. *Nebraska,* 262 U. S. 390, 399, the Court said:

> "Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

The Georgia statute is at war with the clear message of these cases—that a woman is free to make the basic decision whether to bear an unwanted child. Elaborate argument is hardly necessary to demonstrate that childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future. For example, rejected applicants under the Georgia statute are required to endure the

discomforts of pregnancy; to incur the pain, higher mortality rate, and aftereffects of childbirth; to abandon educational plans; to sustain loss of income; to forgo the satisfactions of careers; to tax further mental and physical health in providing child care; and, in some cases, to bear the lifelong stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships.

II

Such reasoning is, however, only the beginning of the problem. The State has interests to protect. Vaccinations to prevent epidemics are one example, as *Jacobson, supra,* holds. The Court held that compulsory sterilization of imbeciles afflicted with hereditary forms of insanity or imbecility is another. *Buck* v. *Bell,* 274 U. S. 200. Abortion affects another. While childbirth endangers the lives of some women, voluntary abortion at any time and place regardless of medical standards would impinge on a rightful concern of society. The woman's health is part of that concern; as is the life of the fetus after quickening. These concerns justify the State in treating the procedure as a medical one.

One difficulty is that this statute as construed and applied apparently does not give full sweep to the "psychological as well as physical well-being" of women patients which saved the concept "health" from being void for vagueness in *United States* v. *Vuitch,* 402 U. S., at 72. But, apart from that, Georgia's enactment has a constitutional infirmity because, as stated by the District Court, it "limits the number of reasons for which an abortion may be sought." I agree with the holding of the District Court, "This the State may not do, because such action unduly restricts a decision sheltered by the Constitutional right to privacy." 319 F. Supp., at 1056.

The vicissitudes of life produce pregnancies which may be unwanted, or which may impair "health" in

the broad *Vuitch* sense of the term, or which may imperil the life of the mother, or which in the full setting of the case may create such suffering, dislocations, misery, or tragedy as to make an early abortion the only civilized step to take. These hardships may be properly embraced in the "health" factor of the mother as appraised by a person of insight. Or they may be part of a broader medical judgment based on what is "appropriate" in a given case, though perhaps not "necessary" in a strict sense.

The "liberty" of the mother, though rooted as it is in the Constitution, may be qualified by the State for the reasons we have stated. But where fundamental personal rights and liberties are involved, the corrective legislation must be "narrowly drawn to prevent the supposed evil," *Cantwell* v. *Connecticut,* 310 U. S. 296, 307, and not be dealt with in an "unlimited and indiscriminate" manner. *Shelton* v. *Tucker,* 364 U. S. 479, 490. And see *Talley* v. *California,* 362 U. S. 60. Unless regulatory measures are so confined and are addressed to the specific areas of compelling legislative concern, the police power would become the great leveler of constitutional rights and liberties.

There is no doubt that the State may require abortions to be performed by qualified medical personnel. The legitimate objective of preserving the mother's health clearly supports such laws. Their impact upon the woman's privacy is minimal. But the Georgia statute outlaws virtually all such operations—even in the earliest stages of pregnancy. In light of modern medical evidence suggesting that an early abortion is safer healthwise than childbirth itself,[5] it cannot be seriously

[5] Many studies show that it is safer for a woman to have a medically induced abortion than to bear a child. In the first 11 months of operation of the New York abortion law, the mortality

urged that so comprehensive a ban is aimed at protecting the woman's health. Rather, this expansive proscription of all abortions along the temporal spectrum can rest only on a public goal of preserving both embryonic and fetal life.

The present statute has struck the balance between the woman's and the State's interests wholly in favor of the latter. I am not prepared to hold that a State may equate, as Georgia has done, all phases of maturation preceding birth. We held in *Griswold* that the States may not preclude spouses from attempting to avoid the joinder of sperm and egg. If this is true, it is difficult to perceive any overriding public necessity which might attach precisely at the moment of conception. As Mr. Justice Clark has said: [6]

> "To say that life is present at conception is to give recognition to the potential, rather than the actual. The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity—the known rather than the unknown. When sperm meets egg life may eventually form, but quite often it does not. The law does not deal in speculation. The phenomenon of

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rate associated with such operations was six per 100,000 operations. Abortion Mortality, 20 Morbidity and Mortality 208, 209 (June 1971) (U. S. Dept. of HEW, Public Health Service). On the other hand, the maternal mortality rate associated with childbirths other than abortions was 18 per 100,000 live births. Tietze, Mortality with Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969). See also Tietze & Lehfeldt, Legal Abortion in Eastern Europe, 175 J. A. M. A. 1149, 1152 (Apr. 1961); Kolblova, Legal Abortion in Czechoslovakia, 196 J. A. M. A. 371 (Apr. 1966); Mehland, Combating Illegal Abortion in the Socialist Countries of Europe, 13 World Med. J. 84 (1966).

[6] Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola U. (L. A.) L. Rev. 1, 9–10 (1969).

> life takes time to develop, and until it is actually present, it cannot be destroyed. Its interruption prior to formation would hardly be homicide, and as we have seen, society does not regard it as such. The rites of Baptism are not performed and death certificates are not required when a miscarriage occurs. No prosecutor has ever returned a murder indictment charging the taking of the life of a fetus.[7] This would not be the case if the fetus constituted human life."

In summary, the enactment is overbroad. It is not closely correlated to the aim of preserving prenatal life. In fact, it permits its destruction in several cases, including pregnancies resulting from sex acts in which unmarried females are below the statutory age of consent. At the same time, however, the measure broadly proscribes aborting other pregnancies which may cause severe mental disorders. Additionally, the statute is overbroad because it equates the value of embryonic life immediately after conception with the worth of life immediately before birth.

III

Under the Georgia Act, the mother's physician is not the sole judge as to whether the abortion should be performed. Two other licensed physicians must concur in his judgment.[8] Moreover, the abortion must be performed in a licensed hospital; [9] and the abortion must be

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[7] In *Keeler* v. *Superior Court*, 2 Cal. 3d 619, 470 P. 2d 617, the California Supreme Court held in 1970 that the California murder statute did not cover the killing of an unborn fetus, even though the fetus be "viable," and that it was beyond judicial power to extend the statute to the killing of an unborn. It held that the child must be "born alive before a charge of homicide can be sustained." *Id.*, at 639, 470 P. 2d, at 630.

[8] See Ga. Code Ann. § 26–1202 (b) (3).

[9] See *id.*, § 26–1202 (b) (4).

approved in advance by a committee of the medical staff of that hospital.[10]

Physicians, who speak to us in *Doe* through an *amicus* brief, complain of the Georgia Act's interference with their practice of their profession.

The right of privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relationship.

It is one thing for a patient to agree that her physician may consult with another physician about her case. It is quite a different matter for the State compulsorily to impose on that physician-patient relationship another layer or, as in this case, still a third layer of physicians. The right of privacy—the right to care for one's health and person and to seek out a physician of one's own choice protected by the Fourteenth Amendment—becomes only a matter of theory, not a reality, when a multiple-physician-approval system is mandated by the State.

The State licenses a physician. If he is derelict or faithless, the procedures available to punish him or to deprive him of his license are well known. He is entitled to procedural due process before professional disciplinary sanctions may be imposed. See *In re Ruffalo*, 390 U. S. 544. Crucial here, however, is state-imposed control over the medical decision whether pregnancy should be interrupted. The good-faith decision of the patient's chosen physician is overridden and the final decision passed on to others in whose selection the patient has no part. This is a total destruction of the right of privacy between physician and patient and the intimacy of relation which that entails.

The right to seek advice on one's health and the right to place reliance on the physician of one's choice are

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[10] *Id.*, § 26–1202 (b) (5).

basic to Fourteenth Amendment values. We deal with fundamental rights and liberties, which, as already noted, can be contained or controlled only by discretely drawn legislation that preserves the "liberty" and regulates only those phases of the problem of compelling legislative concern. The imposition by the State of group controls over the physician-patient relationship is not made on any medical procedure apart from abortion, no matter how dangerous the medical step may be. The oversight imposed on the physician and patient in abortion cases denies them their "liberty," *viz.*, their right of privacy, without any compelling, discernible state interest.

Georgia has constitutional warrant in treating abortion as a medical problem. To protect the woman's right of privacy, however, the control must be through the physician of her choice and the standards set for his performance.

The protection of the fetus when it has acquired life is a legitimate concern of the State. Georgia's law makes no rational, discernible decision on that score.[11] For under the Code, the developmental stage of the fetus is irrelevant when pregnancy is the result of rape, when the fetus will very likely be born with a permanent defect, or when a continuation of the pregnancy will endanger the life of the mother or permanently injure her health. When life is present is a question we do not try to resolve. While basically a question for medical experts, as stated by Mr. Justice Clark,[12] it is, of course, caught up in matters of religion and morality.

In short, I agree with the Court that endangering the life of the woman or seriously and permanently injuring

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[11] See Rochat, Tyler, & Schoenbucher, An Epidemiological Analysis of Abortion in Georgia, 61 Am. J. of Public Health 543 (1971).

[12] *Supra,* n. 6, at 10.

her health are standards too narrow for the right of privacy that is at stake.

I also agree that the superstructure of medical supervision which Georgia has erected violates the patient's right of privacy inherent in her choice of her own physician.

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, dissenting.*

At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are, nevertheless, unwanted for any one or more of a variety of reasons—convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc. The common claim before us is that for any one of such reasons, or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure.

The Court for the most part sustains this position: During the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus; the Constitution, therefore, guarantees the right to an abortion as against any state law or policy seeking to protect the fetus from an abortion not prompted by more compelling reasons of the mother.

With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers

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*[This opinion applies also to No. 70–18, *Roe* v. *Wade*, *ante*, p. 113.]

and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.

The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.

It is my view, therefore, that the Texas statute is not constitutionally infirm because it denies abortions to those who seek to serve only their convenience rather than to protect their life or health. Nor is this plaintiff, who claims no threat to her mental or physical health, entitled to assert the possible rights of those women

whose pregnancy assertedly implicates their health. This, together with *United States* v. *Vuitch,* 402 U. S. 62 (1971), dictates reversal of the judgment of the District Court.

Likewise, because Georgia may constitutionally forbid abortions to putative mothers who, like the plaintiff in this case, do not fall within the reach of § 26–1202 (a) of its criminal code, I have no occasion, and the District Court had none, to consider the constitutionality of the procedural requirements of the Georgia statute as applied to those pregnancies posing substantial hazards to either life or health. I would reverse the judgment of the District Court in the Georgia case.

MR. JUSTICE REHNQUIST, dissenting.

The holding in *Roe* v. *Wade, ante,* p. 113, that state abortion laws can withstand constitutional scrutiny only if the State can demonstrate a compelling state interest, apparently compels the Court's close scrutiny of the various provisions in Georgia's abortion statute. Since, as indicated by my dissent in *Wade,* I view the compelling-state-interest standard as an inappropriate measure of the constitutionality of state abortion laws, I respectfully dissent from the majority's holding.

UNITED STATES ET AL. *v.* FLORIDA EAST COAST RAILWAY CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

No. 70–279. Argued December 7, 1972—Decided January 22, 1973

The District Court ruled that appellee railroads were prejudiced by failure of the Interstate Commerce Commission (ICC) to hold oral hearings as required by §§ 556 and 557 of the Administrative Procedure Act (APA) before establishing industry-wide per diem rates for freight-car use. The ICC did receive written submissions from appellees, but refused to conduct the hearings requested by appellees prior to completion of its rulemaking. *Held:* The language of § 1 (14) (a) of the Interstate Commerce Act that "[t]he Commission may, after hearing . . . establish reasonable rules . . ." did not trigger §§ 556 and 557 of the APA requiring a trial-type hearing and the presentation of oral argument by the affected parties; and the ICC's proceeding was governed only by § 553 of the APA requiring notice prior to rulemaking. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U. S. 742. Nor does the "after hearing" language of § 1 (14) (a) of the Interstate Commerce Act by itself confer upon interested parties either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker. Pp. 234–246.

322 F. Supp. 725, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which STEWART, J., joined, *post*, p. 246. POWELL, J., took no part in the consideration or decision of the case.

Samuel Huntington argued the cause for the United States et al. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Kauper, Fritz R. Kahn,* and *Leonard S. Goodman.*

A. Alvis Layne argued the cause for appellee Florida East Coast Railway Co. With him on the brief was

Walter G. Arnold. Richard A. Hollander argued the cause and filed a brief for appellee Seaboard Coast Line Railroad Co.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellees, two railroad companies, brought this action in the District Court for the Middle District of Florida to set aside the incentive per diem rates established by appellant Interstate Commerce Commission in a rule-making proceeding. *Incentive Per Diem Charges—1968, Ex parte* No. 252 (Sub-No. 1), 337 I. C. C. 217 (1970). They challenged the order of the Commission on both substantive and procedural grounds. The District Court sustained appellees' position that the Commission had failed to comply with the applicable provisions of the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.*, and therefore set aside the order without dealing with the railroads' other contentions. The District Court held that the language of § 1 (14)(a) [1] of the Interstate Commerce

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[1] Section 1 (14)(a) provides:

"The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased

Act, 24 Stat. 379, as amended, 49 U. S. C. § 1 (14)(a), required the Commission in a proceeding such as this to act in accordance with the Administrative Procedure Act, 5 U. S. C. § 556 (d), and that the Commission's determination to receive submissions from the appellees only in written form was a violation of that section because the appellees were "prejudiced" by that determination within the meaning of that section.

Following our decision last Term in *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U. S. 742 (1972), we noted probable jurisdiction, 407 U. S. 908 (1972), and requested the parties to brief the question of whether the Commission's proceeding was governed by 5 U. S. C. § 553,[2]

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by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest."

[2] "§ 553. Rule making.

"(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

"(1) a military or foreign affairs function of the United States; or

"(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

"(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

"(1) a statement of the time, place, and nature of public rule making proceedings;

"(2) reference to the legal authority under which the rule is proposed; and

"(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

[*Footnote 2 continued on p. 227*]

or by §§ 556 [3] and 557,[4] of the Administrative Procedure Act. We here decide that the Commission's proceeding was governed only by § 553 of that Act,

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Except when notice or hearing is required by statute, this subsection does not apply—

"(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

"(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

"(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

"(2) interpretative rules and statements of policy; or

"(3) as otherwise provided by the agency for good cause found and published with the rule.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

[3] "§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.

"(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

"(b) There shall preside at the taking of evidence—

"(1) the agency;

"(2) one or more members of the body which comprises the agency; or

"(3) one or more hearing examiners appointed under section 3105 of this title.

"This subchapter does not supersede the conduct of specified classes

[*Footnote 4 begins on p. 229*]

and that appellees received the "hearing" required by § 1 (14)(a) of the Interstate Commerce Act. We, therefore, reverse the judgment of the District Court and

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of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

"(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

"(1) administer oaths and affirmations;

"(2) issue subpenas authorized by law;

"(3) rule on offers of proof and receive relevant evidence;

"(4) take depositions or have depositions taken when the ends of justice would be served;

"(5) regulate the course of the hearing;

"(6) hold conferences for the settlement or simplication of the issues by consent of the parties;

"(7) dispose of procedural requests or similar matters;

"(8) make or recommend decisions in accordance with section 557 of this title; and

"(9) take other action authorized by agency rule consistent with this subchapter.

"(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced

remand the case to that court for further consideration of appellees' other contentions that were raised there, but which we do not decide.

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thereby, adopt procedures for the submission of all or part of the evidence in written form.

"(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary."

[4] "§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.

"(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

"(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

"(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

"(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

"(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the

I. Background of Chronic Freight Car Shortages

This case arises from the factual background of a chronic freight-car shortage on the Nation's railroads, which we described in *United States* v. *Allegheny-Ludlum Steel Corp., supra.* Judge Simpson, writing for the District Court in this case, noted that "[f]or a number of years portions of the nation have been plagued with seasonal shortages of freight cars in which to ship goods." 322 F. Supp. 725, 726 (MD Fla. 1971). Judge Friendly, writing for a three-judge District Court in the Eastern District of New York in the related case of *Long Island R. Co.* v. *United States,* 318 F. Supp. 490, 491 (EDNY 1970), described the Commission's order as "the latest chapter in a long history of freight-car shortages in certain regions and seasons and of attempts to ease them." Congressional concern for the problem was manifested in the enactment in 1966 of an amendment to § 1 (14)(a) of the Interstate Commerce Act, enlarging the Commission's authority to prescribe per diem charges for the use by one railroad of freight cars owned by another. Pub. L. 89–430, 80 Stat. 168. The Senate

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parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

"(1) proposed findings and conclusions; or

"(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

"(3) supporting reasons for the exceptions or proposed findings or conclusions.

"The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

"(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

"(B) the appropriate rule, order, sanction, relief, or denial thereof."

Committee on Commerce stated in its report accompanying this legislation:

> "Car shortages, which once were confined to the Midwest during harvest seasons, have become increasingly more frequent, more severe, and nationwide in scope as the national freight car supply has plummeted." S. Rep. No. 386, 89th Cong., 1st Sess., 1–2.

The Commission in 1966 commenced an investigation, *Ex parte* No. 252, Incentive Per Diem Charges, "to determine whether information presently available warranted the establishment of an incentive element increase, on an interim basis, to apply pending further study and investigation." 332 I. C. C. 11, 12 (1967). Statements of position were received from the Commission staff and a number of railroads. Hearings were conducted at which witnesses were examined. In October 1967, the Commission rendered a decision discontinuing the earlier proceeding, but announcing a program of further investigation into the general subject.

In December 1967, the Commission initiated the rulemaking procedure giving rise to the order that appellees here challenge. It directed Class I and Class II linehaul railroads to compile and report detailed information with respect to freight-car demand and supply at numerous sample stations for selected days of the week during 12 four-week periods, beginning January 29, 1968.

Some of the affected railroads voiced questions about the proposed study or requested modification in the study procedures outlined by the Commission in its notice of proposed rulemaking. In response to petitions setting forth these carriers' views, the Commission staff held an informal conference in April 1968, at which the objections and proposed modifications were discussed.

Twenty railroads, including appellee Seaboard, were represented at this conference, at which the Commission's staff sought to answer questions about reporting methods to accommodate individual circumstances of particular railroads. The conference adjourned on a note that undoubtedly left the impression that hearings would be held at some future date. A detailed report of the conference was sent to all parties to the proceeding before the Commission.

The results of the information thus collected were analyzed and presented to Congress by the Commission during a hearing before the Subcommittee on Surface Transportation of the Senate Committee on Commerce in May 1969. Members of the Subcommittee expressed dissatisfaction with the Commission's slow pace in exercising the authority that had been conferred upon it by the 1966 Amendments to the Interstate Commerce Act. Judge Simpson in his opinion for the District Court said:

> "Members of the Senate Subcommittee on Surface Transportation expressed considerable dissatisfaction with the Commission's apparent inability to take effective steps toward eliminating the national shortage of freight cars. Comments were general that the Commission was conducting too many hearings and taking too little action. Senators pressed for more action and less talk, but Commission counsel expressed doubt respecting the Commission's statutory power to act without additional hearings." 322 F. Supp., at 727.

Judge Friendly, describing the same event in *Long Island R. Co.* v. *United States, supra,* said:

> "To say that the presentation was not received with enthusiasm would be a considerable understatement. Senators voiced displeasure at the Com-

> mission's long delay at taking action under the 1966 amendment, engaged in some merriment over what was regarded as an unintelligible discussion of methodology . . . and expressed doubt about the need for a hearing . . . . But the Commission's general counsel insisted that a hearing was needed . . . and the Chairman of the Commission agreed . . . ." 318 F. Supp., at 494.

The Commission, now apparently imbued with a new sense of mission, issued in December 1969 an interim report announcing its tentative decision to adopt incentive per diem charges on standard boxcars based on the information compiled by the railroads. The substantive decision reached by the Commission was that so-called "incentive" per diem charges should be paid by any railroad using on its lines a standard boxcar owned by another railroad. Before the enactment of the 1966 amendment to the Interstate Commerce Act, it was generally thought that the Commission's authority to fix per diem payments for freight car use was limited to setting an amount that reflected fair return on investment for the owning railroad, without any regard being had for the desirability of prompt return to the owning line or for the encouragement of additional purchases of freight cars by the railroads as a method of investing capital. The Commission concluded, however, that in view of the 1966 amendment it could impose additional "incentive" per diem charges to spur prompt return of existing cars and to make acquisition of new cars financially attractive to the railroads. It did so by means of a proposed schedule that established such charges on an across-the-board basis for all common carriers by railroads subject to the Interstate Commerce Act. Embodied in the report was a proposed rule adopting the Commission's tentative conclusions and a notice

to the railroads to file statements of position within 60 days, couched in the following language:

> "That verified statements of facts, briefs, and statements of position respecting the tentative conclusions reached in the said interim report, the rules and regulations proposed in the appendix to this order, and any other pertinent matter, are hereby invited to be submitted pursuant to the filing schedule set forth below by an interested person whether or not such person is already a party to this proceeding.
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> . . . . . .
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> "That any party requesting oral hearing shall set forth with specificity the need therefor and the evidence to be adduced." 337 I. C. C. 183, 213.

Both appellee railroads filed statements objecting to the Commission's proposal and requesting an oral hearing, as did numerous other railroads. In April 1970, the Commission, without having held further "hearings," issued a supplemental report making some modifications in the tentative conclusions earlier reached, but overruling *in toto* the requests of appellees.

The District Court held that in so doing the Commission violated § 556 (d) of the Administrative Procedure Act, and it was on this basis that it set aside the order of the Commission.

II. Applicability of Administrative Procedure Act

In *United States* v. *Allegheny-Ludlum Steel Corp., supra,* we held that the language of § 1 (14)(a) of the Interstate Commerce Act authorizing the Commission to act "after hearing" was not the equivalent of a requirement that a rule be made "on the record after opportunity for an agency hearing" as the latter term is used in § 553 (c) of the Administrative Procedure Act. Since the 1966 amendment to § 1 (14)(a), under which

the Commission was here proceeding, does not by its terms add to the hearing requirement contained in the earlier language, the same result should obtain here unless that amendment contains language that is tantamount to such a requirement. Appellees contend that such language is found in the provisions of that Act requiring that:

> "[T]he Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed . . . ."

While this language is undoubtedly a mandate to the Commission to consider the factors there set forth in reaching any conclusion as to imposition of per diem incentive charges, it adds to the hearing requirements of the section neither expressly nor by implication. We know of no reason to think that an administrative agency in reaching a decision cannot accord consideration to factors such as those set forth in the 1966 amendment by means other than a trial-type hearing or the presentation of oral argument by the affected parties. Congress by that amendment specified necessary components of the ultimate decision, but it did not specify the method by which the Commission should acquire information about those components.[5]

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[5] The Court of Appeals for the Ninth Circuit reached a result similar to that which we reach, in *Pacific Coast European Conference* v. *United States,* 350 F. 2d 197 (1965). Construing the authority of the Federal Maritime Commission under § 14b of the Shipping Act, 1916, as amended, 46 U. S. C. § 813a, that court observed that "[t]he authority of the Commission to permit such contracts was limited by requiring that the contracts in eight specified respects meet the congressional judgment as to what they should include." 350 F. 2d, at 201. Notwithstand-

Both of the district courts that reviewed this order of the Commission concluded that its proceedings were governed by the stricter requirements of §§ 556 and 557 of the Administrative Procedure Act, rather than by the provisions of § 553 alone.[6] The conclusion of the District Court for the Middle District of Florida, which we here review, was based on the assumption that the language in § 1 (14)(a) of the Interstate Commerce Act requiring rulemaking under that section to be done "after hearing" was the equivalent of a statutory requirement that the rule "be made on the record after opportunity for an agency hearing." Such an assump-

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ing these explicit directions that particular factors be considered by the Commission in reaching its decision, the court held that the statute's requirements of "notice and hearing" were not sufficient to bring into play the provisions of §§ 556 and 557 of the Administrative Procedure Act.

[6] Both district court opinions were handed down before our decision in *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U. S. 742 (1972), and it appears from the record before us that the Government in those courts did not really contest the proposition that the Commission's proceedings were governed by the stricter standards of §§ 556 and 557.

The dissenting opinion of Mr. Justice Douglas relies in part on indications by the Commission that it proposed to apply the more stringent standards of §§ 556 and 557 of the Administrative Procedure Act to these proceedings. This Act is not legislation that the Interstate Commerce Commission, or any other single agency, has primary responsibility for administering. An agency interpretation involving, at least in part, the provisions of that Act does not carry the weight, in ascertaining the intent of Congress, that an interpretation by an agency "charged with the responsibility" of administering a particular statute does. See *United States* v. *American Trucking Assns.*, 310 U. S. 534 (1940); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294 (1933). Moreover, since any agency is free under the Act to accord litigants appearing before it more procedural rights than the Act requires, the fact that an agency may choose to proceed under §§ 556 and 557 does not carry the necessary implication that the agency felt it was required to do so.

tion is inconsistent with our decision in *Allegheny-Ludlum, supra.*

The District Court for the Eastern District of New York reached the same conclusion by a somewhat different line of reasoning. That court felt that because § 1 (14)(a) of the Interstate Commerce Act had required a "hearing," and because that section was originally enacted in 1917, Congress was probably thinking in terms of a "hearing" such as that described in the opinion of this Court in the roughly contemporaneous case of *ICC* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, 93 (1913). The ingredients of the "hearing" were there said to be that "[a]ll parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal." Combining this view of congressional understanding of the term "hearing" with comments by the Chairman of the Commission at the time of the adoption of the 1966 legislation regarding the necessity for "hearings," that court concluded that Congress had, in effect, required that these proceedings be "on the record after opportunity for an agency hearing" within the meaning of § 553 (c) of the Administrative Procedure Act.

Insofar as this conclusion is grounded on the belief that the language "after hearing" of § 1 (14)(a), without more, would trigger the applicability of §§ 556 and 557, it, too, is contrary to our decision in *Allegheny-Ludlum, supra.* The District Court observed that it was "rather hard to believe that the last sentence of § 553 (c) was directed only to the few legislative sports where the words 'on the record' or their equivalent had found their way into the statute book." 318 F. Supp., at 496. This is, however, the language which Congress used, and since there are statutes on the books that do use these

very words, see, *e. g.*, the Fulbright Amendment to the Walsh-Healey Act, 41 U. S. C. § 43a, and 21 U. S. C. § 371 (e)(3), the regulations provision of the Food and Drug Act, adherence to that language cannot be said to render the provision nugatory or ineffectual. We recognized in *Allegheny-Ludlum* that the actual words "on the record" and "after . . . hearing" used in § 553 were not words of art, and that other statutory language having the same meaning could trigger the provisions of §§ 556 and 557 in rulemaking proceedings. But we adhere to our conclusion, expressed in that case, that the phrase "after hearing" in § 1 (14)(a) of the Interstate Commerce Act does not have such an effect.

III. "Hearing" Requirement of § 1 (14)(a) of the Interstate Commerce Act

Inextricably intertwined with the hearing requirement of the Administrative Procedure Act in this case is the meaning to be given to the language "after hearing" in § 1 (14)(a) of the Interstate Commerce Act. Appellees, both here and in the court below, contend that the Commission procedure here fell short of that mandated by the "hearing" requirement of § 1 (14)(a), even though it may have satisfied § 553 of the Administrative Procedure Act. The Administrative Procedure Act states that none of its provisions "limit or repeal additional requirements imposed by statute or otherwise recognized by law." 5 U. S. C. § 559. Thus, even though the Commission was not required to comply with §§ 556 and 557 of that Act, it was required to accord the "hearing" specified in § 1 (14)(a) of the Interstate Commerce Act. Though the District Court did not pass on this contention, it is so closely related to the claim based on the Administrative Procedure Act that we proceed to decide it now.

If we were to agree with the reasoning of the District Court for the Eastern District of New York with respect to the type of hearing required by the Interstate Commerce Act, the Commission's action might well violate those requirements, even though it was consistent with the requirements of the Administrative Procedure Act.

The term "hearing" in its legal context undoubtedly has a host of meanings.[7] Its meaning undoubtedly will vary, depending on whether it is used in the context of a rulemaking-type proceeding or in the context of a proceeding devoted to the adjudication of particular disputed facts. It is by no means apparent what the drafters of the Esch Car Service Act of 1917, 40 Stat. 101, which became the first part of § 1 (14)(a) of the Interstate Commerce Act, meant by the term. Such an intent would surely be an ephemeral one if, indeed, Congress in 1917 had in mind anything more specific than the language it actually used, for none of the parties refer to any legislative history that would shed light on the intended meaning of the words "after hearing." What is apparent, though, is that the term was used in granting authority to the Commission to make rules and regulations of a prospective nature.

Appellees refer us to testimony of the Chairman of the Commission to the effect that if the added authority ultimately contained in the 1966 amendment were enacted, the Commission would proceed with "great caution" in imposing incentive per diem rates, and to statements of both Commission personnel and Members of Congress as to the necessity for a "hearing" before Commission action. Certainly, the lapse of time of more than three years between the enactment of the 1966 amendment and the Commission's issuance of its tenta-

[7] See 1 K. Davis, Administrative Law Treatise, § 6.05 (1958).

tive conclusions cannot be said to evidence any lack of caution on the part of that body. Nor do generalized references to the necessity for a hearing advance our inquiry, since the statute by its terms requires a "hearing"; the more precise inquiry of whether the hearing requirements necessarily include submission of oral testimony, cross-examination, or oral arguments is not resolved by such comments as these.

Under these circumstances, confronted with a grant of substantive authority made after the Administrative Procedure Act was enacted,[8] we think that reference to that Act, in which Congress devoted itself exclusively to questions such as the nature and scope of hearings, is a satisfactory basis for determining what is meant by the term "hearing" used in another statute. Turning to that Act, we are convinced that the term "hearing" as used therein does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker.

Section 553 excepts from its requirements rulemaking devoted to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," and rulemaking "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." This exception does not apply, however, "when notice or hearing is required by statute"; in those cases, even though interpretative rulemaking be involved, the requirements of § 553 apply. But since these require-

[8] The Interstate Commerce Act was amended in May 1966; the 1946 Administrative Procedure Act was repealed by Act of Sept. 6, 1966, 80 Stat. 378, which revised, codified, and enacted Title 5 of the United States Code, but the section detailing the procedures to be used in rulemaking is substantially similar to the original provision in the 1946 Administrative Procedure Act. See § 4 (b), 60 Stat. 238.

ments themselves do not mandate any oral presentation, see *Allegheny-Ludlum, supra,* it cannot be doubted that a statute that requires a "hearing" prior to rulemaking may in some circumstances be satisfied by procedures that meet only the standards of § 553. The Court's opinion in *FPC* v. *Texaco Inc.,* 377 U. S. 33 (1964), supports such a broad definition of the term "hearing."

Similarly, even where the statute requires that the rulemaking procedure take place "on the record after opportunity for an agency hearing," thus triggering the applicability of § 556, subsection (d) provides that the agency may proceed by the submission of all or part of the evidence in written form if a party will not be "prejudiced thereby." Again, the Act makes it plain that a specific statutory mandate that the proceedings take place on the record after hearing may be satisfied in some circumstances by evidentiary submission in written form only.

We think this treatment of the term "hearing" in the Administrative Procedure Act affords a sufficient basis for concluding that the requirement of a "hearing" contained in § 1 (14)(a), in a situation where the Commission was acting under the 1966 statutory rulemaking authority that Congress had conferred upon it, did not by its own force require the Commission either to hear oral testimony, to permit cross-examination of Commission witnesses, or to hear oral argument. Here, the Commission promulgated a tentative draft of an order, and accorded all interested parties 60 days in which to file statements of position, submissions of evidence, and other relevant observations. The parties had fair notice of exactly what the Commission proposed to do, and were given an opportunity to comment, to object, or to make some other form of written submission. The final order of the Commission indicates that it gave consideration to the statements of the two appellees here.

Given the "open-ended" nature of the proceedings, and the Commission's announced willingness to consider proposals for modification after operating experience had been acquired, we think the hearing requirement of § 1 (14)(a) of the Act was met.

Appellee railroads cite a number of our previous decisions dealing in some manner with the right to a hearing in an administrative proceeding. Although appellees have asserted no claim of constitutional deprivation in this proceeding, some of the cases they rely upon expressly speak in constitutional terms, while others are less than clear as to whether they depend upon the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution, or upon generalized principles of administrative law formulated prior to the adoption of the Administrative Procedure Act.

Morgan v. *United States,* 304 U. S. 1 (1938), is cited in support of appellees' contention that the Commission's proceedings were fatally deficient. That opinion describes the proceedings there involved as "quasi-judicial," *id.,* at 14, and thus presumably distinct from a rulemaking proceeding such as that engaged in by the Commission here. But since the order of the Secretary of Agriculture there challenged did involve a form of ratemaking, the case bears enough resemblance to the facts of this case to warrant further examination of appellees' contention. The administrative procedure in *Morgan* was held to be defective primarily because the persons who were to be affected by the Secretary's order were found not to have been adequately apprised of what the Secretary proposed to do prior to the time that he actually did it. Illustrative of the Court's reasoning is the following passage from the opinion:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party

> and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." *Id.*, at 18–19.[9]

The proceedings before the Secretary of Agriculture had been initiated by a notice of inquiry into the reasonableness of the rates in question, and the individuals being regulated suffered throughout the proceeding from its essential formlessness. The Court concluded that this formlessness denied the individuals subject to regulation the "full hearing" that the statute had provided.

Assuming, *arguendo,* that the statutory term "full hearing" does not differ significantly from the hearing requirement of § 1 (14)(a), we do not believe that the proceedings of the Interstate Commerce Commission before us suffer from the defect found to be fatal in *Morgan.* Though the initial notice of the proceeding by no means set out in detail what the Commission proposed to do, its tentative conclusions and order of December 1969, could scarcely have been more explicit or detailed. All interested parties were given 60 days following the issuance of these tentative findings and order in which to make appropriate objections. Appellees were "fairly advised" of exactly what the Commission proposed to do sufficiently in advance of the entry of the final order to give them adequate time to

[9] This same language was cited with approval by the Court in *Willner* v. *Committee on Character,* 373 U. S. 96, 105 (1963), in which it was held that an applicant for admission to the bar could not be denied such admission on the basis of *ex parte* statements of others whom he had not been afforded an opportunity to cross-examine.

formulate and to present objections to the Commission's proposal. *Morgan,* therefore, does not aid appellees.

ICC v. *Louisville & Nashville R. Co.,* 227 U. S. 88 (1913), involved what the Court there described as a "quasi-judicial" proceeding of a quite different nature from the one we review here. The provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, and of the Hepburn Act, 34 Stat. 584, in effect at the time that case was decided, left to the railroad carriers the "primary right to make rates," 227 U. S., at 92, but granted to the Commission the authority to set them aside, if after hearing, they were shown to be unreasonable. The proceeding before the Commission in that case had been instituted by the New Orleans Board of Trade complaint that certain class and commodity rates charged by the Louisville & Nashville Railroad from New Orleans to other points were unfair, unreasonable, and discriminatory. 227 U. S., at 90. The type of proceeding there, in which the Commission adjudicated a complaint by a shipper that specified rates set by a carrier were unreasonable, was sufficiently different from the nationwide incentive payments ordered to be made by all railroads in this proceeding so as to make the *Louisville & Nashville* opinion inapplicable in the case presently before us.

The basic distinction between rulemaking and adjudication is illustrated by this Court's treatment of two related cases under the Due Process Clause of the Fourteenth Amendment. In *Londoner* v. *Denver,* cited in oral argument by appellees, 210 U. S. 373 (1908), the Court held that due process had not been accorded a landowner who objected to the amount assessed against his land as its share of the benefit resulting from the paving of a street. Local procedure had accorded him the right to file a written complaint and objection, but not to be heard orally. This Court held that due process

of law required that he "have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." *Id.*, at 386. But in the later case of *Bi-Metallic Investment Co.* v. *State Board of Equalization,* 239 U. S. 441 (1915), the Court held that no hearing at all was constitutionally required prior to a decision by state tax officers in Colorado to increase the valuation of all taxable property in Denver by a substantial percentage. The Court distinguished *Londoner* by stating that there a small number of persons "were exceptionally affected, in each case upon individual grounds." *Id.*, at 446.

Later decisions have continued to observe the distinction adverted to in *Bi-Metallic Investment Co., supra.* In *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U. S. 292, 304–305 (1937), the Court noted the fact that the administrative proceeding there involved was designed to require the utility to refund previously collected rate charges. The Court held that in such a proceeding the agency could not, consistently with due process, act on the basis of undisclosed evidence that was never made a part of the record before the agency. The case is thus more akin to *Louisville & Nashville R. Co., supra,* than it is to this case. *FCC* v. *WJR,* 337 U. S. 265 (1949), established that there was no across-the-board constitutional right to oral argument in every administrative proceeding regardless of its nature. While the line dividing them may not always be a bright one, these decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.

Here, the incentive payments proposed by the Commission in its tentative order, and later adopted in its

final order, were applicable across the board to all of the common carriers by railroad subject to the Interstate Commerce Act. No effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances. Indeed, one of the objections of appellee Florida East Coast was that it and other terminating carriers should have been treated differently from the generality of the railroads. But the fact that the order may in its effects have been thought more disadvantageous by some railroads than by others does not change its generalized nature. Though the Commission obviously relied on factual inferences as a basis for its order, the source of these factual inferences was apparent to anyone who read the order of December 1969. The factual inferences were used in the formulation of a basically legislative-type judgment, for prospective application only, rather than in adjudicating a particular set of disputed facts.

The Commission's procedure satisfied both the provisions of § 1 (14)(a) of the Interstate Commerce Act and of the Administrative Procedure Act, and were not inconsistent with prior decisions of this Court. We, therefore, reverse the judgment of the District Court, and remand the case so that it may consider those contentions of the parties that are not disposed of by this opinion.

It is so ordered.

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

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

The present decision makes a sharp break with traditional concepts of procedural due process. The Commission order under attack is tantamount to a rate order. Charges are fixed that nonowning railroads must pay

owning railroads for boxcars of the latter that are on the tracks of the former. These charges are effective only during the months of September through February, the period of greatest boxcar use. For example, the charge for a boxcar that costs from $15,000 to $17,000 and that is five years of age or younger amounts to $5.19 a day. Boxcars costing between $39,000 and $41,000 and that are five years of age or younger cost the non-owning railroad $12.98 a day. The fees or rates charged decrease as the ages of the boxcars lengthen. 49 CFR § 1036.2. This is the imposition on carriers by administrative fiat of a new financial liability. I do not believe it is within our traditional concepts of due process to allow an administrative agency to saddle anyone with a new rate, charge, or fee without a full hearing that includes the right to present oral testimony, cross-examine witnesses, and present oral argument. That is required by the Administrative Procedure Act, 5 U. S. C. § 556 (d); § 556 (a) states that § 556 applies to hearings required by § 553. Section 553 (c) provides that § 556 applies "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing." A hearing under § 1 (14)(a) of the Interstate Commerce Act fixing rates, charges, or fees is certainly adjudicatory, not legislative in the customary sense.

The question is whether the Interstate Commerce Commission procedures used in this rate case "for the submission of . . . evidence in written form" avoided prejudice to the appellees so as to comport with the requirements of the Administrative Procedure Act.[1] The Government appeals from the District Court's order

[1] 5 U. S. C. § 556 (d) provides that a "sanction may not be imposed" without a full hearing, including cross-examination. But § 556 (d) makes an exception, which I submit is not relevant here. It provides: "In rule making . . . an agency may, *when a party will not be prejudiced thereby,* adopt procedures for the submission of all or part of the evidence in written form." (Emphasis added.)

remanding this case to the Commission for further proceedings on the incentive per diem rates to be paid by the appellee railroads for the standard boxcars they use.

In 1966, Congress amended § 1 (14)(a) of the Interstate Commerce Act to require that the Commission investigate the use of methods of incentive compensation to alleviate any shortage of freight cars "and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense." 49 U. S. C. § 1 (14)(a). While the Commission was given the discretion to exempt carriers from incentive payments "in the national interest," it was denied the power to "make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate . . . ." *Ibid.*

The Commission's initial investigation under this authority (31 Fed. Reg. 9240) was terminated without action because it "produced no reliable information respecting the quantum of interim incentive charge necessary to meet the statutory standards." 332 I. C. C. 11, 16. A subsequent study of boxcar supply-and-demand conditions (32 Fed. Reg. 20987) yielded data that were compiled in an interim report containing tentative charges and that were submitted to the railroads for comment. 337 I. C. C. 183. Although the Commission was admittedly uncertain whether its proposed charges would accomplish the statutory objective, *id.*, at 191, and even though "the opportunity to present evidence and arguments" was contemplated, *id.*, at 183, congressional impatience militated against further delay in implementing § 1 (14)(a).[2] Consequently, the Commission rejected the requests of the appellees and other railroads for further hearings and promulgated an in-

[2] See Hearing before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess. (1969).

centive per diem rate schedule for standard boxcars. 337 I. C. C. 217.

Appellees then brought this action in the District Court alleging that they were "prejudiced" within the meaning of the Administrative Procedure Act by the Commission's failure to afford them a proper hearing. 322 F. Supp. 725 (MD Fla. 1971). Seaboard argued that it had been damaged by what it alleged to be the Commission's sudden change in emphasis from specialty to unequipped boxcars and that it would lose some $1.8 million as the result of the Commission's allegedly hasty and experimental action. Florida East Coast raised significant challenges to the statistical validity of the Commission's data,[3] and also contended that its status as a terminating railroad left it with a surfeit of standard boxcars which should exempt it from the requirement to pay incentive charges.

Appellees, in other words, argue that the inadequacy of the supply of standard boxcars was not sufficiently established by the Commission's procedures. Seaboard contends that specialty freight cars have supplanted standard boxcars and Florida East Coast challenges the accuracy of the Commission's findings.

In its interim report, the Commission indicated that there would be an opportunity to present evidence and arguments. See 337 I. C. C. 183, 187. The appellees could reasonably have expected that the later hearings would give them the opportunity to substantiate and elaborate the criticisms they set forth in their

[3] Florida East Coast argues, for example, that the Commission's finding of a boxcar shortage may be attributable to a variety of sampling or definitional errors, asserting that it is unrealistic to define boxcar deficiencies in such a manner as "to show as a 'deficiency' the failure to supply a car on the day requested by the shipper no matter when the request was received." The Government's contention that a 24-hour standard was not used seems unresponsive to this argument. See 337 I. C. C. 217, 221.

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initial objections to the interim report. That alone would not necessarily support the claim of "prejudice." But I believe that "prejudice" was shown when it was claimed that the very basis on which the Commission rested its finding was vulnerable because it lacked statistical validity or other reasoned basis. At least in that narrow group of cases, prejudice for lack of a proper hearing has been shown.

Both *Long Island R. Co.* v. *United States,* 318 F. Supp. 490 (EDNY 1970), and the present case involve challenges to the Commission's procedures establishing incentive per diem rates. In *Long Island,* however, the railroad pointed to no specific challenges to the Commission's findings (*id.,* at 499), and the trial was conducted on stipulated issues involving the right to an oral hearing. *Id.,* at 491 n. 2. Since Long Island presented no information which might have caused the Commission to reach a different result,[4] there was no showing of prejudice, and *a fortiori* no right to an oral hearing. In the

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[4] In the *Long Island* case the court, speaking through Judge Friendly, said:

"Whether there was to be an oral hearing or not, the Long Island's first job was to examine the basic data and find this out. Nothing stood in its way. . . . If, on examining the data, the Long Island had pointed to specifics on which it needed to cross-examine or present live rebuttal testimony and the Commission had declined to grant an oral hearing, we would have a different case. Instead the Long Island's request for an oral hearing was silent as to any respect in which the Commission's disclosure of greater detail or cross-examination of the Commission's staff was needed to enable it to mount a more effective argument against the Commission's proposal. The last sentence of § 556 (d) would be deprived of all meaning if this were held sufficient to put the agency on notice that 'prejudice' would result from the denial of an oral hearing. Even taking into account the further representations that have been made to us, we fail to see that prejudice has been established." 318 F. Supp. 490, 499.

present case, by contrast, there are specific factual disputes and the issue is the narrow one of whether written submission of evidence without oral argument was prejudicial.

The more exacting hearing provisions of the Administrative Procedure Act, 5 U. S. C. §§ 556–557, are only applicable, of course, if the "rules are required by statute to be made on the record after opportunity for an agency hearing." *Id.*, § 553 (c).

United States v. *Allegheny-Ludlum Steel Corp.*, 406 U. S. 742, was concerned strictly with a rulemaking proceeding of the Commission for the promulgation of "car service rules" that in general required freight cars, after being unloaded, to be returned "in the direction of the lines of the road owning the cars." *Id.*, at 743. We sustained the Commission's power with respect to these two rules on the narrow ground that they were wholly legislative. We held that § 1 (14)(a) of the Interstate Commerce Act, requiring by its terms a "hearing," "does not require that such rules 'be made on the record' " within the meaning of § 553 (c). *Id.*, at 757. We recognized, however, that the precise words "on the record" are not talismanic, but that the crucial question is whether the proceedings under review are "an exercise of legislative rulemaking" or "adjudicatory hearings." *Ibid.* The "hearing" requirement of § 1 (14)(a) cannot be given a fixed and immutable meaning to be applied in each and every case without regard to the nature of the proceedings.

The rules in question here established "incentive" per diem charges to spur the prompt return of existing cars and to make the acquisition of new cars financially attractive to the railroads.[5] Unlike those we considered in

[5] Title 49 CFR § 1036.1 provides:

"*Application.*—Each common carrier by railroad subject to the Interstate Commerce Act shall pay to the owning railroads, including

Allegheny-Ludlum, these rules involve the creation of a new financial liability. Although quasi-legislative, they are also adjudicatory in the sense that they determine the measure of the financial responsibility of one road for its use of the rolling stock of another road. The Commission's power to promulgate these rules pursuant to § 1 (14)(a) is conditioned on the preliminary *finding* that the supply of freight cars to which the rules apply is inadequate. Moreover, in fixing incentive compensation once this threshold finding has been made, the Commission "shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply . . . ." [6]

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the owning railroads of Canada, the additional per diem charges set forth in § 1036.2 on all boxcars shown below, . . . while in the possession of nonowning railroads and subject to per diem rules. These charges are in addition to all other per diem charges currently in effect or prescribed. Mexican-owned cars are exempt from the operation of these rules. The rules of this part shall apply regardless of whether the foregoing boxcars are in intrastate, interstate, or foreign commerce."

As I have noted, § 1036.2 contains a schedule of per diem rates or fees for the use of another's boxcars which have been shunted onto its tracks, the rates or fees being definite or precise and controlled by two variables: the cost of the boxcars and the ages of the boxcars. These rates or fees, according to the record, amount to millions of dollars a year.

[6] The Commission discusses the critical factual issues to be resolved in fixing incentive compensation rates under § 1 (14)(a) in *Incentive Per Diem Charges,* 332 I. C. C. 11, 14–15:

"Before an incentive element, either interim or long-term, can be added to the per diem charge for the use of any particular type of freight car, we are required to give consideration to the national level of ownership of that type of car and to other factors affecting the adequacy of the national freight car supply. We have observed that the adequacy of the national freight car fleet depends upon the interplay of a number of factors, none of which can be said to be of superior importance. Further, since the effect of an incentive

The majority finds *ICC* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, "sufficiently different" as to make the opinion in that case inapplicable to the case now before us. I would read the case differently, finding a clear mandate that where, as here, ratemaking must be

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charge must be produced over a future period, consideration must be given to possible changes in these factors. In recent years many innovations and improvements have taken place in car design and operation. In the transportation of many commodities the standard boxcar has been replaced by cars capable of transporting greater loads with substantially less damage. In the transportation of grains, railroads are converting more and more to the use of large covered hopper cars. Shippers of lumber and plywood have found modern cars designed to facilitate transportation of their products increasingly desirable. At the same time, many of these cars are adaptable to the transportation of other commodities when not needed in the particular trade for which they were designed. In large part, the special service boxcars, covered hoppers and flatcars of various types handle traffic which formerly moved in general service boxcars. The same is true to some extent with respect to refrigerator cars. Their larger size and, with respect to the flatcars in trailer-on-flatcar (TOFC) service, their more rapid turnaround, enables them to provide service which would require many more of the general service boxcars which they replaced.

"Valid conclusions as to the types of cars, the construction of which for future use is to be encouraged by application of either an interim or long-range incentive charge, and which must be found to be in inadequate supply pursuant to the statutory requirement, necessarily require consideration of the extent to which the transportation service they perform is or can also be provided by cars of other types. Such consideration requires a thorough analysis of the services currently desired by the shipping public and those reasonably to be anticipated in the future. An overall, nationwide review of traffic and service demands and trends must precede any valid determination of the existing or prospective national requirements for freight cars of particular types. It is quite obvious that application of an incentive charge which served to encourage the acquisition of cars not adaptable to efficient provision of needed service over their normal lifetime would not be in the national interest. Shipper need, demand and acceptance with respect to future equipment is a significant factor."

based on evidential facts, § 1 (14)(a) requires that full hearing which due process normally entails. There we considered Commission procedures for setting aside as unreasonable, after a hearing, carrier-made rates. The Government maintained that the Commission, invested with legislative ratemaking power, but required by the Commerce Act to obtain necessary information, could act on such information as the Congress might. The Government urged that we presume that the Commission's findings were supported by such information, "even though not formally proved at the hearing." *Id.*, at 93. We rejected the contention, holding that the right to a hearing included "an opportunity to test, explain, or refute. . . . All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal." *Ibid.* I would agree with the District Court in *Long Island R. Co., supra,* at 497, that Congress was fully cognizant of our decision in *Louisville & Nashville R. Co.* when it first adopted the hearing requirement of § 1 (14)(a) in 1917. And when Congress debated the 1966 amendment that empowered the Commission to adopt incentive per diem rates, it had not lost sight of the importance of hearings. Questioned about the effect that incentive compensation might have on terminating lines, Mr. Staggers, Chairman of the House Committee on Interstate and Foreign Commerce and floor manager of the bill, responded: "I might say to the gentleman that this will not be put into practice until there have been *full hearings* before the Commission and all sides have had an opportunity to argue and present their facts on the question." 112 Cong. Rec. 10443 (emphasis added). Nor should we overlook the Commission's own interpretation of the hearing requirement in § 1 (14)(a) as it applies to this case. The Commission's order initiat-

ing the rulemaking proceeding notified the parties that it was acting "under authority of Part I of the Interstate Commerce Act (49 U. S. C. § 1, et seq.); more particularly, section 1 (14)(a) and the Administrative Procedure Act (5 U. S. C. §§ 553, 556, and 557)." Clearly, the Commission believed that it was required to hold a hearing on the record.[7] This interpretation, not of the Administrative Procedure Act, but of § 1 (14)(a) of the Commission's own Act, is "entitled to great weight." *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315.

The majority, at one point, distinguishes *Morgan* v. *United States*, 304 U. S. 1 (*Morgan II*), on the ground that the proceedings there involved were "quasi-judicial," "and thus presumably distinct from a rulemaking proceeding such as that engaged in by the Commission here." It is this easy categorization and pigeonholing that leads the majority to find *Allegheny-Ludlum* of controlling significance in this case. *Morgan II* dealt with the "full hearing" requirement of § 310 of the Packers and Stockyards Act, 42 Stat. 166, as it related to rate-making for the purchase and sale of livestock.[8] It is true that the Court characterized the proceedings as "quasi-

[7] In its final report, the Commission apparently still believed that its proceedings had to comply with the provisions of § 556 of the Administrative Procedure Act. The report stated that the parties had been granted a hearing in accordance with those provisions. 337 I. C. C., at 219.

[8] *Morgan II* considered in some depth the parameters of a "full hearing." The majority takes the position that the case is inapposite because the hearings provided in this case do not "suffer from the defect found to be fatal in *Morgan*"—*i. e.*, the parties were "fairly advised" of the scope and substance of the Commission proceedings. In *Morgan II*, however, there was no question that a "full hearing" included the right to present oral testimony and argument. 304 U. S. 1, 18–20.

judicial." But, the first time the case was before the Court, *Morgan* v. *United States,* 298 U. S. 468, Mr. Chief Justice Hughes noted that the "distinctive character" of the proceeding was legislative: "It is a proceeding looking to legislative action in the fixing of rates of market agencies." *Id.,* at 479. Nevertheless, the Secretary of Agriculture was required to establish rates in accordance with the standards and under the limitations prescribed by Congress. The Court concluded: "A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of *quasi-judicial* character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings . . . ." *Id.,* at 480.

Section 1 (14)(a) of the Interstate Commerce Act bestows upon the Commission broad discretionary power to determine incentive rates. These rates may have devastating effects on a particular line. According to the brief of one of the appellees, the amount of incentive compensation paid by debtor lines amounts to millions of dollars each six-month period. Nevertheless, the courts must defer to the Commission as long as its findings are supported by substantial evidence and it has not abused its discretion. "All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' . . . of a fair and open hearing be maintained in its integrity." *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U. S. 292, 304.

Accordingly, I would hold that appellees were not afforded the hearing guaranteed by § 1 (14)(a) of the Interstate Commerce Act and 5 U. S. C. §§ 553, 556, and 557, and would affirm the decision of the District Court.

UNITED STATES *v.* CHANDLER ET AL.

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

No. 72–438. Decided January 22, 1973

United States Savings Bonds are includable for federal estate tax purposes in the gross estate of a decedent registered co-owner who, with donative intent, had delivered the bonds to the other co-owners but who had not complied with applicable Treasury Department regulations for making *inter vivos* transfers of such bonds by having them reissued in the names of the other co-owners alone.

Certiorari granted; 460 F. 2d 1281, reversed.

PER CURIAM.

This case presents a narrow federal estate tax issue: Does a registered co-owner of a United States Savings Bond, Series E, by physical *inter vivos* delivery of the bond to the other registered co-owner, with intent to effectuate a gift, but without reissuance of the bond, succeed in divesting himself of the incidents of ownership so that, at his subsequent death, the value of the bond is not includable in his gross estate under the joint interests provisions of § 2040 of the Internal Revenue Code of 1954, 26 U. S. C. § 2040?

The United States District Court for the Northern District of California ruled that the co-owner had accomplished this divestiture, and it rendered judgment in favor of the taxpayer-estate. 312 F. Supp. 1263 (1970). The United States Court of Appeals for the Ninth Circuit affirmed for the reasons set out in the District Court's opinion. 460 F. 2d 1281 (1972). The Sixth Circuit theretofore had held to the contrary on a fact situation similar to that of the present case. *Estate of Curry* v. *United States,* 409 F. 2d 671 (1969). There

are other decisions to like effect. *Estate of Elliott* v. *Commissioner,* 57 T. C. 152 (1971), reviewed by the court and now pending on appeal to the Fifth Circuit; *Chambless* v. *United States,* 70–1 U. S. T. C. ¶ 12,655, 25 A. F. T. R. 2d 70–1512 (SC 1970). The Third Circuit, however, previously had ruled sweepingly along the lines followed by the Ninth Circuit here. *Silverman* v. *McGinnes,* 259 F. 2d 731 (1958).

We grant certiorari and reverse.

I

The decedent, Mary E. Baum, purchased several United States Savings Bonds, Series E, in 1954. She had them issued in the familiar co-ownership form. Some were in the names of Mrs. Baum "or" Patricia Ritter, a granddaughter. Others were in the names of Mrs. Baum "or" Beatrice Baum, another granddaughter. In 1961 the decedent delivered these bonds to the respective granddaughters, with the intention of making complete, irrevocable, *inter vivos* gifts.[1]

Mrs. Baum died in 1962. At her death the bonds were still in the original co-ownership form. They had not been redeemed. Neither had they been reissued, as they might have been under the applicable regulations, in the names of the respective granddaughters as sole owners.

The respondents, who are executors of the decedent's will, disclosed the bonds in the federal estate tax return filed for the decedent's estate but did not include them in the gross estate. On audit, the Internal Revenue Service ruled that the bonds were includable. A result-

[1] It is stipulated that these deliveries were not made in contemplation of death. Section 2035 of the 1954 Code, 26 U. S. C. § 2035, relating to transfers in contemplation of death, therefore has no application.

ing deficiency in estate tax was assessed and was paid by the respondents. The present suit for refund of the tax attributable to the inclusion of the bonds was instituted in due course.

II

Section 2040 is the governing statute. At the time of the decedent's death the section provided that there shall be included in a decedent's gross estate, with exceptions not here pertinent, "the value of all property . . . to the extent of the interest therein held as joint tenants by the decedent and any other person . . . in their joint names and payable to either or the survivor . . . ."

Title 31 U. S. C. § 757c (a) [2] authorizes the Secretary of the Treasury to issue United States Savings Bonds "in such manner and subject to such terms and conditions consistent with subsections (b)–(d) of this section, *and including any restrictions on their transfer,* as the Secretary of the Treasury may from time to time prescribe" (emphasis supplied).

Pursuant to this authorization, the Secretary issued Regulations on United States Savings Bonds. The first were those that appeared in Department Circular 571, dated December 16, 1936, 1 Fed. Reg. 2165. They have been revised from time to time. The eighth revision was in effect in 1961 when Mrs. Baum delivered the bonds in question to her respective granddaughters.

Section 315.5 of the Regulations, 31 CFR (1959 revision), provided that the "form of registration used must express the actual ownership of and interest in the bond and . . . will be considered as conclusive of such ownership and interest." Section 315.7 authorized registration in the names of two persons in the alternative

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[2] This is § 22 (a) of the Second Liberty Bond Act, 40 Stat. 288, as added by § 6 of the Act of Feb. 4, 1935, 49 Stat. 21, and as amended by § 3 of the Public Debt Act of 1941, 55 Stat. 7.

as co-owners, and stated, "No other form of registration establishing co-ownership is authorized."

Section 315.15 imposed a limitation on transfer: "Savings Bonds are not transferable . . . except as specifically provided in the regulations . . . ." Section 315.20 (a) stated, "No judicial determination will be recognized which would give effect to an attempted voluntary transfer inter vivos of a bond . . . ." Section 315.60 provided that a savings bond registered in co-ownership form will be paid, during the lives of both co-owners, "to either upon his separate request," in which case the other "shall cease to have any interest in the bond," or will be reissued, during the lives of both co-owners, upon the request of both, in the "name of either, alone or with a new co-owner or beneficiary," if, in the case of reissuance, the co-owners possessed one of a number of specifically enumerated relationships, including "grandparent and grandchild."

Section 351.61 related to payment or reissue after the death of a co-owner. The survivor is recognized "as the sole and absolute owner," and payment or reissue is "made as though the bond were registered in the name of the survivor alone," except that the request must be supported by proof of death of the other co-owner.

The regulations thus made the jointly issued bond nontransferable in itself and permitted a change in ownership, so long as both co-owners were alive, only through reissuance at the request of both co-owners.

III

Mary E. Baum, the decedent here, whatever the reason may have been, chose not to have the bonds in question reissued in the names of her granddaughters, as she might have done pursuant to the applicable regulations. Instead, she merely delivered the bonds to the granddaughters with donative intent. Our issue is

whether that delivery, accompanied by that donative intent, was sufficient to remove the bonds from the decedent's gross estate. We conclude that it was not.

We have no reason to rule against the integrity and effect of the regulations. The issuance of the bonds by the Secretary, subject to such "restrictions on their transfer" as the Secretary may prescribe, was clearly authorized by the Congress in 31 U. S. C. § 757c (a). And the restrictions on their transfer were just as clearly spelled out by the Secretary in his regulations. No claim is made—and none could be made—that the regulations are unclear or are inapplicable to Mrs. Baum's purported transfers. Nor can we view the regulations as an undue or improper restriction of the transfer rights the decedent would otherwise have. The bonds were issued subject to transfer restrictions, and those restrictions, in the eyes of the law at least, were known to her. She could have had the bonds issued originally in the sole names of the grandchildren, but she chose the co-ownership form and, as her later attempts at transfer reveal, she chose to retain possession of them. Having done so, she was obligated to play the game according to the rules.

The decisions below also overlook the facts that until her death, the decedent retained the right to redeem each of the bonds in question, the right to succeed to the proceeds if she survived the putative donee, and the right to join or to veto any attempt to have the bonds reissued. 31 CFR §§ 315.60 and 315.61 (1959 revision).[3]

We note, in passing, that any other rule could well lead to chaotic conditions with respect to savings bonds

[3] The District Court, and the Court of Appeals in adopting the District Court's opinion, stated that either co-owner could have had the bonds "reissued without even the signature of the other." 312 F. Supp. 1263, 1268. This ignores the positive requirement of § 315.60 that reissue is to be "upon the request of both."

and to great potential for abuse. Millions of these bonds are outstanding.[4] The requirements of Government for uniformity and for proper recordkeeping alone demand and justify something less than absolute freedom of transfer. Considerations of safety and an aspect of permanency of investment are additional factors that demand the same result.

Our conclusion, we feel, is required by the holding in *Free* v. *Bland,* 369 U. S. 663 (1962). There the Court held that, absent fraud, the regulations creating a right of survivorship in United States Savings Bonds issued in co-ownership form overrode or pre-empted any inconsistent state property law. We stressed there, as we do here, that a contrary result would fail "to give effect to a term or condition under which a federal bond is issued." *Id.,* at 669. We see nothing in the earlier case of *Bank of America Trust & Savings Assn.* v. *Parnell,* 352 U. S. 29 (1956), that implies anything to the contrary. That case was also distinguished in *Free* v. *Bland,* 369 U. S., at 669.

Reversed.

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[4] The Government in its petition, p. 8, asserts that approximately 500 million Series E Bonds are outstanding, that these are worth over 50 billion dollars, and that 75% of them are registered in co-ownership form.

Syllabus

McGINNIS, COMMISSIONER OF CORRECTION, ET AL. *v.* ROYSTER ET AL.

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

No. 71–718. Argued December 11, 1972—Decided February 21, 1973

Appellees challenge as violative of equal protection § 230 (3) of the New York Correction Law, which denies certain state prisoners good-time credit toward parole eligibility for the period of their presentence county jail incarceration, whereas those released on bail prior to sentence received under the statute full allowance of good-time credit for the entire period of their prison confinement. A three-judge District Court, viewing the good-time statutory scheme as primarily aimed at fostering prison discipline, upheld appellees' claim on the ground that there is no rational basis for the statutory distinction between jail and non-jail defendants in awarding good-time credit. *Held:* Under the New York scheme good-time credit takes into account a prisoner's performance under the program of rehabilitation that is fostered under the state prison system, but not in the county jails, which serve primarily as detention centers. Since the jails have no significant rehabilitation program, a rational basis exists for declining to give good-time credit for the pretrial jail-detention period; and the statute will be sustained even if fostering rehabilitation was not necessarily the primary legislative objective, cf. *South Carolina* v. *Katzenbach,* 383 U. S. 301, 331; *Dandridge* v. *Williams,* 397 U. S. 471, 486. Pp. 268–277.

332 F. Supp. 973, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. 277.

Michael Colodner, Assistant Attorney General of New York, argued the cause for appellants. With him on the briefs were *Louis J. Lefkowitz,* Attorney General, and *Samuel A. Hirshowitz,* First Assistant Attorney General.

G. Jeffery Sorge argued the cause for appellees *pro hac vice*. With him on the brief were *James J. McDonough* and *Matthew Muraskin* by appointment of the Court, 406 U. S. 955.

MR. JUSTICE POWELL delivered the opinion of the Court.

The question before us concerns the constitutionality of § 230 (3) of the New York Correction Law, which denied appellee state prisoners "good time" credit for their presentence incarceration in county jails.[1] Appellees

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[1] Section 230 (3):

"In the case of a definite sentence prisoner, said reduction shall be computed upon the term of the sentence as imposed by the court, less jail time allowance, and in the case of an indeterminate sentence prisoner said reduction shall be computed upon the minimum term of such sentence, less jail time allowance. No prisoner, however, shall be released under the provisions hereof from a state prison until he shall have served at least one year. In the case of a prisoner confined in a penitentiary, said reduction shall be computed upon the term of the sentence as imposed by the court, including jail time allowance. Subject to the rules of the commissioner of correction, the maximum reduction of ten days in each month may, in the discretion of the board hereinafter provided for, be in whole or in part withheld, forfeited or cancelled, in accordance with the rules of the commissioner of correction for bad conduct, violation of prison rules or failure to perform properly duties assigned."

Other relevant sections read as set forth below.

Section 230 (2):

"Every prisoner confined in a state prison or penitentiary, except a prisoner sentenced for an indeterminate term having a minimum of one day and a maximum of his natural life, may receive, for good conduct and efficient and willing performance of duties assigned, a reduction of his sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence, or of the term as imposed by the court in the case of a definite sentence. The maximum reduction allowable under this provision shall be four months per year, but nothing herein contained shall be construed

claim that disallowing such credit to them while permitting credit up to the full period of ultimate incarceration for state prisoners who were released on bail prior to sentencing deprived them of equal protection of the laws. The three-judge District Court, one judge dissenting, upheld their claim, 332 F. Supp. 973 (1971). The Commissioner of Correction and other officials (hereafter Commissioner) have appealed and we noted probable jurisdiction, 405 U. S. 986 (1972).[2]

The challenged New York sentencing system is a complex one, and some basic definitions are required at the outset. *Jail time* denotes that time an individual passes

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to confer any right whatsoever upon any prisoner to demand or require the whole or any part of such reduction."

Section 230 (4):

"Every prisoner confined in an institution under the jurisdiction of the state department of correction for an indeterminate term, except a prisoner sentenced for a term having a maximum of natural life, may receive, for good conduct and efficient and willing performance of duties assigned, a reduction of his sentence not to exceed two days for each month of the maximum term. For meritorious progress and achievement in a treatment program to which he has been assigned, following appropriate testing and classification, such prisoner may also receive a reduction of his sentence not to exceed three additional days for each month of the maximum term. In no event, however, shall the maximum reduction allowable under this subdivision exceed two months for each year of the maximum sentence, nor shall any such reduction be calculated under this subdivision to reduce the time actually served to a term less than the minimum sentence imposed by the court. . . ."

[2] The Commissioner claims in his brief that the court below should have treated the instant case, not as a class action, Fed. Rule Civ. Proc. 23, but as a petition for habeas corpus with the attendant requirement that appellees exhaust their state remedies. Brief for Appellants 2. Appellants did not, however, raise this question in their jurisdictional statement, and did not argue it before the Court. In light of this, it becomes unnecessary to comment further on any possible exhaustion question.

in a county jail prior to trial and sentencing. *Good time* is awarded for good behavior and efficient performance of duties during incarceration. Both good time and jail time figure variously in the calculations of a series of release dates that each prisoner receives upon his arrival at state prison. Each inmate has both a *minimum parole date,* which is the earliest date on which he *may* be paroled at the discretion of the Parole Board, and a *statutory release date* which is the earliest date he *must* be paroled by the Parole Board.[3] The minimum parole date is calculated under §§ 230 (2) and 230 (3) by subtracting the greatest amount of good time that can be earned (10 days per month) from the *minimum* sentence of an indeterminate term.[4] The statutory release date is calculated under § 230 (4) by subtracting the greatest amount of good time that can be earned (5 days per month) from the *maximum* sentence of an indeterminate term.

Although appellees did receive jail-time credit for the period of their presentence incarceration in county jail, § 230 (3) explicitly forbids, in calculating the *minimum parole date,* any good-time credit for the period of county jail detention served prior to transfer to state prison.[5] Appellee Royster, being unable to post bail,

[3] He also has a maximum expiration date which is the date of the maximum sentence to which an inmate can be held if he receives no good-time credit at all. This date, unlike the other two, bears no direct relevance to the instant case.

[4] Both prisoners here were sentenced to indeterminate terms. See § 230 (1):

". . . A sentence to imprisonment in a state prison having minimum and maximum limits fixed by the court or the governor is an indeterminate sentence."

[5] As the court below noted:

"There is no doubt that by its express wording Section 230 mandates the denial of good time credit for the time plaintiffs served in county jail awaiting trial and sentencing. Subsection 2 thereof pro-

served 404 days' jail time in the Nassau County Jail prior to his transfer to state prison to serve consecutive 5-to-10-year terms for burglary in the third degree and grand larceny in the first degree. Appellee Rutherford also failed to make bail and spent 242 days' jail time in Nassau County Jail prior to his trial, sentencing, and transfer to state prison for concurrent terms of 10 to 20 years for robbery in the first degree and two and one-half to five years for grand larceny in the second degree. It is undisputed that, were appellees Royster and Rutherford to receive good-time credit for their presentence confinement in county jail, they would be entitled to appear before the Parole Board approximately four and three months earlier, respectively, than under the computation required by § 230 (3).

Two additional points merit mention. While New York does deny good-time credit for jail time in computing the minimum parole date under §§ 230 (2) and (3), it allows such credit in calculating the statutory release date under § 230 (4).[6] Finally, § 230 (3) itself provides that good-time credit for jail time shall be awarded to those prisoners confined after sentence in county penitentiaries, as opposed to those convicted of felonies, such as appellees, who are transferred after sentence to state prison.[7]

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vides that a state prisoner may receive, 'for good conduct and efficient and willing performance of duties assigned, a reduction of his sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence . . . ,' and subsection 3 states that 'in the case of an indeterminate sentence prisoner said reduction shall be computed upon the minimum term of such sentence, *less jail time allowance.*' (Emphasis added.)" 332 F. Supp. 973, 974–975.

[6] See *People* v. *Deegan,* 56 Misc. 2d 567, 289 N. Y. S. 2d 285 (1968); *Paul* v. *Warden,* N. Y. L. J., May 21, 1969, p. 18, col. 6.

[7] "In the case of a prisoner confined in a penitentiary, said reduc-

I

Section 230 (3) of the New York Correction Law does, as appellees note, draw a distinction "between the treatment of state prisoners incarcerated prior to sentencing and those who were not similarly incarcerated." [8] Appellees contend that "denying state prisoners good-time credit for the period of their pre-sentence incarceration in a County Jail whereas those fortunate enough to obtain bail prior to sentence [receive] a full allowance of good time credit for the entire period which they ultimately spend in custody" [9] violates the equal protection of the laws and discriminates against those state prisoners unable to afford or otherwise qualify for bail prior to trial.

We first note that any relative disadvantage the distinction works on appellees is lessened by the fact that New York on September 1, 1967, replaced § 230 of its Correction Law with §§ 803 and 805, which apply to all convictions for offenses after that date.[10] Under the new

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tion shall be computed upon the term of the sentence as imposed by the court, *including jail time allowance.*" (Emphasis added.)

[8] Brief for Appellees 5.

[9] *Id.*, at 5–6.

[10] The court below correctly noted:

"[The] statutory scheme of § 230, which is the subject of this lawsuit, is no longer the law in New York. On September 1, 1967, § 230 was replaced by §§ 803 and 805 of the Correction Law and §§ 70.30 and 70.40 of the new Penal Law, which sections apply to all convictions for offenses committed *on or after that date* (but not to convictions—as of plaintiffs herein—for offenses committed *prior to* the effective date). Thus, the scope of this case (and of the proposed class) is necessarily limited, for the challenged statute, § 230 (3) of the Correction Law, now applies only to those prisoners who were convicted for offenses committed before September 1, 1967, whose minimum terms have not yet expired, who have not yet met with the Parole Board, and who have not yet elected the 'conditional release' program offered by the new law and made available to old law pris-

scheme, "good time earned on the minimum sentence is abolished. A prisoner meets with the Parole Board at the expiration of his minimum term, regardless of how much good time he has earned or of how much time he spent in jail prior to arriving at state prison."[11] New York has given appellees—and all those sentenced for offenses committed prior to September 1, 1967—a chance to elect the new procedure, but appellees declined to do so. Appellees thus enjoy at least as favorable a position as all state prisoners convicted for offenses committed subsequent to September 1, 1967, including those released on bail prior to sentence. Appellees thus are disadvantaged in the computation of time only in comparison with those who were convicted of offenses committed prior to September 1, 1967, and made bail prior to trial. Even the adverse impact of this difference is lessened, though not eliminated, by the fact that New York did not deprive appellees of credit for the full amount of *actual* time spent in jail prior to trial and sentencing but only of the potential *additional* 10 days per month of good time ordinarily available under § 230 (2) to inmates for good conduct and efficient performance of duty.[12]

We note, further, that the distinction of which appellees complain arose in the course of the State's sensitive

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oners by § 230–a of the Correction Law. Of these prisoners, a smaller class yet—comprised of those inmates who served time in county jail prior to sentence to state prison—actually feel the effect of § 230 (3)'s proscription against good time credit for jail time. Nevertheless, the briefs in this case attest to the continuing effect of that mandate on a substantial number of individuals." 332 F. Supp., at 975 n. 4.

[11] Brief for Appellants 12.

[12] As noted above, this would make a difference of three and four months, respectively, in the time appellees Rutherford and Royster were eligible to appear before the Parole Board.

and difficult effort to encourage for its prisoners constructive future citizenship while avoiding the danger of releasing them prematurely upon society. The determination of an optimal time for parole eligibility elicited multiple legislative classifications and groupings, which the court below rightly concluded require only some rational basis to sustain them. *James* v. *Strange,* 407 U. S. 128, 140 (1972); *Lindsey* v. *Normet,* 405 U. S. 56, 73–74 (1972); *Schilb* v. *Kuebel,* 404 U. S. 357 (1971); *Dandridge* v. *Williams,* 397 U. S. 471, 487 (1970). Appellees themselves recognize this to be the appropriate standard.[13] For this Court has observed that "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *City of Chicago,* 228 U. S. 61, 69–70 (1913). We do not wish to inhibit state experimental classifications in a practical and troublesome area, but inquire only whether the challenged distinction rationally furthers some legitimate, articulated state purpose. We conclude that it does.

II

The Commissioner defends the distinction by noting that "state prisons differ from county jails with respect to purpose, usage and availability of facilities." State prisons are "intended to have rehabilitation as a prime purpose and the facilities at these institutions are built and equipped to serve this purpose." The Commissioner cites the presence at state prisons of "educational and vocational services such as schools, factories, job-training programs and related activities."[14] At argument, the Commissioner noted: "We have barber shops. We teach

[13] Tr. of Oral Arg. 30.

[14] Brief for Appellants 14.

trades. We manufacture a lot of goods. . . . Greenhaven State Prison has a textile factory." [15]

We pass no judgment on the success or merits of the State's efforts, but note only that at state prisons a serious rehabilitative program exists. County jails, on the other hand, serve primarily as detention centers. The Commissioner asserts they are "neither equipped nor intended to do anything more than detain people awaiting trial and maintain no schools, run no factories and require no work from these inmates." [16] While appellees do point to the existence of some rehabilitative or recreational facilities within some county jails,[17] it is clear that nothing comparable to the State's rehabilitative effort exists.

These significant differences afford the basis for a different treatment within a constitutional framework. We note that the granting of good-time credit toward parole eligibility takes into account a prisoner's rehabilitative performance. Section 230 (2) of the New York Correction Law authorizes such credit toward the minimum parole date "for good conduct *and efficient and willing performance of duties assigned* [emphasis added]." [18] The regulations of the New York Department of Correction, 7 N. Y. C. R. R. § 260.1 (a), state that: "[T]he opportunity to earn good behavior allowances offers inmates a tangible reward for *positive efforts* made during incarceration [emphasis added]." [19] As the statute and reg-

[15] Tr. of Oral. Arg. 13.

[16] Brief for Appellants 15.

[17] Brief for Appellees 17. But the State notes that "some counties have absolutely nothing. Some have a little something." Tr. of Oral Arg. 6.

[18] See n. 1, *supra*.

[19] Appellants further note that:

"Section 260.3 sets forth the criteria for awarding allowances and states:

"'(b) In evaluating the amount of allowance to be granted, the

ulations contemplate state evaluation of an inmate's progress toward rehabilitation, in awarding good time,[20] it is reasonable not to award such time for pretrial deten-

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statutory criteria (i. e. good behavior, efficient and willing performance of duties assigned, progress and achievement in an assigned treatment program) shall be viewed in the light of the following factors:

"'(1) The attitude of the inmate;

"'(2) The capacity of the inmate; and

"'(3) The efforts made by the inmate within the limits of his capacity.'

"These factors are evaluated by a time allowance committee, whose purpose is to make recommendations to the superintendent as to the amount of good behavior allowance to be granted to inmates who are eligible to be considered for such allowance. 7 N. Y. C. R. R. 261.2. The time allowance committee awards good time on the following criteria [7 N. Y. C. R. R. 261.3]:

"'(d) The committee *shall consider the entire file of the inmate* and shall interview the inmate and then shall decide upon a recommendation as to the amount of good behavior allowance to be granted, *applying the principles set forth in sections 260.3 and 260.4 of this Part.*

"'(e) The committee shall not recommend the granting of the total allowance authorized by law or the withholding of any part of the allowance in accordance with any automatic rule, but *shall appraise the entire institutional experience of the inmate* and make its own determination.' (Emphasis added.)" Reply Brief for Appellants 2–3.

[20] See also the affidavit of the Deputy Commissioner of the Department of Correction, John R. Cain, who stated that:

"The actual allowance of 'good time' is discretionary and is awarded as an incentive for good conduct. It is a means for encouraging participation in programs, efficient work and discipline.

"The state correctional system seeks to encourage rehabilitation by work participation by inmates, job training programs and education programs. An inmate can be evaluated in his work and participation in the facility's programs and 'good time' granted as an incentive. Prior to being received in the facility, however, an inmate who is in jail is not under the supervision of the State Correction Department and is not involved in the facility program. Since the

tion in a county jail where no systematic rehabilitative programs exist and where the prisoner's conduct and performance are not even observed and evaluated by the responsible state prison officials. Further, it would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence. In short, an inmate in county jail is neither under the supervision of the State Correction Department nor participating in the State's rehabilitative programs. Where there is no evaluation by state officials and little or no rehabilitative participation for anyone to evaluate, there is a rational justification for declining to give good-time credit.[21]

III

We do not agree with the court below that the integrity of appellants' assertions as to rehabilitation is undermined by the fact that the State does grant under § 230 (3) good-time credit for presentence jail time to

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inmate is not participating in the state programs while in jail there is no opportunity to evaluate him nor need to encourage his participation." App. 19a.

[21] Appellants further correctly note:

"In fact, until recently changed by federal policy, the federal prison system itself did not require the awarding of good time for pre-trial incarceration under 18 U. S. C. § 4161, which awards good time solely for good behavior. Section 4161 states that good time begins to run 'with the day on which the sentence commences to run', and the sentence does not start to run until the prisoner is received in a federal penitentiary. See *Blackshear* v. *United States,* 434 F. 2d 58 (5th Cir. 1970). The federal courts have uniformly upheld the denial of the opportunity to earn good time on this jail time. *Bandy* v. *Willingham,* 398 F. 2d 333 (10th Cir. 1968), *cert. den.* 393 U. S. 1006; *Aderhold* v. *Ellis,* 84 F. 2d 543 (5th Cir. 1936), *cert. den.* 299 U. S. 587; *Swope* v. *Lawton,* 83 F. 2d 814 (9th Cir. 1936)." Brief for Appellants 20–21.

county penitentiary inmates and under § 230 (4) to state prisoners for the purpose of calculating their statutory release dates.[22] The legislature could have concluded rationally that *county* penitentiary inmates, who are nonfelons with less than one-year sentences, required quantitatively and qualitatively less rehabilitation—with fewer risks of misevaluation—than inmates confined to state prison for more serious crimes. And the legislature could rationally have distinguished between the minimum parole date and the statutory release date on the ground that an acceleration of the minimum parole date posed a greater danger that an inmate would be released without adequate exposure to rehabilitative programs and without adequate evaluation by prison officials. Thus, New York's decision to deny good-time credit for presentence jail time solely with respect to a state prisoner's minimum parole date is rationally justified on the ground that the risk of prematurely releasing unrehabilitated or dangerous criminals may well be greatest when the parole decision is made prior to expiration of the minimum sentence.

IV

Neither appellees nor the court below contended that increased opportunity for state evaluation of an inmate's behavior and rehabilitative progress was not a purpose of the challenged provision of § 230 (3). Appellees state

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[22] See *supra*, at 268, and nn. 7 and 8. The court below stated: "Whatever the merit in defendants' attempted distinction, the fact remains that state prisoners can be, and, under certain circumstances, are, granted good time credit for jail time for reasons other than as a reward for participation in the various rehabilitative programs of the state prison system. The awarding of good time for jail time to these two classes of prisoners only reinforces the belief that the legislature's primary aim in enacting the good time statute was to foster and insure the maintenance of prison discipline." 332 F Supp., at 978.

only that the rehabilitative purpose was not the "overriding" one,[23] and the District Court noted that "the legislature's *primary* aim in enacting the good time statute was to foster and insure the maintenance of prison discipline." 332 F. Supp., at 978 (emphasis added).[24]

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[23] At oral argument the following instructive colloquy occurred:

"Q. Then it is your position that the only purpose at all, sir, by the statute, exclusively, the only single purpose, is the disciplinary one?

"MR. SORGE: Your Honor, it is extremely difficult to say whether the only purpose is just for the discipline. I believe that the court has——

"Q. If a purpose is the rehabilitation one, then are you not in some trouble?

"MR. SORGE: If the main purpose is?

"Q. If a purpose, not the main purpose, a purpose.

"MR. SORGE: I do not believe so, Your Honor, because, as the district court stated, the overriding consideration in this case is disciplinary.

. . . . .

"Q. You go further then than the district court, I take it, because I read the district court's opinion the same way MR. JUSTICE BRENNAN does, as saying that rehabilitation is a subordinate function and that its opinion is based on that. You say that it really is no function at all?

"MR. SORGE: I believe that if you take the state prisoners themselves, Mr. Justice, there might be a subordinate position. However, I would repeat that the overriding consideration is the disciplinary aspect of it." Tr. of Oral Arg. 28–30.

[24] See also the court's statement that:

"Defendants contend that good time is granted as an incentive to the inmates to participate in these prison rehabilitation programs and that, since county jails are not equipped to provide such services, there is no basis for granting good time for time served therein. If it were clear that the awarding of good time was based solely and exclusively on an evaluation of an inmate's performance in such programs so endemic to the state prison system, the denial of good time for jail time might be understandable; however, this does not appear to be the case. Rather, it seems that the overriding consideration in the granting of good time reductions is the maintenance of prison discipline." 332 F. Supp., at 977.

We do not dispute these statements: the disciplinary purpose is certainly an important and possibly the "primary" aim of the legislation.[25] Yet, our decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which subordinate. Rather, legislative solutions must be respected if the "distinctions drawn have some basis in practical experience," *South Carolina* v. *Katzenbach,* 383 U. S. 301, 331 (1966), or if some legitimate state interest is advanced, *Dandridge* v. *Williams,* 397 U. S., at 486. So long as the state purpose upholding a statutory class is legitimate and nonillusory, its lack of primacy is not disqualifying.

When classifications do not call for strict judicial scrutiny, this is the only approach consistent with proper judicial regard for the judgments of the Legislative Branch. The search for legislative purpose is often elusive enough, *Palmer* v. *Thompson,* 403 U. S. 217 (1971), without a requirement that primacy be ascertained. Legislation

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[25] The court below noted that the disciplinary purpose of the statute is demonstrated by the fact that "a prisoner is immediately and automatically credited with a maximum allowance of good time credit for *future* good behavior at the time his minimum parole date is initially fixed upon his arrival in state prison. In effect, then, a prisoner does not 'earn' good time credit as time goes on for exemplary performance in assorted prison programs but rather simply avoids being penalized for bad behavior." The court then cited § 235 of New York Correction Law providing that good time may be withheld as " 'punishment for offenses *against the discipline* of the prison or penitentiary' (emphasis added) . . . ." 332 F. Supp., at 977–978.

The statements above do demonstrate a disciplinary purpose for the statute, but do not negate the rehabilitative one. There is nothing to show that good-time credit may not be revoked for failure of the inmate to participate acceptably in the State's rehabilitative program as well as for disciplinary violations. Indeed, § 230 (3) requires loss of good time for "bad conduct, violation of prison rules or *failure to perform properly duties assigned.*" (Emphasis added.)

is frequently multipurposed: the removal of even a "subordinate" purpose may shift altogether the consensus of legislative judgment supporting the statute. Permitting nullification of statutory classifications based rationally on a nonprimary legislative purpose would allow courts to peruse legislative proceedings for subtle emphases supporting subjective impressions and preferences. The Equal Protection Clause does not countenance such speculative probing into the purposes of a coordinate branch. We have supplied no imaginary basis or purpose for this statutory scheme, but we likewise refuse to discard a clear and legitimate purpose because the court below perceived another to be primary.

V

As the challenged classification here rationally promotes the legitimate desire of the state legislature to afford state prison officials an adequate opportunity to evaluate both an inmate's conduct and his rehabilitative progress before he is eligible for parole, the decision of the District Court is

Reversed.

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

Under § 230 (3) of the New York Correction Law, a prisoner loses "good time" as punishment for offenses against the discipline of the prison. The statutory appearance of inmates before a parole board is computed by allowance of up to 10 days for "good conduct" each month under the law governing appellees.[1] No "good time"

[1] The statutory scheme of § 230 was replaced on September 1, 1967, by §§ 803 and 805 of the Correction Law and §§ 70.30 and 70.40 of the new Penal Law, which sections apply to all convictions for offenses committed *on or after that date* (but not to convictions—as of appellees—for offenses committed *prior* to the effective date).

credit is allowed, however, for the period of their presentence incarceration in a county jail. Thus, two prisoners—one out on bail or personal recognizance pending trial and the other confined in jail while awaiting trial—are treated differently when it comes to parole, though each is convicted of the same crime and receives the identical sentence. The result, as the opinion of the Court makes plain, is that appellees are required to wait some months longer before they may appear before the Parole Board than do those who were out on bail or on personal recognizance pending trial but sentenced to the same term for the same crime.

The "good time" deduction is not based on progress toward rehabilitation but is an inducement to inhibit bad conduct. That is what the three-judge court held in 332 F. Supp. 973. That construction accurately reflects New York's interpretation of § 230 (3). The court in *Perez* v. *Follette*, 58 Misc. 2d 319, 295 N. Y. S. 2d 231, said:

> "The policy underlying the discretionary grant of good time reductions is clear. The attitude and conduct of prisoners should improve if they are offered an incentive for good and productive behavior while at the same time the fact that reductions can be withheld will inhibit bad conduct." *Id.*, at 321, 295 N. Y. S. 2d, at 233.

The challenged statute, § 230 (3) of the Correction Law, now applies only to those prisoners who were convicted for offenses committed before September 1, 1967, whose minimum terms have not yet expired, who have not yet met with the Parole Board, and who have not yet elected the "conditional release" program offered by the new law and made available to old law prisoners by § 230–a of the Correction Law. Of these prisoners, a smaller class yet—composed of those inmates who served time in county jail prior to sentence to state prison—actually feel the effect of the § 230 (3) proscription against good-time credit for jail time. Nevertheless, the mandate of § 230 (3) affects a substantial number of individuals. See 332 F. Supp. 973, 975 n. 4.

That discipline—not rehabilitative progress—is the key to "good time" credit is evidenced in another way. Once a prisoner arrives at prison, his future "good time" is immediately computed and credited to his sentence. "In effect, then, a prisoner does not 'earn' good time credit as time goes on for exemplary performance in assorted prison programs but rather simply avoids being penalized for bad behavior." 332 F. Supp., at 978. That is confirmed by § 235 of the New York Correction Law:

> "[A] punishment for offenses against the discipline of the prison or penitentiary [is] in accordance with the rules hereinbefore mentioned. Reduction credited to a prisoner in the first instance, in his account, by the warden, as provided in section two hundred and thirty, shall stand as the reduction allowed, unless withheld wholly or partly by the board as punishment, as above provided."

Moreover, under § 230 (4) of the Act, jail time is *not* excluded from the computation of a prisoner's maximum good-time allowance from the maximum term of an indeterminate sentence. That is the earliest date on which an inmate *must* be paroled, unlike the one we have here which involves the earliest date on which a prisoner *may* be paroled. But no rational grounds have been advanced for allowing "good time" credit for jail time in one case but not in the other.

The claim that "good time" is correlated to rehabilitative programs that only prisons have is the red herring in this litigation. The District Court exposed the fallacy in that rationale. Since the "good time" credit is to induce good behavior by prisoners while they are confined, the place of their confinement becomes irrelevant. Jail-time allowance is allowed those confined in county penitentiaries. § 230 (3). And, as I have said, jail time is credited in computing a prisoner's statutory release date.

It would seem that the "good time" provision in § 230 (3) is used capriciously, since it is allowed in cases not dissimilar to the present one.

After all is said and done, the discrimination in the present case is a statutory one leveled against those too poor to raise bail and unable to obtain release on personal recognizance.[2] See *People* v. *Deegan,* 56 Misc. 2d 567, 289 N. Y. S. 2d 285. That is the real rub in the present case.

In *Paul* v. *Warden,* N. Y. L. J., May 21, 1969, p. 18, col. 6, the Court said:

> "In computing the allowance of 'time off' for good behavior respondent considered only that time served subsequent to sentence as eligible for the allowance. Time served prior to sentence was excluded from the computation. The respondent's computation follows the method suggested by the Department of Correction.
>
> "This court is not in agreement with [the] method employed. It is inequitable in that it discriminates against those persons charged with crime that are able to furnish bail upon arraignment and those remanded as a result of inability to furnish bail.[3]

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[2] The court in *People* v. *Deegan,* 56 Misc. 2d 567, 289 N. Y. S. 2d 285, in refusing to infer that § 230 (4) must exclude jail time since § 230 (3) does so, explicitly said: "Adoption of the respondent's interpretation would have the effect of prejudicing a defendant who was unable to raise funds in order to be released on bail, and would deprive him of 'equal protection of the laws' in violation of the 14th Amendment of the United States Constitution. For example, a defendant who was at liberty on bail prior to judgment, and received a similar sentence, would be subject to a maximum of 16 months, as opposed to 18 months for petitioner who could not afford bail and who languished in jail awaiting sentence. If there is logic or justice in this anomaly it escapes the court." *Id.,* at 568, 289 N. Y. S. 2d, at 287.

[3] This loss is real, for "[w]hat he is losing . . . is the possibility that if he appeared before the board he might persuade it to decide in

> "The inequity is blatantly apparent in the following cases. Two persons are charged with crimes identical in nature. On arraignment defendant A furnishes bail. A is subsequently sentenced, after a trial resulting in a verdict finding him guilty as charged, to one year in the county jail. Predicated upon his good behavior during the period of his incarceration A would be allowed a reduction of sixty days from the sentence of one year and would serve a total of 305 days. The defendant B, if confined for a period of 350 days prior to trial and sentence, and upon sentence was sentenced to confinement for one year would only be entitled to 'time off' for the period served following sentence or one-sixth of fifteen days for a total allowance of two days reduction in sentence despite good behavior during his entire period of imprisonment. B because of inability to furnish bail would thus serve 363 days as compared to the 305 days served by A.
>
> "This court refuses to countenance such disparity and discrimination."

If "good time" were related to rehabilitative progress, I would agree that the law passes muster under the Equal Protection Clause of the Fourteenth Amendment. But since "good time" is disallowed only to those who cannot raise bail or obtain release on personal recognizance, the discrimination is plainly invidious.

We deal here with a deepseated inequity. In New York City as of 1964, 49% of those accused were imprisoned before trial, while only 40% were imprisoned after conviction.[4] See Wald, Pretrial Detention and

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his favor. Of course this loss, in practical, human, terms is serious and involves a chance for at least qualified liberty." *United States ex rel. Campbell* v. *Pate,* 401 F. 2d 55, 57.

[4] The Vera Foundation in its Report, The Manhattan Bail Project, observed that "bail is generally a door to pre-trial liberty for the

Ultimate Freedom: A Statistical Study, 39 N. Y. U. L. Rev. 631, 634 (1964). It is poverty that is "generally accepted as the main reason for pretrial detention." *Id.*, at 636. The inequality apparently appears in the end product since "the longer the period of detention before disposition of the case, the greater the likelihood of a prison sentence. . . . The key seems to be the defendant's at-large status at the time of sentencing. The glow of freedom apparently shines through." *Id.*, at 635.

Another sample of 385 defendants showed that 64% of those continuously in jail from arraignment to adjudication were sentenced to prison, while only 17% of the 374 who made bail received prison sentences. Rankin, The Effect of Pretrial Detention, 39 N. Y. U. L. Rev. 641, 643 (1964). Detained persons are more likely to be sentenced to prison than bailed persons regardless of

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rich, to pre-trial detention for the poor." For the latter, it notes, "poverty is, in fact, a punishable offense." Even those with money may not be able to purchase a bail bond (*id.*, at 3). "The bondsman is responsible to no one and is subject to no review. He can refuse to write a bail bond whenever he chooses—because he 'mistrusts' a defendant, because he dislikes members of a given minority group, or because he got up on the wrong side of the bed. A bail bondsman is not obliged to have valid or sensible reasons." *Id.*, at 4.

The Vera Foundation has a staff that works with the magistrate to see which of those arrested may properly be released on their personal recognizance.

"During the Project's first 30 months in the Manhattan courts, 2300 defendants were released on their own recognizance upon the recommendation of Vera staff members.

"Ninety-nine per cent of these defendants returned to court when required; only one per cent failed to appear.

"During this same period, about three per cent of those freed on bail failed to appear in court. Thus, it appears that verified information about a defendant's background is a more reliable criterion on which to release a defendant than is his ability to purchase a bail bond." *Id.*, at 7.

whether high or low bail amounts have been set. *Id.*, at 641.

These studies were made by the Vera Foundation founded by Louis Schweitzer. See Programs in Criminal Justice Reform, Vera Institute of Justice, Ten-Year Report 1961–1971 (1972). That Report states that "people who were too poor to afford bail or private counsel ended up in prison more often than those who could pay." *Id.*, at 96. And see Ares, Rankin, and Sturz, The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole, 38 N. Y. U. L. Rev. 67 (1963).

The present case is on the periphery of one of the most critical problems in criminal law enforcement.

The important issue involved in this case is not when and whether a prisoner is released. It concerns only the time when the Parole Board may give a hearing. To speed up the time of that hearing for those rich or influential enough to get bail or release on personal recognizance and to delay the time of the hearing for those without the means to buy a bail bond or the influence or prestige that will give release on personal recognizance emphasizes the invidious discrimination at work in § 230 (3).

CHAMBERS *v.* MISSISSIPPI

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 71–5908. Argued November 15, 1972—
Decided February 21, 1973

After petitioner was arrested for murder, another person (McDonald) made, but later repudiated, a written confession. On three separate occasions, each time to a different friend, McDonald orally admitted the killing. Petitioner was convicted of the murder in a trial that he claimed was lacking in due process because petitioner was not allowed to (1) cross-examine McDonald (whom petitioner had called as a witness when the State failed to do so), since under Mississippi's common-law "voucher" rule a party may not impeach his own witness, or (2) introduce the testimony of the three persons to whom McDonald had confessed, the trial court having ruled their testimony inadmissible as hearsay. The Mississippi Supreme Court affirmed. *Held:* Under the facts and circumstances of this case, petitioner was denied a fair trial, in violation of the Due Process Clause of the Fourteenth Amendment. Pp. 294–303.

(a) The application of the "voucher" rule prevented petitioner, through cross-examination of McDonald, from exploring the circumstances of McDonald's three prior oral confessions and challenging his renunciation of the written confession, and thus deprived petitioner of the right to contradict testimony that was clearly "adverse." Pp. 295–298.

(b) The trial court erred in excluding McDonald's hearsay statements, which were critical to petitioner's defense and which bore substantial assurances of trustworthiness, including that each was made spontaneously to a close acquaintance, that each was corroborated by other evidence in the case, that each was in a real sense against McDonald's interest, and that McDonald was present and available for cross-examination by the State. Pp. 298–303.

252 So. 2d 217, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 303. REHNQUIST, J., filed a dissenting opinion, *post*, p. 308.

Peter Westen argued the cause for petitioner *pro hac vice*. With him on the briefs was *Ramsey Clark*.

Timmie Hancock, Special Assistant Attorney General of Mississippi, argued the cause for respondent. With him on the brief were *A. F. Summer*, Attorney General, and *Guy N. Rogers*, Assistant Attorney General.

MR. JUSTICE POWELL delivered the opinion of the Court.

Petitioner, Leon Chambers, was tried by a jury in a Mississippi trial court and convicted of murdering a policeman. The jury assessed punishment at life imprisonment, and the Mississippi Supreme Court affirmed, one justice dissenting. 252 So. 2d 217 (1971). Pending disposition of his application for certiorari to this Court, petitioner was granted bail by order of the Circuit Justice, dated February 1, 1972. Two weeks later, on the State's request for reconsideration, that order was reaffirmed. 405 U. S. 1205 (1972). Subsequently, the petition for certiorari was granted, 405 U. S. 987 (1972), to consider whether petitioner's trial was conducted in accord with principles of due process under the Fourteenth Amendment. We conclude that it was not.

I

The events that led to petitioner's prosecution for murder occurred in the small town of Woodville in southern Mississippi. On Saturday evening, June 14, 1969, two Woodville policemen, James Forman and Aaron "Sonny" Liberty, entered a local bar and pool hall to execute a warrant for the arrest of a youth named C. C. Jackson. Jackson resisted and a hostile crowd of some 50 or 60 persons gathered. The officers' first attempt to handcuff Jackson was frustrated when 20 or 25 men in the crowd intervened and wrestled him

free. Forman then radioed for assistance and Liberty removed his riot gun, a 12-gauge sawed-off shotgun, from the car. Three deputy sheriffs arrived shortly thereafter and the officers again attempted to make their arrest. Once more, the officers were attacked by the onlookers and during the commotion five or six pistol shots were fired. Forman was looking in a different direction when the shooting began, but immediately saw that Liberty had been shot several times in the back. Before Liberty died, he turned around and fired both barrels of his riot gun into an alley in the area from which the shots appeared to have come. The first shot was wild and high and scattered the crowd standing at the face of the alley. Liberty appeared, however, to take more deliberate aim before the second shot and hit one of the men in the crowd in the back of the head and neck as he ran down the alley. That man was Leon Chambers.

Officer Forman could not see from his vantage point who shot Liberty or whether Liberty's shots hit anyone. One of the deputy sheriffs testified at trial that he was standing several feet from Liberty and that he saw Chambers shoot him. Another deputy sheriff stated that, although he could not see whether Chambers had a gun in his hand, he did see Chambers "break his arm down" shortly before the shots were fired. The officers who saw Chambers fall testified that they thought he was dead but they made no effort at that time either to examine him or to search for the murder weapon. Instead, they attended to Liberty, who was placed in the police car and taken to a hospital where he was declared dead on arrival. A subsequent autopsy showed that he had been hit with four bullets from a .22-caliber revolver.

Shortly after the shooting, three of Chambers' friends

discovered that he was not yet dead. James Williams,[1] Berkley Turner, and Gable McDonald loaded him into a car and transported him to the same hospital. Later that night, when the county sheriff discovered that Chambers was still alive, a guard was placed outside his room. Chambers was subsequently charged with Liberty's murder. He pleaded not guilty and has asserted his innocence throughout.

The story of Leon Chambers is intertwined with the story of another man, Gable McDonald. McDonald, a lifelong resident of Woodville, was in the crowd on the evening of Liberty's death. Sometime shortly after that day, he left his wife in Woodville and moved to Louisiana and found a job at a sugar mill. In November of that same year, he returned to Woodville when his wife informed him that an acquaintance of his, known as Reverend Stokes, wanted to see him. Stokes owned a gas station in Natchez, Mississippi, several miles north of Woodville, and upon his return McDonald went to see him. After talking to Stokes, McDonald agreed to make a statement to Chambers' attorneys, who maintained offices in Natchez. Two days later, he appeared at the attorneys' offices and gave a sworn confession that he shot Officer Liberty. He also stated that he had already told a friend of his, James Williams, that he shot Liberty. He said that he used his own pistol, a nine-shot .22-caliber revolver, which he had discarded shortly after the shooting. In response to questions from Chambers' attorneys, McDonald affirmed that his confession was voluntary and that no one had compelled him to come to them. Once the confession had been transcribed,

[1] James Williams was indicted along with Chambers. The State, however, failed to introduce any evidence at trial implicating Williams in the shooting. At the conclusion of the State's case-in-chief, the trial court granted a directed verdict in his favor.

signed, and witnessed, McDonald was turned over to the local police authorities and was placed in jail.

One month later, at a preliminary hearing, McDonald repudiated his prior sworn confession. He testified that Stokes had persuaded him to confess that he shot Liberty. He claimed that Stokes had promised that he would not go to jail and that he would share in the proceeds of a lawsuit that Chambers would bring against the town of Woodville. On examination by his own attorney and on cross-examination by the State, McDonald swore that he had not been at the scene when Liberty was shot but had been down the street drinking beer in a cafe with a friend, Berkley Turner. When he and Turner heard the shooting, he testified, they walked up the street and found Chambers lying in the alley. He, Turner, and Williams took Chambers to the hospital. McDonald further testified at the preliminary hearing that he did not know what had happened, that there was no discussion about the shooting either going to or coming back from the hospital, and that it was not until the next day that he learned that Chambers had been felled by a blast from Liberty's riot gun. In addition, McDonald stated that while he once owned a .22-caliber pistol he had lost it many months before the shooting and did not own or possess a weapon at that time. The local justice of the peace accepted McDonald's repudiation and released him from custody. The local authorities undertook no further investigation of his possible involvement.

Chambers' case came on for trial in October of the next year.[2] At trial, he endeavored to develop two

[2] Upon Chambers' motion, a change of venue was granted and the trial was held in Amite County, to the east of Woodville. The change of trial setting was in response to petitioner's claim that, because of adverse publicity and the hostile attitude of the police and sheriff's staffs in Woodville, he could not obtain a fair and impartial trial there.

grounds of defense. He first attempted to show that he did not shoot Liberty. Only one officer testified that he actually saw Chambers fire the shots. Although three officers saw Liberty shoot Chambers and testified that they assumed he was shooting his attacker, none of them examined Chambers to see whether he was still alive or whether he possessed a gun. Indeed, no weapon was ever recovered from the scene and there was no proof that Chambers had ever owned a .22-caliber pistol. One witness testified that he was standing in the street near where Liberty was shot, that he was looking at Chambers when the shooting began, and that he was sure that Chambers did not fire the shots.

Petitioner's second defense was that Gable McDonald had shot Officer Liberty. He was only partially successful, however, in his efforts to bring before the jury the testimony supporting this defense. Sam Hardin, a lifelong friend of McDonald's, testified that he saw McDonald shoot Liberty. A second witness, one of Liberty's cousins, testified that he saw McDonald immediately after the shooting with a pistol in his hand. In addition to the testimony of these two witnesses, Chambers endeavored to show the jury that McDonald had repeatedly confessed to the crime. Chambers attempted to prove that McDonald had admitted responsibility for the murder on four separate occasions, once when he gave the sworn statement to Chambers' counsel and three other times prior to that occasion in private conversations with friends.

In large measure, he was thwarted in his attempt to present this portion of his defense by the strict application of certain Mississippi rules of evidence. Chambers asserts in this Court, as he did unsuccessfully in his motion for new trial and on appeal to the State Supreme Court, that the application of these evidentiary rules ren-

dered his trial fundamentally unfair and deprived him of due process of law.[3] It is necessary, therefore, to examine carefully the rulings made during the trial.

[3] On the record in this case, despite the State Supreme Court's failure to address the constitutional issue, it is clear that Chambers' asserted denial of due process is properly before us. He objected during trial to each of the court's rulings. As to the confrontation claim, petitioner asserted, both before and during trial, his right to treat McDonald as an adverse witness. His motion for new trial, filed after the jury's verdict, listed as error the trial court's refusal to permit cross-examination of McDonald and the exclusion of evidence corroborative of McDonald's guilt. The motion concluded that the trial "was not in accord with fundamental fairness guaranteed by the Fourteenth Amendment of the Constitution." Chambers reasserted those claims on appeal to the State Supreme Court. After the affirmance of his conviction by that court, Chambers filed a petition for rehearing addressed almost entirely to the claim that his trial had not been conducted in a manner consistent with traditional notions of due process. The State Supreme Court raised no question that Chambers' claims were not properly asserted, and no claim has been made by the State—in its response to the petition for certiorari, in its brief on the merits, or at oral argument—that the questions are not properly reviewable by this Court. See *Street* v. *New York*, 394 U. S. 576, 581–585 (1969); *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67–68 (1928).

Unlike *Henry* v. *Mississippi*, 379 U. S. 443 (1965), this case does not involve the state procedural requirement of contemporaneous objection to the admission of evidence. Petitioner's contention, asserted before the trial court on motion for new trial and subsequently before the Mississippi Supreme Court, is that he was denied "fundamental fairness guaranteed by the Fourteenth Amendment" as a result of several evidentiary rulings. His claim, the substance of which we accept in this opinion, rests on the cumulative effect of those rulings in frustrating his efforts to develop an exculpatory defense. Although he objected to each ruling individually, petitioner's constitutional claim—based as it is on the cumulative impact of the rulings—could not have been raised and ruled upon prior to the conclusion of Chambers' evidentiary presentation. Since the State has not asserted any independent state procedural ground as a basis for not reaching the merits of petitioner's constitutional claim, we have no occasion to decide whether—if such a ground

II

Chambers filed a pretrial motion requesting the court to order McDonald to appear. Chambers also sought a ruling at that time that, if the State itself chose not to call McDonald, he be allowed to call him as an adverse witness. Attached to the motion were copies of McDonald's sworn confession and of the transcript of his preliminary hearing at which he repudiated that confession. The trial court granted the motion requiring McDonald to appear but reserved ruling on the adverse-witness motion. At trial, after the State failed to put McDonald on the stand, Chambers called McDonald, laid a predicate for the introduction of his sworn out-of-court confession, had it admitted into evidence, and read it to the jury. The State, upon cross-examination, elicited from McDonald the fact that he had repudiated his prior confession. McDonald further testified, as he had at the preliminary hearing, that he did not shoot Liberty, and that he confessed to the crime only on the promise of Reverend Stokes that he would not go to jail and would share in a sizable tort recovery from the town. He also retold his own story of his actions on the evening of the shooting, including his visit to the cafe down the street, his absence from the scene during the critical period, and his subsequent trip to the hospital with Chambers.

At the conclusion of the State's cross-examination, Chambers renewed his motion to examine McDonald as an adverse witness. The trial court denied the motion, stating: "He may be hostile, but he is not adverse in the sense of the word, so your request will be overruled." On appeal, the State Supreme Court upheld the trial

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exists—its imposition in this case would serve any "legitimate state interest." *Id.*, at 447. Under these circumstances, we cannot doubt the propriety of our exercise of jurisdiction.

court's ruling, finding that "McDonald's testimony was not adverse to appellant" because "[n]owhere did he point the finger at Chambers." 252 So. 2d, at 220.

Defeated in his attempt to challenge directly McDonald's renunciation of his prior confession, Chambers sought to introduce the testimony of the three witnesses to whom McDonald had admitted that he shot the officer. The first of these, Sam Hardin, would have testified that, on the night of the shooting, he spent the late evening hours with McDonald at a friend's house after their return from the hospital and that, while driving McDonald home later that night, McDonald stated that he shot Liberty. The State objected to the admission of this testimony on the ground that it was hearsay. The trial court sustained the objection.[4]

Berkley Turner, the friend with whom McDonald said he was drinking beer when the shooting occurred, was then called to testify. In the jury's presence, and without objection, he testified that he had not been in the cafe that Saturday and had not had any beers with McDonald. The jury was then excused. In the absence of the jury, Turner recounted his conversations with McDonald while they were riding with James Williams to take Chambers to the hospital. When asked whether McDonald said anything regarding the shooting of Liberty, Turner testified that McDonald told him that he "shot him." Turner further stated that one week later, when he met McDonald at a friend's house, McDonald reminded him of their prior conversation and urged Turner not to "mess him up." Petitioner argued to the court that, especially where there was other proof

[4] Hardin's testimony, unlike the testimony of the other two men who stated that McDonald had confessed to them, was actually given in the jury's presence. After the State's objection to Hardin's account of McDonald's statement was sustained, the trial court ordered the jury to disregard it.

in the case that was corroborative of these out-of-court statements, Turner's testimony as to McDonald's self-incriminating remarks should have been admitted as an exception to the hearsay rule. Again, the trial court sustained the State's objection.

The third witness, Albert Carter, was McDonald's neighbor. They had been friends for about 25 years. Although Carter had not been in Woodville on the evening of the shooting, he stated that he learned about it the next morning from McDonald. That same day, he and McDonald walked out to a well near McDonald's house and there McDonald told him that he was the one who shot Officer Liberty. Carter testified that McDonald also told him that he had disposed of the .22-caliber revolver later that night. He further testified that several weeks after the shooting, he accompanied McDonald to Natchez where McDonald purchased another .22 pistol to replace the one he had discarded.[5] The jury was not allowed to hear Carter's testimony. Chambers urged that these statements were admissible, the State objected, and the court sustained the objection.[6] On appeal, the State Supreme Court approved the lower court's exclusion of these witnesses' testimony on hearsay grounds. 252 So. 2d, at 220.

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[5] A gun dealer from Natchez testified that McDonald had made two purchases. The witness' business records indicated that McDonald purchased a nine-shot .22-caliber revolver about a year prior to the murder. He purchased a different style .22 three weeks after Liberty's death.

[6] It is not entirely clear whether the trial court's ruling was premised on the same hearsay rationale underlying the exclusion of the other testimony. In this instance, the State argued that Carter's testimony was an impermissible attempt by petitioner to impeach a witness (McDonald) who was not adverse to him. The trial court did not state why it was excluding the evidence but the State Supreme Court indicated that it was excluded as hearsay. 252 So. 2d, at 220.

In sum, then, this was Chambers' predicament. As a consequence of the combination of Mississippi's "party witness" or "voucher" rule and its hearsay rule, he was unable either to cross-examine McDonald or to present witnesses in his own behalf who would have discredited McDonald's repudiation and demonstrated his complicity. Chambers had, however, chipped away at the fringes of McDonald's story by introducing admissible testimony from other sources indicating that he had not been seen in the cafe where he said he was when the shooting started, that he had not been having beer with Turner, and that he possessed a .22 pistol at the time of the crime. But all that remained from McDonald's own testimony was a single written confession countered by an arguably acceptable renunciation. Chambers' defense was far less persuasive than it might have been had he been given an opportunity to subject McDonald's statements to cross-examination or had the other confessions been admitted.

III

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr. Justice Black, writing for the Court in *In re Oliver,* 333 U. S. 257, 273 (1948), identified these rights as among the minimum essentials of a fair trial:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."

See also *Morrissey* v. *Brewer,* 408 U. S. 471, 488–489 (1972); *Jenkins* v. *McKeithen,* 395 U. S. 411, 428–429 (1969); *Specht* v. *Patterson,* 386 U. S. 605, 610 (1967). Both of these elements of a fair trial are implicated in the present case.

A

Chambers was denied an opportunity to subject McDonald's damning repudiation and alibi to cross-examination. He was not allowed to test the witness' recollection, to probe into the details of his alibi, or to "sift" his conscience so that the jury might judge for itself whether McDonald's testimony was worthy of belief. *Mattox* v. *United States,* 156 U. S. 237, 242–243 (1895). The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." *Dutton* v. *Evans,* 400 U. S. 74, 89 (1970); *Bruton* v. *United States,* 391 U. S. 123, 135–137 (1968). It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas,* 380 U. S. 400, 405 (1965). Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. *E. g., Mancusi* v. *Stubbs,* 408 U. S. 204 (1972). But its denial or significant diminution calls into question the ultimate " 'integrity of the fact-finding process' " and requires that the competing interest be closely examined. *Berger* v. *California,* 393 U. S. 314, 315 (1969).

In this case, petitioner's request to cross-examine McDonald was denied on the basis of a Mississippi common-law rule that a party may not impeach his own witness. The rule rests on the presumption—without regard to the circumstances of the particular case—that a party who calls a witness "vouches for his credibility."

Clark v. *Lansford,* 191 So. 2d 123, 125 (Miss. 1966). Although the historical origins of the "voucher" rule are uncertain, it appears to be a remnant of primitive English trial practice in which "oath-takers" or "compurgators" were called to stand behind a particular party's position in any controversy. Their assertions were strictly partisan and, quite unlike witnesses in criminal trials today, their role bore little relation to the impartial ascertainment of the facts.[7]

Whatever validity the "voucher" rule may have once enjoyed, and apart from whatever usefulness it retains today in the civil trial process, it bears little present relationship to the realities of the criminal process.[8] It might have been logical for the early common law to require a party to vouch for the credibility of witnesses he brought before the jury to affirm his veracity. Having selected them especially for that purpose, the party might reasonably be expected to stand firmly behind their testimony. But in modern criminal trials, defendants are rarely able to select their witnesses: they must take them where they find them. Moreover, as applied in this case, the "voucher" rule's [9] impact was doubly harmful to Chambers' efforts to develop his defense. Not only was he precluded from cross-examining McDonald, but, as the State conceded at oral argument,[10] he was also

[7] 3A J. Wigmore, Evidence § 896, pp. 658–660 (J. Chadbourn ed. 1970); C. McCormick, Evidence § 38, pp. 75–78 (2d ed. 1972).

[8] The "voucher" rule has been condemned as archaic, irrational, and potentially destructive of the truth-gathering process. C. McCormick, *supra,* n. 7; E. Morgan, Basic Problems of Evidence 70–71 (1962); 3A J. Wigmore, *supra,* n. 7, § 898, p. 661.

[9] The "voucher" rule has been rejected altogether by the newly proposed Federal Rules of Evidence, Rule 607, Rules of Evidence for United States Courts and Magistrates (approved Nov. 20, 1972, and transmitted to Congress to become effective July 1, 1973, unless the Congress otherwise determines).

[10] Tr. of Oral Arg. 35–37.

restricted in the scope of his direct examination by the rule's corollary requirement that the party calling the witness is bound by anything he might say. He was, therefore, effectively prevented from exploring the circumstances of McDonald's three prior oral confessions and from challenging the renunciation of the written confession.

In this Court, Mississippi has not sought to defend the rule or explain its underlying rationale. Nor has it contended that its rule should override the accused's right of confrontation. Instead, it argues that there is no incompatability between the rule and Chambers' rights because no right of confrontation exists unless the testifying witness is "adverse" to the accused. The State's brief asserts that the "right of confrontation applies to witnesses *'against'* an accused." [11] Relying on the trial court's determination that McDonald was not "adverse," and on the State Supreme Court's holding that McDonald did not "point the finger at Chambers," [12] the State contends that Chambers' constitutional right was not involved.

The argument that McDonald's testimony was not "adverse" to, or "against," Chambers is not convincing. The State's proof at trial excluded the theory that more than one person participated in the shooting of Liberty. To the extent that McDonald's sworn confession tended to incriminate him, it tended also to exculpate Chambers.[13] And, in the circumstances of this case, McDonald's retraction inculpated Chambers to the same extent that it exculpated McDonald. It can hardly be disputed that McDonald's testimony was in fact seriously adverse to Chambers. The availability of the right

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[11] Brief for Respondent 9 (emphasis supplied).

[12] 252 So. 2d, at 220.

[13] See *Donnelly* v. *United States*, 228 U. S. 243, 272 (1913).

to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State. We reject the notion that a right of such substance in the criminal process may be governed by that technicality or by any narrow and unrealistic definition of the word "against." The "voucher" rule, as applied in this case, plainly interfered with Chambers' right to defend against the State's charges.

B

We need not decide, however, whether this error alone would occasion reversal since Chambers' claimed denial of due process rests on the ultimate impact of that error when viewed in conjunction with the trial court's refusal to permit him to call other witnesses. The trial court refused to allow him to introduce the testimony of Hardin, Turner, and Carter. Each would have testified to the statements purportedly made by McDonald, on three separate occasions shortly after the crime, naming himself as the murderer. The State Supreme Court approved the exclusion of this evidence on the ground that it was hearsay.

The hearsay rule, which has long been recognized and respected by virtually every State, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury. *California* v. *Green,* 399 U. S. 149, 158 (1970). A number of exceptions have developed over the years to allow admission

of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination. Among the most prevalent of these exceptions is the one applicable to declarations against interest [14]—an exception founded on the assumption that a person is unlikely to fabricate a statement against his own interest at the time it is made. Mississippi recognizes this exception but applies it only to declarations against pecuniary interest.[15] It recognizes no such exception for declarations, like McDonald's in this case, that are against the penal interest of the declarant. *Brown* v. *State,* 99 Miss. 719, 55 So. 961 (1911).

This materialistic limitation on the declaration-against-interest hearsay exception appears to be accepted by most States in their criminal trial processes,[16] although a number of States have discarded it.[17] Declarations against penal interest have also been excluded in federal courts under the authority of *Donnelly* v. *United States,* 228 U. S. 243, 272–273 (1913), although exclusion would not be required under the newly proposed Federal Rules of Evidence.[18] Exclusion, where the limitation prevails, is usually premised on the view that admission would lead to the frequent presentation of perjured testimony to the jury. It is believed that confessions of

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[14] Jefferson, Declarations Against Interest: An Exception to the Hearsay Rule, 58 Harv. L. Rev. 1 (1944).

[15] H. McElroy, Mississippi Evidence § 46 (1955); *Forrest County Coop. Assn.* v. *McCaffrey,* 253 Miss. 486, 493, 176 So. 2d 287, 289–290 (1965).

[16] C. McCormick, *supra,* n. 7, § 278, p. 673; 5 J. Wigmore, Evidence § 1476, pp. 283–287 n. 9 (1940).

[17] See, *e. g., People* v. *Spriggs,* 60 Cal. 2d 868, 389 P. 2d 377 (1964); *People* v. *Lettrich,* 413 Ill. 172, 108 N. E. 2d 488 (1952); *People* v. *Brown,* 26 N. Y. 2d 88, 257 N. E. 2d 16 (1970); *Hines* v. *Commonwealth,* 136 Va. 728, 117 S. E. 843 (1923).

[18] Rule 804, *supra,* n. 9.

criminal activity are often motivated by extraneous considerations and, therefore, are not as inherently reliable as statements against pecuniary or proprietary interest. While that rationale has been the subject of considerable scholarly criticism,[19] we need not decide in this case whether, under other circumstances, it might serve some valid state purpose by excluding untrustworthy testimony.

The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability. First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case—McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each. Third, whatever may be the parameters of the penal-interest rationale,[20] each

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[19] *See, e. g.,* Committee on Rules of Practice & Procedure, Rules of Evidence for United States Courts and Magistrates 129–131 (rev. draft, Mar. 1971); 5 J. Wigmore, *supra,* n. 16, § 1476, p. 284; Wright, Uniform Rules and Hearsay, 26 U. Cin. L. Rev. 575 (1957); *United States* v. *Annunziato,* 293 F. 2d 373, 378 (CA2), cert. denied, 368 U. S. 919 (1961) (Friendly, J.); *Scolari* v. *United States,* 406 F. 2d 563, 564 (CA9), cert. denied, 395 U. S. 981 (1969).

[20] The Mississippi case which refused to adopt a hearsay exception for declarations against penal interest concerned an out-of-court declarant who purportedly stated that he had committed the murder with which his brother had been charged. The Mississippi Supreme Court believed that the declarant might have been motivated by a desire to free his brother rather than by any compulsion of guilt. The Court also noted that the declarant had fled, was unavailable for cross-examination, and might well have known at

confession here was in a very real sense self-incriminatory and unquestionably against interest. See *United States* v. *Harris,* 403 U. S. 573, 584 (1971); *Dutton* v. *Evans,* 400 U. S., at 89. McDonald stood to benefit nothing by disclosing his role in the shooting to any of his three friends and he must have been aware of the possibility that disclosure would lead to criminal prosecution. Indeed, after telling Turner of his involvement, he subsequently urged Turner not to "mess him up." Finally, if there was any question about the truthfulness of the extrajudicial statements, McDonald was present in the courtroom and was under oath. He could have been cross-examined by the State, and his demeanor and responses weighed by the jury. See *California* v. *Green,* 399 U. S. 149 (1970). The availability of McDonald significantly distinguishes this case from the prior Mississippi precedent, *Brown* v. *State, supra,* and from the *Donnelly*-type situation, since in both cases the declarant was unavailable at the time of trial.[21]

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the time he made the statement that he would not suffer for it. *Brown* v. *State,* 99 Miss. 719, 55 So. 961 (1911). There is, in the present case, no such basis for doubting McDonald's statements. See Note, 43 Miss. L. J. 122, 127–129 (1972).

[21] McDonald's presence also deprives the State's argument for retention of the penal-interest rule of much of its force. In claiming that "[t]o change the rule would work a travesty on justice," the State posited the following hypothetical:

"If the rule were changed, A could be charged with the crime; B could tell C and D that he committed the crime; *B could go into hiding* and at A's trial C and D would testify as to B's admission of guilt; A could be acquitted and B would return to stand trial; B could then provide several witnesses to testify as to his whereabouts at the time of the crime. The testimony of those witnesses along with A's statement that he really committed the crime could result in B's acquittal. A would be barred from further prosecution because of the protection against double jeopardy. No one could

Few rights are more fundamental than that of an accused to present witnesses in his own defense. *E. g., Webb* v. *Texas,* 409 U. S. 95 (1972); *Washington* v. *Texas,* 388 U. S. 14, 19 (1967); *In re Oliver,* 333 U. S. 257 (1948). In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process. In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and

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be convicted of perjury as A did not testify at his first trial, B did not lie under oath, and C and D were truthful in their testimony." Brief for Respondent 7 n. 3 (emphasis supplied).

Obviously, B's absence at trial is critical to the success of the justice-subverting ploy.

procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.

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

It is so ordered.

MR. JUSTICE WHITE, concurring.

We would not ordinarily expect an appellate court in the state or federal system to remain silent on a constitutional issue requiring decision in the case before it. Normally, a court's silence on an important question would simply indicate that it was unnecessary to decide the issue because it was not properly before the court or for some other reason. As my Brother REHNQUIST points out, the Court stated in *Street* v. *New York,* 394 U. S. 576, 582 (1969), that "when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."

Under this rule it becomes the petitioner's burden to demonstrate that under the applicable state law his claim was properly before the state court and was therefore necessarily rejected, although silently, by affirmance of the judgment. If he fails to do so, we need not entertain and decide the federal question that he presses.

It is not our invariable practice, however, that we will not ourselves canvass state law to determine whether the federal question, presented to but not discussed by the state supreme court, was properly raised in accordance with state procedures. The Court surveyed state law in *Street,* itself, with little if any help from the appellant; and I think it is appropriate here where the State does not contest our jurisdiction and seemingly

concedes that the question was properly raised below and necessarily decided by the Mississippi Supreme Court.

There is little doubt that Mississippi ordinarily enforces a rule of contemporaneous objection with respect to evidence; the three opinions in *Henry* v. *State,* 253 Miss. 263, 154 So. 2d 289 (1963); 253 Miss. 283, 174 So. 2d 348 (1965); 198 So. 2d 213 (1967), make this sufficiently clear. Also, that case came here, and we not only noted the existence of the rule but recognized that it served a legitimate state interest. *Henry* v. *Mississippi,* 379 U. S. 443 (1965). The same rule obtains where the proponent of evidence claims error in its exclusion:

> "The rejection of evidence not apparently admissible is not error, in the absence of an offer or sufficient statement of the purpose of its introduction, by which the court may determine its relevancy or admissibility. . . . This Court has consistently followed this rule requiring definiteness and sufficiency of an offer of proof. . . ." *Freeman* v. *State,* 204 So. 2d 842, 847–848 (1967) (dissenting opinion).

There are Mississippi cases stating that in proper circumstances the contemporaneous-objection rule will not be enforced and that the State Supreme Court in some circumstances will consider an issue raised there for the first time. In *Carter* v. *State,* 198 Miss. 523, 21 So. 2d 404 (1945), the only issue in the appellate court concerned appellant's mental condition at the time of the crime, an issue not raised at trial. The court said "[t]he rule that questions not raised in the trial court cannot be raised for the first time on appeal, is not without exceptions, among which are errors 'affecting fundamental rights of the parties . . . or affecting

public policy,' . . . if to act on which will work no injustice to any party to the appeal." *Id.*, at 528, 21 So. 2d, at 404. The court proceeded to consider the issue. In *Brooks* v. *State,* 209 Miss. 150, 155, 46 So. 2d 94, 97 (1950), a convicted defendant asserted in the State Supreme Court for the first time the inadmissibility of certain evidence on the grounds of an illegal search and seizure, violation of the rule against self-incrimination, and improper cross-examination. The court considered these questions and reversed the conviction, saying that "[e]rrors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal. . . . [W]here fundamental and constitutional rights are ignored, due process does not exist, and a fair trial in contemplation of law cannot be had."

The reach of these cases was left in doubt when, in affirming the judgment in *Henry* v. *State,* 253 Miss. 263, 154 So. 2d 289 (1963), the Mississippi Supreme Court refused to consider a claim of illegally obtained evidence because the matter had not been presented to the trial court. The case did not come within *Brooks* v. *State, supra,* the court ruled, because Henry's counsel were experienced and adequate, and Henry was bound by their mistakes. This Court vacated that judgment and remanded for determination whether there had been a deliberate bypass, reading Mississippi law as extending no discretion to give relief from the contemporaneous-objection rule where "petitioner was represented by competent local counsel familiar with local procedure." *Henry* v. *Mississippi,* 379 U. S., at 449 n. 5. In its initial opinion on remand, the Supreme Court of Mississippi reasserted the necessity to object at the time testimony is offered in the trial court, but it said "[n]evertheless if it appears to the trial judge that the

foregoing rule of procedure would defeat justice and bring about results not justified or intended by substantive law, the rule may be relaxed and subordinated to the primary purpose of the law to enforce constitutional rights in the interest of justice." *Henry* v. *State,* 253 Miss., at 287, 174 So. 2d, at 351.*

In *King* v. *State,* 230 So. 2d 209, 211 (1970), this statement from the 1965 *Henry* opinion was interpreted as giving the Supreme Court of the State, as well as the trial court, sufficient latitude to treat the request for a peremptory instruction to the jury after failure to object to the introduction of allegedly illegally obtained evidence as if the appellant had made timely objection.

Moreover, in *Wood* v. *State,* 257 So. 2d 193, 200 (1972), where a convicted defendant complained of a wide-ranging and allegedly unfair cross-examination of defense witnesses, and where there had been a failure to object to part of the prejudicial inquiry, the State Supreme Court nevertheless considered the question, stating: "We note also that no objection was made to the testimony of Donald Ray Boyd when he was asked whether he had ever been in jail. However, it was stated in *Brooks, supra,* that in extreme cases a failure to object to questions which were violative of a constitutional right did not in all events have to be objected to before they would receive consideration by this Court. The appellant in this case was being tried for murder. The evidence of defendant's guilt was extremely close. A shred of evidence one way or the other could have been persuasive to the jury. In our opinion, this warrants our

*The trial court on remand from the 1965 *Henry* decision, 253 Miss. 283, 174 So. 2d 348, found there had been deliberate bypass, and, affirming on appeal, 198 So. 2d 213 (1967), the Mississippi Supreme Court did not mention *Brooks* v. *State,* 209 Miss. 150, 46 So. 2d 94 (1950), or the rule for like cases.

consideration of the questions and responses to which repeated objections were made and sustained by the court, as well as the consideration of the testimony of Donald Ray Boyd wherein he was asked whether he had been in jail or not though no formal objection was made thereto."

These cases seemingly preserve some aspects of the *Brooks* rule, and hence anticipate some situations where the contemporaneous-objection requirement will not be enforced, despite *Henry*. There will be occasions where the Supreme Court of Mississippi will consider constitutional claims made in that court for the first time.

Where this leaves the matter of our jurisdiction in the light of decisions such as *Williams* v. *Georgia,* 349 U. S. 375 (1955), is not clear. There, while acknowledging that motions for a new trial after final judgment were not favored in Georgia, the Court recognized that such motions had been granted in "exceptional" or "extraordinary" cases, their availability being within the well-informed discretion of the courts. It was claimed that denying Williams' motion was an adequate state ground precluding review here, but "since his motion was based upon a constitutional objection, and one the validity of which has in principle been sustained here, the discretionary decision to deny the motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us." *Id.*, at 389.

In the circumstances before us, where there were repeated offers of evidence and objections to its exclusion, although not on constitutional grounds, where the matter was presented in federal due process terms to the State Supreme Court and where the State does not now deny that the issue was properly before the state court and could have been considered by it, I am inclined, although

dubitante, to conclude with the Court that we have jurisdiction.

As to the merits, I would join in the Court's opinion and judgment.

MR. JUSTICE REHNQUIST, dissenting.

Were I to reach the merits in this case, I would have considerable difficulty in subscribing to the Court's further constitutionalization of the intricacies of the common law of evidence. I do not reach the merits, since I conclude that petitioner failed to properly raise in the Mississippi courts the constitutional issue that he seeks to have this Court decide.

Title 28 U. S. C. § 1257 provides in pertinent part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . . .
>
> "(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

We deal here with a limitation imposed by Congress upon this Court's authority to review judgments of state courts. It is a jurisdictional limitation, *Cardinale* v. *Louisiana,* 394 U. S. 437, 438 (1969), that has always been interpreted with careful regard for the delicate nature of the authority conferred upon this Court to review the judgments of state courts of last resort:

> "Upon like grounds the jurisdiction of this court to reëxamine the final judgment of a state court

> cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648, 655 (1897).

In *Street* v. *New York,* 394 U. S. 576 (1969), cited by the Court in its n. 3, the following language from the earlier case of *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 67 (1928), was quoted:

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision *and in due time.*" 394 U. S., at 584 (emphasis added).

The question of whether a constitutional issue has been raised in "due time" in the state courts is one generally left to state procedure, subject to the important condition that the state procedure give no indication "that there was an attempt on the part of the state court to evade the decision of Federal questions, duly set up, by unwarranted resort to alleged rules under local practice." *Louisville & Nashville R. Co.* v. *Woodford,* 234 U. S. 46, 51 (1914). More recently, the Court has stated in *Henry* v. *Mississippi,* 379 U. S. 443, 447 (1965) that:

> "These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest."

Since the Court in *Henry* was dealing with a rule of trial procedure from the State of Mississippi, its analysis in that case is particularly helpful in deciding this one. It was conceded by all parties there that the Mississippi

rules required contemporaneous objection to evidentiary rulings, and this Court commented:

> "The Mississippi rule . . . clearly does serve a legitimate state interest. By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence. If the objection is well taken the fruits of the illegal search may be excluded from jury consideration, and a reversal and new trial avoided." *Id.*, at 448.

In that case, the petitioner had made his motion to exclude the evidence at the close of the State's case, and this Court observed that a ruling on the motion at that point would very likely have prevented the possibility of reversal and new trial just as surely as a ruling on a motion made contemporaneously with the offer of the evidence.

Here, however, the record of the state proceedings shows that the first occasion on which petitioner's counsel even hinted that his previous evidentiary objection had a constitutional basis was at the time he filed a motion for new trial. By delaying his constitutional contention until after the evidence was in and the jury had retired and returned a verdict of guilty against him, petitioner denied the trial court an opportunity to reconsider its evidentiary ruling in the light of the constitutional objection. While this Court in *Henry* expressed doubt as to the adequacy for federal purposes of Mississippi's differing treatment of a motion to exclude at the close of the State's case and an objection made contemporaneously with the offer of the evidence, there can be no doubt that the policy supporting Mississippi's requirement of contemporaneous objection cannot be served equally well by a motion for new trial following the rendition of the jury's verdict.

It is perfectly true, as the Court states in n. 3 of its opinion, that petitioner "objected during trial to each of the court's rulings." But this is only half the test; the litigant seeking to have a decision here on a constitutional claim must not only object or otherwise advise the lower court of his claim that a ruling is error, but he must make it clear that his claim of error is *constitutionally* grounded. In *Bailey* v. *Anderson,* 326 U. S. 203 (1945), the petitioner argued in this Court that a state court condemnation award that failed to include interest from the date of possession denied him just compensation in violation of the Due Process Clause of the Fourteenth Amendment. This Court noted that in the state circuit court petitioner had requested that the award include interest from the date of taking, and that the circuit court without explanation had rejected this claim. But this Court went on to say:

> "But throughout the proceedings in the circuit court appellant made no claim to interest on constitutional grounds, and made no attack on the constitutionality of the award or the court's decree because of the asserted denial of interest." *Id.,* at 206.

Concluding from an examination of the opinion of the Supreme Court of Appeals of Virginia that although appellant had raised his constitutional claim there, it had not been passed upon by that court, this Court held that the "appeal must be dismissed for want of any properly presented substantial federal question." *Id.,* at 207.

Neither the majority nor the dissenting opinions of the Supreme Court of Mississippi contain one syllable that refers expressly or by implication to any claim based on the Constitution of the United States. Those opinions did, of course, treat the evidentiary objections and proffers

that this Court now holds to be of constitutional dimension, but it passed on them in terms of nonconstitutional evidentiary questions that are one of the staples of the business of appellate courts that regularly review claims of error in the conduct of trial. Since Mississippi requires contemporaneous objection to evidentiary rulings during the trial, it would have been entirely proper for the Supreme Court of Mississippi to conclude that even though petitioner might have asserted constitutional claims in his brief there, they had been raised too late to require consideration by it.

This Court said in *Street* v. *New York:*

> "Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." 394 U. S., at 582.

If, by some extraordinarily lenient construction of the decisional requirement that the constitutional claim be made "in due time" in the state proceedings, the making of such a claim for the first time in a motion for a new trial were deemed timely, it is still extraordinarily doubtful that this petitioner adequately raised any constitutional claims in his motion for new trial. That motion consisted of the following pertinent points:

> "3rd, the Court erred in refusing to declare Gable McDonald a hostile and adverse witness and permitting the Defendant to propound leading questions as on cross-examination.
>
> "4th, the Court erred in refusing to permit the Defendant to introduce evidence corroborating the

admission of Gable McDonald admitting the killing of Aaron Liberty.

. . . . .

"6th, the trial of the Defendant was not in accord with fundamental fairness guaranteed by the Fourteenth Amendment of the Constitution of the United States and Article Three, Sections Fourteen and Twenty-Six of the Constitution of the State of Mississippi."

It would have to be an extraordinarily perceptive trial judge who could glean from this motion that the separately stated third and fourth points, dealing as they do in customary terms of claims of trial error in the exclusion or admission of evidence, were intended to be bolstered by the generalized assertion of the violation of due process contained in a separately stated point. The contention of the sixth point, standing by itself, that "the trial of the Defendant was not in accord with fundamental fairness guaranteed by the Fourteenth Amendment of the Constitution of the United States" directs the trial court to no particular ruling or decision that he may have made during the trial; it is a bald assertion that the trial from beginning to end was somehow fundamentally unfair. Even the most lenient construction of that part of 28 U. S. C. § 1257 that requires that the "title, right, privilege or immunity" be "specially set up or claimed" could not aid petitioner in his claim that this point properly raised a federal constitutional issue.

This Court under the Constitution has the extraordinarily delicate but equally necessary authority to review judgments of state courts of last resort on issues that turn on construction of the United States Constitution or federal law. But before we undertake to tell a

state court of last resort that its judgment is inconsistent with the mandate of the Constitution, it behooves us to make certain that in doing so we adhere to the congressional mandate that limits our jurisdiction. Believing as I do that petitioner has not complied with 28 U. S. C. § 1257 (3), I would dismiss the writ of certiorari.

Syllabus

MAHAN, SECRETARY, STATE BOARD OF ELECTIONS, ET AL. *v.* HOWELL ET AL.

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

No. 71–364. Argued December 12, 1972—
Decided February 21, 1973*

The Virginia General Assembly in 1971 reapportioned the State for the election of state delegates and senators. The apportionment statutes, on challenge by appellees, were invalidated by a three-judge District Court, which ruled the reapportionments impermissible violations of the "one person, one vote" principle. The court substituted its own electoral districts, reducing to about 10% the percentage variation from the ideal district from the approximately 16% variation permitted by the legislature's plan but, contrary to that plan, in many instances not following political subdivision lines. *Held:*

1. Reapportionment of electoral districts for Virginia's House of Delegates complied with the Equal Protection Clause of the Fourteenth Amendment, since the legislature's maximum population percentage variation, which was not excessive, resulted from the State's rational objective of preserving the integrity of political subdivision lines. Pp. 320–330.

(a) In the implementation of the basic constitutional principle that both houses of a bicameral state legislature be apportioned substantially on a population basis (*Reynolds* v. *Sims*, 377 U. S. 533), more flexibility is permissible with respect to state legislative reapportionment than with respect to congressional redistricting. Pp. 320–325.

(b) The State's objective of preserving the integrity of political subdivision lines is rational since it furthers the legislative purpose of facilitating enactment of statutes of purely local concern and preserves for the voters in the political subdivisions a voice in the state legislature on local matters. Pp. 325–328.

(c) Given the wider constitutional latitude in state legislative reapportionment, the population disparities reflected in the legis-

*Together with No. 71–373, *City of Virginia Beach* v. *Howell et al.*, on appeal from the same court, and No. 71–444, *Weinberg* v. *Prichard et al.*, on appeal from the same court but not argued. See n. 10, *infra*.

lature's maximum percentage deviation are within tolerable constitutional limits. Pp. 328–330.

2. The establishment by the legislature of three numerically ideal senatorial electoral districts by assigning to one of them about 36,700 persons who were "home-ported" at the U. S. Naval Station, Norfolk, regardless of where they actually resided, because that is where they were counted on official census tracts, was constitutionally impermissible discrimination against military personnel, cf. *Davis* v. *Mann*, 377 U. S. 678; and the District Court, which was under severe time pressures, did not abuse its discretion in prescribing an interim plan of combining the three districts into one multimember district. Pp. 330–333.

330 F. Supp. 1138, affirmed in part, reversed in part.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and BLACKMUN, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 333. POWELL, J., took no part in the consideration or decision of the cases.

Andrew P. Miller, Attorney General of Virginia, argued the cause for appellants in No. 71–364. With him on the briefs were *Vann H. Lefcoe*, Assistant Attorney General, and *Anthony F. Troy*, Special Assistant Attorney General. *Harry Frazier III* argued the cause for appellant in No. 71–373. With him on the briefs were *J. Dale Bimson* and *John B. Ashton*. *Robert L. Weinberg, pro se*, filed a jurisdictional statement for appellant in No. 71–444.

Henry E. Howell, Jr., pro se, argued the cause for appellees Howell et al. in both cases. With him on the brief was *Peter K. Babalas*. *Clive L. DuVal II, pro se*, argued the cause in both cases. With him on the brief was *Edmund D. Campbell*. *Henry L. Marsh III, S. W. Tucker, Armand Derfner, R. Stephen Browning*, and *Gary Greenberg* filed a brief for appellees Thornton et al. in No. 71–364. *Leonard H. Davis* and *Gordon B. Tayloe*,

Jr., filed a brief for appellee City of Norfolk in No. 71–373. *Messrs. Miller, Troy,* and *Lefcoe* filed a motion to affirm for appellees in No. 71–444.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Acting pursuant to the mandate of its newly revised state constitution,[1] the Virginia General Assembly enacted statutes apportioning the State for the election of members of its House of Delegates [2] and Senate.[3] Two suits were brought challenging the constitutionality of the House redistricting statute on the grounds that there were impermissible population variances in the districts, that the multimember districts diluted representation,[4] and that the use of multimember districts

[1] Article II, § 6, of the Revised Virginia Constitution provides:

"Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 1971 and every ten years thereafter.

"Any such reapportionment law shall take effect immediately and not be subject to the limitations contained in Article IV, Section 13, of this Constitution."

[2] Va. Code. Ann. § 24.1–12.1 (Supp. 1972).

[3] Va. Code Ann. § 24.1–14.1, as amended by c. 246, Acts of Assembly, June 14, 1971.

[4] The reapportionment statutes were originally passed on March 1, 1971. On May 7, 1971, the Attorney General of the United States, acting pursuant to § 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973c, interposed objections to both the House and the Senate plans. Objections to the House plan were based on the use of five multimember districts in certain metropolitan areas. Between

constituted racial gerrymandering.[5] The Senate redistricting statute was attacked in a separate suit, which alleged that the city of Norfolk was unconstitutionally split into three districts, allocating Navy personnel "home-ported" in Norfolk to one district and isolating Negro voters in one district. Three three-judge district courts were convened to hear the suits pursuant to 28 U. S. C. §§ 2281 and 2284. The suits were consolidated and heard by the four judges who variously made up the three three-judge panels.

The consolidated District Court entered an interlocutory order that, *inter alia,* declared the legislative reapportionment statutes unconstitutional and enjoined the holding of elections in electoral districts other than those established by the court's opinion. *Howell* v. *Mahan,* 330 F. Supp. 1138, 1150 (ED Va. 1971). Appellants, the Secretary of the State Board of Elections and its members and the city of Virginia Beach, have appealed directly to this Court from those portions of the court's order, invoking our jurisdiction under 28 U. S. C. § 1253.

I

The statute apportioning the House provided for a combination of 52 single-member, multimember, and floater delegate districts from which 100 delegates would

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his interposition and the trial of these cases, this Court decided *Whitcomb* v. *Chavis,* 403 U. S. 124 (1971), and the Attorney General's objections to the House plan were subsequently withdrawn. The objection of the Senate plan was cured by the amendment contained in c. 246, *supra,* n. 3.

[5] The Court initially noted probable jurisdiction in the related case of *Thornton* v. *Prichard,* No. 71–553. This appeal primarily involved the question of whether or not the multimember districts had a discriminatory effect on the rights of Negro voters under § 5 of the Voting Rights Act, *supra,* n. 4, as well as under the Fourteenth and Fifteenth Amendments. On appellant's own motion, this appeal was dismissed, 409 U. S. 802.

be elected. As found by the lower court, the ideal district in Virginia consisted of 46,485 persons per delegate, and the maximum percentage variation from that ideal under the Act was 16.4%—the 12th district being overrepresented by 6.8% and the 16th district being underrepresented by 9.6%.[6] The population ratio between these two districts was 1.18 to 1. The average percentage variance under the plan was ±3.89%, and the minimum population percentage necessary to elect a majority of the House was 49.29%. Of the 52 districts, 35 were within 4% of perfection and nine exceeded a 6% variance from the ideal. With one exception, the delegate districts followed political jurisdictional lines of the counties and cities. That exception, Fairfax County, was allotted 10 delegates but was divided into two five-member districts.

Relying on *Kirkpatrick* v. *Preisler,* 394 U. S. 526 (1969), *Wells* v. *Rockefeller,* 394 U. S. 542 (1969), and *Reynolds* v. *Sims,* 377 U. S. 533 (1964), the District Court concluded that the 16.4% variation was sufficient to condemn the House statute under the "one person, one vote" doctrine. While it noted that the variances were traceable to the desire of the General Assembly to maintain the integrity of traditional county and city boundaries, and that it was impossible to draft district lines to overcome unconstitutional disparities and still main-

[6] These are the figures found by the District Court. Appellee DuVal argues that another method of computation involving Virginia's floterial districts results in a maximum deviation of 23.6%. The State and the city of Virginia Beach disputed that the deviation for the district relied on by DuVal for his figure was as much as claimed. The lower court made no finding on that dispute, concluding that the 16.4% variation was "sufficient to condemn the plan." 330 F. Supp. 1138, 1139–1140. We decline to enter this imbroglio of mathematical manipulation and confine our consideration to the figures actually found by the court and used to support its holding of unconstitutionality.

tain such integrity, it held that the State proved no governmental necessity for strictly adhering to political subdivision lines. Accordingly, it undertook its own redistricting and devised a plan having a percentage variation of slightly over 10% from the ideal district, a percentage it believed came "within passable constitutional limits as 'a good-faith effort to achieve absolute equality.' Kirkpatrick v. Preisler . . . ." *Howell* v. *Mahan,* 330 F. Supp., at 1147–1148.

Appellants contend that the District Court's reliance on *Kirkpatrick* v. *Preisler, supra,* and *Wells* v. *Rockefeller, supra,* in striking down the General Assembly's reapportionment plan was erroneous, and that proper application of the standards enunciated in *Reynolds* v. *Sims, supra,* would have resulted in a finding that the statute was constitutional.

In *Kirkpatrick* v. *Preisler* and *Wells* v. *Rockefeller,* this Court invalidated state reapportionment statutes for federal congressional districts having maximum percentage deviations of 5.97% and 13.1% respectively. The express purpose of these cases was to elucidate the standard first announced in the holding of *Wesberry* v. *Sanders,* 376 U. S. 1 (1964), that "the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.,* at 7–8 (footnotes omitted). And it was concluded that that command "permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Kirkpatrick* v. *Preisler, supra,* at 531. The principal question thus presented for review is whether or not the Equal Protection Clause of the Fourteenth Amendment likewise permits only "the limited population variances which are unavoidable despite a good-

faith effort to achieve absolute equality" in the context of state legislative reapportionment.[7]

This Court first recognized that the Equal Protection Clause requires both houses of a bicameral state legislature to be apportioned substantially on a population basis in *Reynolds* v. *Sims, supra.* In so doing, it suggested that in the implementation of the basic constitutional principle—equality of population among the districts—more flexibility was constitutionally permissible with respect to state legislative reapportionment than in congressional redistricting. *Id.,* at 578. Consideration was given to the fact that, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, and that therefore it may be feasible for a State to use political subdivision lines to a greater extent in establishing state legislative districts than congressional districts while still affording adequate statewide representation. *Ibid.* Another possible justification for deviation from population-based representation in state legislatures was stated to be:

> "[T]hat of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only

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[7] In *Connor* v. *Williams,* 404 U. S. 549 (1972), we expressly reserved decision on this issue.

> to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering. . . ." *Id.*, at 580–581.

The Court reiterated that the overriding objective in reapportionment must be "substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.*, at 579.

By contrast, the Court in *Wesberry* v. *Sanders, supra,* recognized no excuse for the failure to meet the objective of equal representation for equal numbers of people in congressional districting other than the practical impossibility of drawing equal districts with mathematical precision. Thus, whereas population alone has been the sole criterion of constitutionality in congressional redistricting under Art. I, § 2, broader latitude has been afforded the States under the Equal Protection Clause in state legislative redistricting because of the considerations enumerated in *Reynolds* v. *Sims, supra.* The dichotomy between the two lines of cases has consistently been maintained. In *Kirkpatrick* v. *Preisler,* for example, one asserted justification for population variances was that they were necessarily a result of the State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing political subdivision boundaries. This argument was rejected in the congressional context. But in *Abate* v. *Mundt,* 403 U. S. 182 (1971), an apportionment for a county legislature having a maximum deviation from equality of 11.9% was upheld in the face of an equal protection challenge, in part because New York had a long history of maintaining the integrity of existing local government units within the county.

Application of the "absolute equality" test of *Kirkpatrick* and *Wells* to state legislative redistricting may impair the normal functioning of state and local governments. Such an effect is readily apparent from an analysis of the District Court's plan in this case. Under Art. VII, §§ 2 and 3 of Virginia's Constitution, the General Assembly is given extensive power to enact special legislation regarding the organization of, and the exercise of governmental powers by, counties, cities, towns, and other political subdivisions. The statute redistricting the House of Delegates consistently sought to avoid the fragmentation of such subdivisions, assertedly to afford them a voice in Richmond to seek such local legislation.

The court's reapportionment, based on its application of *Kirkpatrick* and *Wells*, resulted in a maximum deviation of slightly over 10%,[8] as compared with the roughly 16% maximum variation found in the plan adopted by the legislature. But to achieve even this limit of variation, the court's plan extended single and multimember districts across subdivision lines in 12 instances, substituting population equality for subdivision representation. Scott County, for example, under the Assembly's plan was placed in the first district and its population of 24,376 voted with the 76,346 persons in Dickinson, Lee, and Wise Counties for two delegates. The district thus established deviated by 8.3% from the ideal. The court transferred five of Scott County's enumeration districts, containing 6,063 persons, to the contiguous second district composed of the city of Bristol, and Smyth and Washington Counties, population 87,041. Scott County's representation was thereby substantially reduced in the first district, and all but nonexistent in the second dis-

[8] The lower court concluded that its spread was only slightly over 7%, but in its arithmetic it did not consider two counties because of their asserted isolation from the remainder of the State. *Howell* v. *Mahan,* 330 F. Supp. 1138, 1147 n. 8.

trict. The opportunity of its voters to champion local legislation relating to Scott County is virtually nil. The countervailing benefit resulting from the court's readjustment is the fact that the first district's deviation from the ideal is now reduced to 1.8%.

The city of Virginia Beach saw its position deteriorate in a similar manner under the court-imposed plan. Under the legislative plan, Virginia Beach constituted the 40th district and was allocated three delegates for its population of 172,106. The resulting underrepresentation was cured by providing a floterial district, the 42d, which also included portions of the cities of Chesapeake and Portsmouth. Under the court's plan, the 42d district was dissolved. Of its 32,651 persons that constituted the deviation from the ideal for the 40th district, 3,515 were placed in the 40th, and 29,136 were transferred to Norfolk's 39th district. The 39th district is a multimember district that includes the 307,951 persons who make up the population of the city of Norfolk. Thus, those Virginia Beach residents who cast their vote in the 39th district amount to only 8.6% of that district's population. In terms of practical politics, Virginia Beach complains that such representation is no representation at all so far as local legislation is concerned, and that those 29,136 people transferred to the 39th district have in that respect been effectively disenfranchised.

We conclude, therefore, that the constitutionality of Virginia's legislative redistricting plan was not to be judged by the more stringent standards that *Kirkpatrick* and *Wells* make applicable to congressional reapportionment, but instead by the equal protection test enunciated in *Reynolds* v. *Sims, supra.* We reaffirm its holding that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal

population as is practicable." 377 U. S., at 577. We likewise reaffirm its conclusion that "[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature." *Id.*, at 579.

The asserted justification for the divergences in this case—the State's policy of maintaining the integrity of political subdivision lines—is not a new one to this Court. In *Davis* v. *Mann,* 377 U. S. 678, 686 (1964), it was noted:

> "Because cities and counties have consistently not been split or divided for purposes of legislative representation, multimember districts have been utilized for cities and counties whose populations entitle them to more than a single representative . . . . And, because of a tradition of respecting the integrity of the boundaries of cities and counties in drawing district lines, districts have been constructed only of combinations of counties and cities and not by pieces of them. . . ."

The then-existing substantial deviation in the apportionment of both Houses defeated the constitutionality of Virginia's districting statutes in that case, but the possibility of maintaining the integrity of political subdivision lines in districting was not precluded so long as there existed "such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." *Roman* v. *Sincock,* 377 U. S. 695, 710 (1964).

We are not prepared to say that the decision of the people of Virginia to grant the General Assembly the power to enact local legislation dealing with the political

subdivisions is irrational. And if that be so, the decision of the General Assembly to provide representation to subdivisions *qua* subdivisions in order to implement that constitutional power is likewise valid when measured against the Equal Protection Clause of the Fourteenth Amendment. The inquiry then becomes whether it can reasonably be said that the state policy urged by Virginia to justify the divergences in the legislative reapportionment plan of the House is, indeed, furthered by the plan adopted by the legislature, and whether, if so justified, the divergences are also within tolerable limits. For a State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality.

There was uncontradicted evidence offered in the District Court to the effect that the legislature's plan, subject to minor qualifications, "produces the minimum deviation above and below the norm, keeping intact political boundaries. . . ." (Defendants' Exhibit 8.) That court itself recognized that equality was impossible if political boundaries were to be kept intact in the process of districting. But it went on to hold that since the State "proved no governmental necessity for strictly adhering to political subdivision lines," the legislative plan was constitutionally invalid. *Howell* v. *Mahan, supra,* at 1140. As we noted above, however, the proper equal protection test is not framed in terms of "governmental necessity," but instead in terms of a claim that a State may "rationally consider." *Reynolds* v. *Sims, supra,* at 580–581.

The District Court intimated that one reason for rejecting the justification for divergences offered by the State was its conclusion that the legislature had not in fact implemented its asserted policy, "as witness the division of Fairfax County." *Howell* v. *Mahan, supra,*

at 1140. But while Fairfax County was divided, it was not fragmented. And had it not been divided, there would have been one ten-member district in Fairfax County, a result that this Court might well have been thought to disfavor as a result of its opinion in *Connor* v. *Johnson,* 402 U. S. 690, 692 (1971). The State can scarcely be condemned for simultaneously attempting to move toward smaller districts and to maintain the integrity of its political subdivision lines.

Appellees argue that the traditional adherence to such lines is no longer a justification since the Virginia constitutional provision regarding reapportionment, Art, II, § 6, *supra,* n. 1, neither specifically provides for apportionment along political subdivision lines nor draws a distinction between the standards for congressional and legislative districting. The standard in each case is described in the "as nearly as is practicable" language used in *Wesberry* v. *Sanders, supra,* and *Reynolds* v. *Sims, supra.* But, as we have previously indicated, the latitude afforded to States in legislative redistricting is somewhat broader than that afforded to them in congressional redistricting. Virginia was free as a matter of federal constitutional law to construe the mandate of its Constitution more liberally in the case of legislative redistricting than in the case of congressional redistricting, and the plan adopted by the legislature indicates that it has done so.

We also reject the argument that, because the State is not adhering to its tradition of respecting the boundaries of political subdivisions in congressional and State Senate redistricting, it may not do so in the case of redistricting for the House of Delegates. Nothing in the fact that Virginia has followed the constitutional mandate of this Court in the case of congressional redistricting, or that it has chosen in some instances to ignore political subdivision lines in the case of the State Senate,

detracts from the validity of its consistently applied policy to have at least one house of its bicameral legislature responsive to voters of political subdivisions as such.[9]

We hold that the legislature's plan for apportionment of the House of Delegates may reasonably be said to advance the rational state policy of respecting the boundaries of political subdivisions. The remaining inquiry is whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits. We conclude that they do not.

The most stringent mathematical standard that has heretofore been imposed upon an apportionment plan for a state legislature by this Court was enunciated in *Swann* v. *Adams*, 385 U. S. 440 (1967), where a scheme having a maximum deviation of 26% was disapproved. In that case, the State of Florida offered no evidence at the trial level to support the challenged variations with respect to either the House or Senate. *Id.*, at 446. The Court emphasized there that "the fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State." *Id.*, at 445. We, therefore, find the citations to numerous cases decided by state and lower

[9] Appellees also contend that it is clear the State has abandoned its traditional adherence to political subdivision boundaries since it provided in the reapportionment statute that districts shall not change even though boundaries do as a result of annexation, for example. The short answer is that the General Assembly had the dual goal of maintaining such lines and providing for population equality. Reapportionment was only constitutionally required every 10 years between redistricting, and it was the Assembly's decision that if during the 10 years between redistricting one of its goals should conflict with the other, the one based on known population variances should prevail. Such a determination does not render constitutionally defective an otherwise valid plan.

federal courts to be of limited use in determining the constitutionality of Virginia's statute. The relatively minor variations present in the Virginia plan contrast sharply with the larger variations in state legislative reapportionment plans that have been struck down by previous decisions of this Court. See, *e. g., Reynolds* v. *Sims, supra; Swann* v. *Adams, supra;* and *Kilgarlin* v. *Hill,* 386 U. S. 120 (1967).

Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not. The 16-odd percent maximum deviation that the District Court found to exist in the legislative plan for the reapportionment of the House is substantially less than the percentage deviations that have been found invalid in the previous decisions of this Court. While this percentage may well approach tolerable limits, we do not believe it exceeds them. Virginia has not sacrificed substantial equality to justifiable deviations.

The policy of maintaining the integrity of political subdivision lines in the process of reapportioning a state legislature, the policy consistently advanced by Virginia as a justification for disparities in population among districts that elect members to the House of Delegates, is a rational one. It can reasonably be said, upon examination of the legislative plan, that it does in fact advance that policy. The population disparities that are permitted thereunder result in a maximum percentage deviation that we hold to be within tolerable constitutional limits. We, therefore, hold the General Assembly's plan for the reapportionment of the House of Delegates constitutional and reverse the District Court's conclusion

to the contrary. We also affirm *Weinberg* v. *Prichard et al.*, No. 71–444, held pending this disposition.[10]

II

The General Assembly divided the State into 40 single-member senatorial districts. Under the plan, a portion of the city of Virginia Beach was added to the city of Norfolk and the entire area was divided into three single-member districts, which the court below found conformed almost ideally, numerically, to the "one person, one vote" principle. But all naval personnel "home-ported" at the U. S. Naval Station, Norfolk, about 36,700 persons, were assigned to the Fifth Senatorial District because that is where they were counted on official census tracts.[11] It was undisputed that only about 8,100 of such

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[10] In this companion case, appellant Weinberg challenges the order of the District Court insofar as it sustains the validity of the 22d and 23d districts established in the House of Delegates apportionment statute. He argues that in court-ordered reapportionment, this Court ought to exercise its supervisory power to require more equality than would be required from legislative reapportionment. He also contends that the method of computation of floterial district deviations utilized by the District Court was erroneous. Since the House of Delegates apportionment statute is constitutional, and since the deviation for the 23d district under appellant's method of computation is only 3.9%, substantially lower than the approximately 16% deviation today upheld, we affirm those portions of the judgment appealed from in No. 71–444.

[11] Such personnel were attached to ships "home-ported" at Norfolk and they were enumerated in Census Tract 000999, a location encompassing a series of ship piers. They were counted that way in accordance with instructions from the Director of the Bureau of the Census, George H. Brown. All ship commanders were directed to obtain an enumeration of all personnel assigned to their ships. Specifically his instructions provided that ship commanders were to: "Include all married personnel in the enumeration even though they may be home with their families on 1 April. Wives of personnel

personnel lived aboard vessels assigned to the census tract within the Fifth District. The court had before it evidence that about 18,000 lived outside the Fifth District but within the Norfolk and Virginia Beach areas that, if true, indicated a malapportionment with respect to such personnel.[12] Lacking survey data sufficiently precise to permit the creation of three single-member districts more closely representing the actual population, the court corrected the disparities by establishing one multimember district composed of the Fifth, Sixth, and Seventh Districts, encompassing the city of Norfolk and a portion of Virginia Beach. *Howell* v. *Mahan, supra.*

Appellants charge that the District Court was not justified in overturning the districts established by the General Assembly since the Assembly validly used census tracts in apportioning the area and that the imposition by the court of a multimember district contravened the valid legislative policy in favor of single-member districts. We conclude that under the unusual, if not unique, circumstances in this case the District Court did not err in declining to accord conclusive weight to the legislative reliance on census figures. That court justifiably found

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assigned to vessels will be instructed not to include their husbands when they complete their census forms."

Thus, even though Navy personnel assigned to ships "home-ported" at Norfolk might have lived outside the Fifth Senatorial District with their wives and families, for census purposes they were assigned to that District.

The legislative use of this census enumeration to support a conclusion that all of the Navy personnel on a ship actually resided within the state senatorial district in which the ship was docked placed upon the census figures a weight that they were not intended to bear. The Navy itself used as a "rule of thumb" an estimate that 50% of such personnel occupied housing units on shore.

[12] The District Court found that the remaining 10,000 lived off the base but within the Fifth Senatorial District.

that with respect to the three single-member districts in question, the legislative plan resulted in both significant population disparities and the assignment of military personnel to vote in districts in which they admittedly did not reside. Since discriminatory treatment of military personnel in legislative reapportionment is constitutionally impermissible, *Davis* v. *Mann, supra,* at 691, we hold that the interim relief granted by the District Court as to the State Senate was within the bounds of the discretion confided to it.

Application of interim remedial techniques in voting rights cases has largely been left to the district courts. *Reynolds* v. *Sims, supra,* at 585. The courts are bound to apply equitable considerations and in *Reynolds* it was stated that "[i]n awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws . . . ." *Ibid.*

The court below was faced with severe time pressures. The reapportionment plans were first forwarded to the Attorney General on March 1, 1971. By April 7, these three cases had been filed and consolidated. The first hearing was scheduled for May 24, but on May 7, the Attorney General interposed his objections pursuant to the Voting Rights Act. As a result, the May 24 hearing was largely devoted to arguing about the effect of such objections and after that hearing, the court directed the cases to be continued until June 15. It also postponed the primary elections, which had been set for June 8, until September 14. The cases were finally heard on June 16, and the court's interlocutory order was entered on July 2, just two weeks prior to the revised July 16 filing deadline for primary candidates.

Prior to the time the court acted, this Court had handed down *Whitcomb* v. *Chavis,* 403 U. S. 124 (1971), recognizing that multimember districts were not *per se*

violative of the Equal Protection Clause. The court conscientiously considered both the legislative policy and this Court's admonition in *Connor* v. *Johnson, supra,* that in fashioning apportionment remedies, the use of single-member districts is preferred. But it was confronted with plausible evidence of substantial malapportionment with respect to military personnel, the mandate of this Court that voting discrimination against military personnel is constitutionally impermissible, *Davis* v. *Mann, supra,* at 691–692, and the fear that too much delay would have seriously disrupted the fall 1971 elections. Facing as it did this singular combination of unique factors, we cannot say that the District Court abused its discretion in fashioning the interim remedy of combining the three districts into one multimember district.[13] We, therefore, affirm the order of that Court insofar as it dealt with the State Senate.

Affirmed in part, reversed in part.

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

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

I agree with the Court in No. 71–373, *City of Virginia Beach* v. *Howell,* that the joinder by the District Court of three senatorial districts in the Norfolk-Virginia Beach area to create one multimember senatorial district for the 1971 election was permissible under the special cir-

[13] We note that the order appealed from is interlocutory and the lower court has retained jurisdiction. There is nothing in its order to prevent the Virginia General Assembly from enacting an apportionment plan for the Fifth, Sixth, and Seventh Districts which differs from that ordered by the court but is nonetheless consistent with constitutional requirements.

cumstances of this case. Cf. *Whitcomb* v. *Chavis*, 403 U. S. 124, 176–179 (1971) (DOUGLAS, J., concurring and dissenting); see *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965); *Burns* v. *Richardson*, 384 U. S. 73, 88 (1966). I dissent, however, in No. 71–364, *Mahan* v. *Howell*, from the Court's action in setting aside the District Court's finding that the apportionment of the State House of Delegates violated the Equal Protection Clause of the Fourteenth Amendment.

The Court approves a legislative apportionment plan that is conceded to produce a total deviation of *at least* 16.4% from the constitutional ideal.[1] Of course, "the fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State." *Swann* v. *Adams*, 385 U. S. 440, 445 (1967). "What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case." *Reynolds* v. *Sims*, 377 U. S. 533, 578 (1964). Since every reapportionment case presents as its factual predicate a unique combination of circumstances, decisions upholding or invalidating a legislative plan cannot normally have great precedential significance. *Abate* v. *Mundt*, 403 U. S. 182, 189 (1971) (BRENNAN, J., dissenting). But language in the Court's opinion today suggests that more may be at stake than the application of well-established principles to a novel set of facts. In my view, the problem in the case before us is in no sense one of first impression, but is squarely controlled by our prior decisions. See *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969); *Swann* v. *Adams*, *supra*; *Reynolds* v. *Sims*, *supra*; *Davis* v. *Mann*, 377 U. S. 678 (1964); *Roman* v.

[1] The full extent of the deviation may, in fact, be substantially in excess of 16.4%, as appellees maintain and appellants seemingly concede. See *infra*, at 335–338.

Sincock, 377 U. S. 695 (1964). It is appropriate, therefore, to call to mind again the controlling principles and to show that, properly applied to the facts of the case before us, they preclude a reversal of the District Court's decision.

I

Virginia's recently amended Constitution provides that "members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly," and "[e]very electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district." Art. II, § 6. Pursuant to that requirement, the General Assembly in 1971 divided the Commonwealth into 52 legislative districts from which the 100 members of the House of Delegates were to be elected.

On the basis of 1970 census figures, which set the population of the Commonwealth at 4,648,494, each delegate should ideally represent 46,485 persons. While the legislature's plan does not disregard constitutional requirements to the flagrant extent of many earlier cases,[2] it does, nevertheless, demonstrate a systematic pattern of substantial deviation from the constitutional ideal. Under the 1971 plan, more than 25% of the delegates would be elected from districts in which the population deviates from the ideal by more than 5%. Almost 60% of the delegates would represent districts that deviate by more than 3%. Four legislators would be elected from districts that are overrepresented or underrepresented by more than 8%. And the maximum deviation—the

[2] See, *e. g., Avery* v. *Midland County,* 390 U. S. 474 (1968); *Reynolds* v. *Sims,* 377 U. S. 533 (1964); *Roman* v. *Sincock,* 377 U. S. 695 (1964).

spread between the most overrepresented and the most underrepresented districts—would be at least 16.4%, and might be as high as 23.6%, depending on the method of calculation.

Assuming a maximum deviation of 16.4%, the legislature's plan is still significantly less representative than many plans previously struck down by state and lower federal courts.[3] Appellees maintain, however, that the total deviation, properly computed, is in fact 23.6%—a figure closely approximating the 25.65% deviation that led us to invalidate the Senate plan in *Swann* v. *Adams, supra,* the 26.48% deviation that led us to invalidate the House plan in *Kilgarlin* v. *Hill,* 386 U. S. 120 (1967), and the 24.78% deviation that led us to invalidate the House plan in *Whitcomb* v. *Chavis,* 403 U. S. 124, 161–163 (1971). Appellees arrive at the figure of 23.6% by taking into account the deviations in floterial districts, see App. 81–83, and appellants seem to concede that 23.6% is an accurate indicator of the total deviation. See Brief for Appellant Commonwealth of Virginia 7.[4]

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[3] See, *e. g., Cummings* v. *Meskill,* 341 F. Supp. 139 (Conn. 1972) (maximum deviation for House, 7.83%, and for Senate, 1.81%); *In re Legislative Districting of General Assembly,* 193 N. W. 2d 784 (1972) (House, 3.8%, and Senate, 3.2%); *Graves* v. *Barnes,* 343 F. Supp. 704 (WD Tex. 1972) (9.9%); *Troxler* v. *St. John the Baptist Parish Police Jury,* 331 F. Supp. 222 (ED La. 1971) (6.2%); *In re Legislative Districting of General Assembly,* 175 N. W. 2d 20 (1970) (House, 13%, and Senate, 12.1%); *Driggers* v. *Gallion,* 308 F. Supp. 632 (MD Ala. 1969) (at least 10%); *Skolnick* v. *Illinois State Electoral Bd.,* 307 F. Supp. 691 (ND Ill. 1969) (House, 16.9%, and Senate, 14.7%); *Long* v. *Docking,* 282 F. Supp. 256, 283 F. Supp. 539 (Kan. 1968) (16.6%).

[4] "The deviations from absolute equality of population arrived at by the redistricting of the House ranged from an under-representation of plus 9.6% to an over-representation of minus 6.8%, or a total variance of 16.4%. *As noted by the Court, however, the 42nd District, a floater shared by the cities of Chesapeake, Portsmouth*

The District Court pointed out that the "range of deviation may exceed 16.4%," 330 F. Supp. 1138, 1139 n. 1 (ED Va. 1971), but it had no occasion to consider whether 23.6% was the more accurate figure because of its finding that "[u]nder either mode of calculation . . . the statewide range of deviation will not pass constitutional muster." *Ibid.* Although conceding that the District Court did not reject or disparage appellees' assertion of a 23.6% deviation, the Court nevertheless reaches the perplexing conclusion that we "confine our consideration to the figures actually found by the court and used to support its holding of unconstitutionality"—16.4%. *Ante,* at 319, n. 6. But if the legislature's plan does, in fact, "pass constitutional muster" on the assumption of a 16.4% deviation, then it is surely fair to ask whether the plan would still be valid assuming a total deviation of 23.6%. The Court refuses either to confront the question directly or to render it moot by determining that the figure of 23.6% is irrelevant because improperly derived. Instead, it attempts to obscure the issue by contending that the Commonwealth and the city of Virginia Beach disputed appellees' assertion of a 23.6% total deviation. That contention is wholly incorrect. Neither in the answers filed in the District Court, nor in the briefs, nor at oral argument did the Commonwealth or the city of Virginia Beach quarrel with appellee's method of calculating the deviation in floterial districts. See n. 4, *supra.* The Court's refusal to consider the question can only mean that appellees have the option of reopening this litigation in the District Court in an attempt to persuade that court that the true measure of the

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and Virginia Beach would have as to that one instance increased the total variation to 23.6%." (Emphasis supplied.) See also Reply Brief for Appellant City of Virginia Beach 3–4.

deviation is 23.6% and that a deviation of this order is fatal to the Commonwealth's plan.

In my view, there is no need to prolong this litigation by resolution in the court below of an issue that this Court should, but inexplicably does not, decide. The District Court correctly held that deviations of the magnitude of even 16.4% are sufficient to invalidate the legislature's plan. And that court added—again correctly—that "[i]n reapportionment cases the burden is on the State to justify deviations from parity by 'legitimate considerations incident to the effectuation of a rational state policy.' Reynolds v. Sims, 377 U. S. 533, 579 (1964); see Swann v. Adams, 385 U. S. 440, 444 (1967). The State has proved no governmental necessity for strictly adhering to political subdivision lines." 330 F. Supp., at 1140. Accordingly, the District Court promulgated its own apportionment plan, which significantly reduced the extent of deviation.

Under the District Court's plan, the maximum deviation would be 7.2%,[5] excluding one district which is geographically isolated from the mainland of the Commonwealth.[6] And, even including that isolated district, the maximum total deviation would not exceed 10.2%. But the substantial reduction in the maximum deviation does not in itself make clear the full measure of the improvement achieved by the District Court's plan. The number of delegates whose districts deviate from the norm by 3% or more would be almost cut in

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[5] The deviation would be slightly in excess of 8% if floterial districts were weighted according to appellees' method of calculation. 330 F. Supp. 1138, 1147 n. 9.

[6] The isolated district comprises Accomack and Northampton Counties. These counties, known as the Eastern Shore, are separated from the mainland of Virginia by Chesapeake Bay and the Atlantic Ocean. They are contiguous only to the State of Maryland. The district, the 46th, is overrepresented by 6.5%.

half, from 58 to 32. And of the 32 districts still exceeding the 3% mark, only one—the geographically isolated district—would exceed the mean by more than 3.7%. In short, while the District Court did not achieve its stated goal of "perfect mathematical division" because of the "multiplicity of delegates, the geography of the State and the diversity of population concentrations," 330 F. Supp., at 1147, its plan would still produce measurably greater equality of representation.

Appellants necessarily concede that the District Court's plan would reduce the inequality in population per district, but they defend the legislature's plan on the ground that "tolerance of political jurisdictional lines is justification for some deviation," Brief for Appellant Commonwealth of Virginia 24. They maintain that the legislature's plan achieved the highest degree of equality possible without fragmenting political subdivisions. The principal question presented for our decision is whether on the facts of this case an asserted state interest in preserving the integrity of county lines can justify the resulting substantial deviations from population equality.

II

The holdings of our prior decisions can be restated in two unequivocal propositions. First, the paramount goal of reapportionment must be the drawing of district lines so as to achieve precise equality in the population of each district.[7] "[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of

[7] *Reynolds* v. *Sims, supra,* at 567: "[T]he basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." See also *id.,* at 579.

equal population as is practicable." *Reynolds* v. *Sims,* 377 U. S., at 577; see also *Kirkpatrick* v. *Preisler,* 394 U. S., at 531. The Constitution does not permit a State to relegate considerations of equality to secondary status and reserve as the primary goal of apportionment the service of some other state interest.

Second, it is open to the State, in the event that it should fail to achieve the goal of population equality, to attempt to justify its failure by demonstrating that precise equality could not be achieved without jeopardizing some critical governmental interest. The Equal Protection Clause does not exalt the principle of equal representation to the point of nullifying every competing interest of the State. But we have held firmly to the view that variations in weight accorded each vote can be approved only where the State meets its burden of presenting cogent reasons in explanation of the variations, and even then only where the variations are small. See, *e. g., Abate* v. *Mundt,* 403 U. S. 182 (1971); *Kirkpatrick* v. *Preisler, supra; Swann* v. *Adams, supra.*

The validity of these propositions and their applicability to the case before us are not at all diminished by the fact that *Kirkpatrick* v. *Preisler* and *Wells* v. *Rockefeller,* 394 U. S. 542 (1969)—two of the many cases in which the propositions were refined and applied—concerned the division of States into federal congressional districts rather than legislative reapportionment. Prior to today's decision, we have never held that different constitutional *standards* are applicable to the two situations. True, there are significant differences between congressional districting and legislative apportionment, and we have repeatedly recognized those differences. In *Reynolds* v. *Sims,* for example, we termed "more than insubstantial" the argument that "a State can rationally consider according political subdivisions some independent representation in at least one body

of the state legislature, as long as the basic standard of equality of population among districts is maintained." 377 U. S., at 580. See also *id.*, at 578; *Abate* v. *Mundt, supra.* But the recognition of these differences is hardly tantamount to the establishment of two distinct controlling standards. What our decisions have made clear is that certain state interests that are pertinent to legislative reapportionment can have no possible relevance to congressional districting. Thus, the need to preserve the integrity of political subdivisions as political subdivisions may, in some instances, justify small variations in the population of districts from which state legislators are elected. But that interest can hardly be asserted in justification of malapportioned congressional districts. *Kirkpatrick* v. *Preisler, supra.* While the State may have a broader range of interests to which it can point in attempting to justify a failure to achieve precise equality in the context of legislative apportionment, it by no means follows that the State is subject to a lighter burden of proof or that the controlling constitutional standard is in any sense distinguishable.

Our concern in *Kirkpatrick* v. *Preisler* was with the constitutional requirement that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry* v. *Sanders,* 376 U. S. 1, 7–8 (1964). We rejected the State's argument that "there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard. . . . Since 'equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives,' *Wesberry* v. *Sanders, supra,* at 18, the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. See *Reynolds* v. *Sims,* 377 U. S. 533, 577 (1964)." *Kirkpatrick* v. *Preisler,*

supra, at 530–531. Moreover, we held, *id.,* at 532, that "[i]t was the burden of the State 'to present . . . acceptable reasons for the variations among the populations of the various . . . districts . . . .' *Swann* v. *Adams, supra,* at 443–444."

The principles that undergirded our decision in *Kirkpatrick* v. *Preisler* are the very principles that supported our decision in *Swann* v. *Adams,* a case involving the apportionment of a state legislature. The opinion in *Kirkpatrick* does not suggest that a different standard might be applicable to congressional districting. On the contrary, the "as nearly as practicable" standard with which we were concerned is identical to the standard that *Reynolds* v. *Sims* specifically made applicable to controversies over state legislative apportionment. See *Reynolds* v. *Sims, supra,* at 577. See also *Hadley* v. *Junior College District,* 397 U. S. 50, 56 (1970). And the holding in *Kirkpatrick* that the State must bear the burden of justifying deviations from population equality not only rested squarely and exclusively on our holding in *Swann* v. *Adams,* but even defined the test by quotation from *Swann.* See *Kirkpatrick* v. *Preisler, supra,* at 532.

In *Swann* v. *Adams* we held that variations in the population of legislative districts must be justified by the State by presentation of "acceptable reasons for the variations." 385 U. S., at 443. And a comparison of the opinion for the Court in *Swann* with the views expressed by two Justices in dissent, see *Swann* v. *Adams, supra,* at 447–448 (Harlan, J., dissenting), decisively refutes any suggestion that unequal representation will be upheld so long as some rational basis for the discrimination can be found. A showing of necessity, not rationality, is what our decision in *Swann* requires.

If *Swann* does not establish the point with sufficient clarity, then surely our decision in *Kilgarlin* v. *Hill,* 386

U. S. 120 (1967), where we elucidated and applied the principles of *Swann,* removes all doubt. There, the District Court had sustained the state apportionment plan on two grounds, one of which we termed a "burden of proof" ruling. The lower court held that appellants "had the burden not only of demonstrating the degree of variance from the equality principle but also of 'negat[ing] the existence of any state of facts which would sustain the constitutionality of the legislation.' 252 F. Supp. 404, 414." *Id.,* at 122. We squarely rejected that statement of the controlling legal standard, and held that under *Swann* v. *Adams,* "it is quite clear that unless satisfactorily justified by the court or by the evidence of record, population variances of the size and significance evident here [a total deviation of 26.48%] are sufficient to invalidate an apportionment plan." *Ibid.* We also rejected the District Court's second ground of decision: namely, that the deviations were amply justified by the State's attempt, wherever possible, to respect county boundaries. Significantly, the opinion stated that "[w]e are doubtful . . . that the deviations evident here are the kind of 'minor' variations which *Reynolds* v. *Sims* indicated might be justified by local policies counseling the maintenance of established political subdivisions in apportionment plans. 377 U. S. 533, 578–579. But we need not reach that constitutional question, for we are not convinced that the announced policy of the State of Texas *necessitated* the range of deviations between legislative districts which is evident here." *Id.,* at 123 (emphasis supplied).

III

I would affirm the District Court's decision because, on this record, the Commonwealth of Virginia failed—just as the State of Florida failed in *Swann* v. *Adams* and the State of Texas failed in *Kilgarlin* v. *Hill*—to justify sub-

stantial variations in the population of the districts from which members of the House of Delegates are elected. The panel that heard the case below consisted of four judges, all from Virginia, and I share their unanimous view that the Commonwealth failed to prove that the variations were justified by a need to insure representation of political subdivisions or a need to respect county boundaries in the drawing of district lines.

If variations in the population of legislative districts are to be upheld, the Court must determine, before turning to the justifications that are asserted in defense of the variations, that they are "free from any taint of arbitrariness or discrimination." *Ante,* at 325, quoting from *Roman* v. *Sincock,* 377 U. S., at 710. Appellees alleged before the District Court that the legislature's reapportionment plan did indeed discriminate against one region of the State—the Northern Virginia suburbs of Washington, D. C. Each House seat in Northern Virginia would be underrepresented by an average of 4.3% under the 1971 plan, and several would be underrepresented by as much as 6.3%. In view of what it termed the "pervasive under-representation in districts in Northern Virginia," 330 F. Supp., at 1146, the District Court ordered the transfer of one delegate out of the systematically overrepresented Tidewater region and into Northern Virginia.

In *Abate* v. *Mundt, supra,* at 185–186, we pointed out that we have

> "never suggested that certain geographic areas or political interests are entitled to disproportionate representation. . . .
>
> "Accordingly, we have underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests or which necessarily will tend to favor, for example, less populous districts over their more

> highly populated neighbors, see *Hadley* v. *Junior College District,* 397 U. S. 50, 57–58 (1970)."

The District Court found as a fact that the 1971 plan did include a "built-in bias tending to favor [a] particular geographic area." Conveniently, the Court discerns no need even to acknowledge this critical finding of fact, and sets it aside without explanation. We have no basis for concluding that the finding is clearly erroneous, and that finding requires an affirmance of the District Court's decision without regard to the Commonwealth's asserted justifications for the inequalities in district population.

But even assuming that the Commonwealth's plan can be considered free of any "taint of arbitrariness or discrimination," appellants have failed to meet their burden of justifying the inequalities. They insist that the legislature has followed a consistent practice of drawing district lines in conformity with county boundaries. But a showing that a State has followed such a practice is still a long step from the necessary showing that the State *must* follow that practice. Neither in the Virginia Constitution nor in any Act of the Assembly has Virginia explicitly indicated any interest in preserving the integrity of county lines or in providing representation of political subdivisions as political subdivisions. Cf. *Reynolds* v. *Sims, supra,* at 580–581. On the contrary, the Constitution establishes a single standard for both legislative apportionment and congressional districting, and that standard requires only that lines be drawn so as to insure, "as nearly as is practicable," representation in proportion to population.[8]

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[8] Cf., *e. g.,* the apportionment provision in the Indiana Constitution. *Whitcomb* v. *Chavis,* 403 U. S. 124, 136 n. 14 (1971):

"A Senatorial or Representative district, where more than one county shall constitute a district, shall be composed of contiguous

And the origins of the constitutional provision make clear that equality in district population, not the representation of political subdivisions, is the Commonwealth's pre-eminent goal.[9]

Moreover, in asserting its interest in preserving the integrity of county boundaries, the Commonwealth offers nothing more than vague references to "local legislation," without describing such legislation with precision, without indicating whether such legislation amounts to a significant proportion of the legislature's business, and without demonstrating that the District Court's plan would materially affect the treatment of such legislation.[10]

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counties; *and no county, for Senatorial apportionment, shall ever be divided.*" Art. 4, § 6 (emphasis supplied).

[9] Prior to its amendment in 1971, the Constitution provided that "[t]he General Assembly shall by law apportion the State into districts, corresponding with the number of representatives to which it may be entitled in the House of Representatives of the Congress of the United States; which districts shall be composed of contiguous and compact territory containing as nearly as practicable, an equal number of inhabitants." § 55. At the same time, the Constitution provided, with respect to legislative apportionment, only that "[t]he present apportionment of the Commonwealth into senatorial and house districts shall continue; but a reapportionment shall be made in the year nineteen hundred and thirty-two and every ten years thereafter." § 43. Plainly, the adoption in 1971 of a provision, Art. II, § 6, which sets a single standard to govern legislative districting and congressional apportionment, indicates that in the minds of the draftsmen the same considerations should apply in the two situations. See Commission on Constitutional Revision, Report on the Constitution of Virginia 117 (1969): "There is no reason to make any distinction between General Assembly and congressional apportionment. For this reason, the proposed section [Art. II, § 6] combines the provisions of sections 43 and 55 so that a common set of principles applies to apportionment of legislative seats and congressional seats."

[10] Appellants maintain that:

"[L]ocal governments carry out much of the various responsibilities of State government as well as having direct concern in the enactment

The Court assumes that county representation is an important goal of Virginia's reapportionment plan, *ante,* at 326–328, and appellants suggest that the plan can be justified, at least in part, by the effort "to give an independent voice to the cities and counties [the legislature] daily governs." Brief for Appellant Commonwealth of Virginia 33. If county representation is indeed the Commonwealth's goal, then the apportionment plan adopted in 1971 itself falls far short of that objective. Appellants describe the problem in the following terms:

> "Under the Court's plan, a situation could arise where the 1602 citizens of Wythe County, Virginia, who were placed in the Sixth Legislative District are opposed to local legislation pending in the General Assembly for their county. They must voice such opposition to the delegates representing 91,620 other persons in the Sixth Legislative District composed of the Counties of Carroll, Floyd and Montgomery

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of numerous local legislative enactments. This alone justifies Virginia's tradition of adherence to political jurisdictions. Moreover, the revised Virginia Constitution now allows for the first time special or local legislation for counties as well as for cities. Revised Constitution of Virginia, Article VII, Section 2. Those provisions now permit counties the constitutional flexibility formerly afforded only to cities in providing services for their citizens." Brief for Appellant Commonwealth of Virginia 27.

The constitutional provision to which appellants refer declares that "[t]he General Assembly may also provide by special act for the organization, government, and powers of any county, city, town, or regional government, including such powers of legislation, taxation, and assessment as the General Assembly may determine . . . ." It should be noted, however, that this provision permits the delegation of broad powers to local governments. It does not speak to the issue—obviously of great concern to the residents of each political subdivision—of the manner in which that delegated power will be exercised by the local government.

> and the City of Radford, rather than oppose only their 20,537 fellow citizens of Wythe County." Brief for Appellant Commonwealth of Virginia 27.

That argument assumes that some significant number of issues will have an impact squarely on Wythe County, while having no impact, or a differing impact, on the surrounding areas. For on issues affecting the entire region or the Commonwealth as a whole—presumably the vast majority of issues—the critical concern is not that each vote in Wythe County be cast in a single district, but that each vote cast be precisely equal in weight to votes in every other part of the Commonwealth. And the argument also assumes that the issues affecting only one county are of predominant concern to the voters. Under a representative form of government, the voters participate indirectly through the election of delegates. It should be obvious that as a voter's concern with regional or statewide issues increases relative to his interest in county issues, the significance of voting outside the county will correspondingly diminish.

But even if a substantial number of issues do have an impact primarily on a single county, and even if those issues are of deep concern to the voters, it still does not follow that the legislature's apportionment plan is a rational attempt to serve an important state interest. The plan would by no means provide, even in the legislature's own terms, effective representation for each county. Thus, the fourth legislative district, which would elect one delegate under the 1971 plan, consists of Wythe, Grayson, and Bland Counties along with the city of Galax. Yet Wythe County alone, according to appellants' figures, comprises 22,139 of the 49,279 persons resident in the district. Since Wythe County makes up almost one-half of the population of the fourth district, the district's delegate is likely to champion Wythe County's cause should an issue arise that pits its interest

against the interests of Grayson or Bland County or the city of Galax.

In short, the best that can be said of appellants' efforts to secure county representation is that the plan can be effective only with respect to some unspecified but in all likelihood small number of issues that affect a single county and that are overwhelmingly important to the voters of that county; and even then it provides effective representation only where the affected county represents a large enough percentage of the voters in the district to have a significant impact on the election of the delegate.[11] But even if county representation were, in fact, a strong and legitimate goal of the Commonwealth, and even if the 1971 plan did represent a rational effort to serve that goal, it is still not clear that the legislature's plan should be upheld. The plan prepared by the District Court would achieve a much higher degree of equality in district population, and it would accomplish that salutary goal with minimal disruption of the legislature's effort to avoid fragmenting counties. Of the 134 political subdivisions in the Commonwealth, only 12 would be divided by the District Court's plan. More significant, the number of persons resident in voting districts that would be cut out of one county or city and shifted to another is 64,738, out of the total state population of 4,648,494. Thus, even making each of the logical and empirical assumptions implicit in the view that violating county lines would effectively disenfranchise certain persons on certain local issues, the number

[11] To realize the goal of county representation it would, of course, be necessary to accord each county at least one representative. In the case of Virginia such a plan could not be implemented without generating vast and unconstitutional disparities in the population of the districts. And such a plan clearly could not be justified by invoking the so-called "federal analogy." See *Reynolds* v. *Sims*, *supra*, at 571–577.

of persons affected would still be less than 1½% of the total state population.

IV

On this record—without any showing of the specific need for county representation or a showing of how such representation can be meaningfully provided to small counties whose votes would be submerged in a multi-county district—I see no basis whatsoever for upholding the Assembly's 1971 plan and the resulting substantial variations in district population. Accordingly, I would affirm the judgment of the District Court holding the plan invalid under the Equal Protection Clause of the Fourteenth Amendment.

TACON *v.* ARIZONA

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 71-6060. Argued January 9, 1973—Decided February 21, 1973

Where issues presented in petition for certiorari were not raised below nor passed upon by the State's highest court, and where the only issue actually litigated does not alone justify exercise of certiorari jurisdiction, the writ of certiorari is dismissed as improvidently granted.

107 Ariz. 353, 488 P. 2d 973, certiorari dismissed as improvidently granted.

Robert J. Hirsh argued the cause and filed a brief for petitioner.

William P. Dixon, Assistant Attorney General of Arizona, argued the cause for respondent. With him on the brief was *Gary K. Nelson,* Attorney General.

PER CURIAM.

Petitioner, while a soldier in the United States Army stationed at Fort Huachuca, Arizona, was arrested and charged by state authorities with the sale of marihuana in violation of applicable state law. Prior to his trial on this charge, the petitioner was discharged from the Army and voluntarily left Arizona for New York. When the trial date was set, the petitioner's court-appointed attorney so advised the petitioner and requested him to return to Arizona. Assertedly because he lacked travel funds, the petitioner did not appear in Arizona on the date set for trial. Under these circumstances, the trial proceeded without the petitioner's presence, as authorized by state procedure. The jury returned a guilty verdict. After the verdict was rendered, the petitioner obtained the necessary travel funds and returned to Arizona in time for his sentencing. He was sentenced to not less than five

nor more than five and one-half years in prison. The Arizona Supreme Court affirmed his conviction. 107 Ariz. 353, 488 P. 2d 973 (1971).

The petition for certiorari in this case presented questions as to constitutional limits on the States' authority to try in absentia a person who has voluntarily left the State and is unable, for financial reasons, to return to that State. Upon reviewing the record, however, it appears that these broad questions were not raised by the petitioner below nor passed upon by the Arizona Supreme Court. We cannot decide issues raised for the first time here. *Cardinale* v. *Louisiana,* 394 U. S. 437 (1969). The only related issue actually raised below was whether petitioner's conduct amounted to a knowing and intelligent waiver of his right to be present at trial. Since this is primarily a factual issue which does not, by itself, justify the exercise of our certiorari jurisdiction, the writ of certiorari is dismissed as improvidently granted.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

Petitioner, while in the Armed Services, was stationed in Arizona and while there was arrested and charged with the unlawful sale of marihuana. That was on February 24, 1969. His counsel asked for a continuance of the trial until April 22, 1969, which was granted. But no trial date was set at that time, one being subsequently set for March 31, 1970. In the meantime, petitioner had been discharged from the Army and left Arizona for New York and gave his attorney his New York address. The attorney sent word by letter on March 3, 1970, that the trial would start March 31 and asked that he return a week early for preparation. Petitioner received that letter March 6 or 7, but had no funds to return. He apparently in good faith tried to raise the money but was

not successful. He eventually did succeed and arrived in Arizona April 2. But the trial was over. Petitioner was convicted in absentia and sentenced to not less than five years nor more than five and one-half years. On appeal, the Arizona Supreme Court affirmed. 107 Ariz. 353, 488 P. 2d 973.

Under Rule 231 of Arizona's Rules of Criminal Procedure, a trial may be conducted in the defendant's absence "if his absence is voluntary." *Id.*, at 355, 488 P. 2d, at 975. The Arizona Supreme Court held that there had been "a knowing and intelligent waiver of his right to be present at the trial." *Id.*, at 357, 488 P. 2d, at 977. The federal rule of a knowing and intelligent waiver of his right to confrontation and to be present at the trial of his case, cf. *ibid.*, was the test applied by the Arizona Supreme Court.

The Sixth Amendment is applicable to the States by reason of the Fourteenth. *Gideon* v. *Wainwright,* 372 U. S. 335; *Pointer* v. *Texas,* 380 U. S. 400, 406; *Washington* v. *Texas,* 388 U. S. 14. The right "to be confronted with the witnesses against" him—the right of confrontation in the popular sense—means a "face-to-face" meeting. As stated in *Illinois* v. *Allen,* 397 U. S. 337, 338: "One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."

It is said by the Court that the broad issue of whether a defendant charged with a felony can ever waive his right to be present at trial is not properly before us, since petitioner neglected to plead the issue in this manner before the state courts. The issue which petitioner did raise in the state courts was whether the evidence in the record was sufficient to show that his absence from trial was voluntary, *i. e.,* that he made a knowing and intelligent waiver of his right to be present. The Court disposes of this "related issue" by holding that it is a factual

issue that does not justify the exercise of our jurisdiction. But the question whether a constitutional right has been waived always involves factual matters. "When constitutional rights turn on the resolution of a factual dispute we are *duty bound to make an independent examination* of the evidence in the record." *Brookhart* v. *Janis,* 384 U. S. 1, 4 n. 4 (emphasis added).

The question of a knowing and intelligent waiver of this man's federal constitutional right to be present at his trial is far from frivolous. Petitioner was not fleeing the jurisdiction or going into hiding. He knew of the trial date and was trying to raise the necessary funds to travel west. A second letter dated March 18, sent by his attorney, suggested that a guilty plea to a reduced charge might be acceptable. But due to a mail strike petitioner did not receive that letter until April 1, when his trial was over. On March 24 petitioner's counsel sent him a telegram stating that trial would proceed March 31 whether petitioner was present or not. But that telegram was never received even by Western Union in New York. On March 30, petitioner called his lawyer, who told him the court would proceed with the trial even though the accused was absent. Petitioner replied that he would attempt to make it. But, as noted, he did not arrive until April 2.

On this record, one cannot say that petitioner had knowingly and intelligently waived his Sixth Amendment right of confrontation. Heretofore, we have never treated the question of waiver cavalierly. We indulge every presumption against the waiver of a constitutional right. We said in a rate case that we "do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co.* v. *Commission,* 301 U. S. 292, 307. I would treat a hapless victim of a criminal marihuana charge equally as I would a corporate victim of an incompetent regulatory commission.

When we decide to dismiss this case, we multiply the burdens of the federal court system. The issue of waiver *vel non* of the Sixth Amendment right is now ready for decision. When we dismiss, we in effect tell petitioner first to try state habeas corpus and then federal habeas corpus. When indigents had no counsel, these trials were often pregnant with error, and habeas corpus was the normal remedy. But where the issue is exposed on appeal, it should be resolved then and there. When we fail to take that step here, we ask petitioner and his counsel to exhaust themselves during the next five years while they seek a federal determination of their federal right.

The law of waiver that governs here was stated by Mr. Justice Black in an earlier case many years ago. He ruled on waiver of counsel; but there is no difference when it comes to waiver of the right of confrontation. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson* v. *Zerbst,* 304 U. S. 458, 464. This Court later held that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with *sufficient awareness of the relevant circumstances and likely consequences.*" *Brady* v. *United States,* 397 U. S. 742, 748 (emphasis added); see also *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 275; *Patton* v. *United States,* 281 U. S. 276, 312.

No such showing has been made in the present case. I would reverse the judgment below.

LEHNHAUSEN, DIRECTOR, DEPARTMENT OF LOCAL GOVERNMENT AFFAIRS OF ILLINOIS *v.* LAKE SHORE AUTO PARTS CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 71–685. Argued January 15, 1973—Decided February 22, 1973*

An Illinois constitutional provision subjecting corporations and similar entities, but not individuals, to ad valorem taxes on personalty comports with equal protection requirements, the States being accorded wide latitude in making classifications and drawing lines that in their judgment produce reasonable taxation systems. *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, disapproved. Pp. 359–365.

49 Ill. 2d 137, 273 N. E. 2d 592, reversed.

DOUGLAS, J., delivered the opinion for a unanimous Court.

William J. Scott, Attorney General of Illinois, argued the cause for petitioner in No. 71–685. With him on the briefs was *Jayne A. Carr,* Assistant Attorney General. *Aubrey F. Kaplan* argued the cause and filed a brief for petitioners in No. 71–691.

Arnold M. Flamm argued the cause for respondents in No. 71–685. With him on the brief was *Arthur T. Susman. Louis L. Biro* argued the cause for respondents in No. 71–691 and filed a brief for corporation respondents M. Weil & Sons, Inc., et al. *Gust W. Dickett* filed a brief for respondents Shapiro et al. in No. 71–691. *Edward A. Berman, Eugene T. Sherman,* and *Lewis W.*

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*Together with No. 71–691, *Barrett, County Clerk of Cook County, Illinois, et al.* v. *Shapiro et al.,* also on certiorari to the same court.

Schlifkin filed a brief for proprietor respondents Herman, dba The Spot, et al. in both cases.†

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1970 the people of Illinois amended its constitution [1] adding Art. IX–A to become effective January 1, 1971, and reading:

> "Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals."

There apparently appeared on the ballot when Art. IX–A was approved the following:

> "The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870, Article IX–A, thus setting aside existing provisions of Article IX, Section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations."

Respondent Lake Shore Auto Parts Co., a corporation, brought an action against Illinois officials on its behalf

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†*Richard B. Ogilvie,* Governor of Illinois, filed a brief as *amicus curiae* urging reversal in No. 71–685. *Louis Ancel, Stewart H. Diamond,* and *Samuel W. Witwer* filed a brief for Proviso Township High School District No. 209 et al. as *amici curiae* urging affirmance in both cases. *William R. Dillon* filed a brief for Members of the Corporate Fiduciaries Association of Illinois as *amici curiae* in both cases.

[1] In 1969, the Illinois Legislature had provided for the submission of the proposed amendment to a referendum vote.

and on behalf of all other corporations and "non-individuals" subject to the personal property tax, claiming that the tax violated the Equal Protection Clause of the Fourteenth Amendment since it exempts from personal property taxes all personal property owned by individuals but retains such taxes as to personal property owned by corporations and other "non-individuals." The Circuit Court held the Revenue Act of Illinois, as amended by Art. IX–A, unconstitutional as respects corporations by reason of the Equal Protection Clause of the Fourteenth Amendment.

Shapiro and other individuals also brought suit alleging they are natural persons who own personal property, one for himself and his family, one as a sole proprietor of a business, and one as a partnership. A different trial judge entered an order in these cases dismissing the complaints except as to Shapiro and members of his class. The trial judge held that all other provisions of Illinois law imposing personal property taxes on property owned by corporations and other "non-individuals" were unaffected by Art. IX–A, in line with the statement on the ballot, quoted above.

All respondents in both cases appealed to the Illinois Supreme Court, which held that Art. IX–A did not affect all forms of real and personal property taxes but only personal property taxes on individuals, which it construed to mean "*ad valorem* taxation of personal property owned by a natural person or by two or more natural persons as joint tenants or tenants in common." 49 Ill. 2d 137, 148, 273 N. E. 2d 592, 597. As so construed, the Illinois Supreme Court held that the tax violated the Equal Protection Clause of the Fourteenth Amendment. *Id.*, at 151, 273 N. E. 2d, at 599, one Justice dissenting.[2]

[2] The result was either to reverse with directions to dismiss the complaints or to affirm the judgment that dismissed the complaints. Those two cases were heard by the Illinois Supreme Court along with

The cases are here on writs of certiorari which we granted. 405 U. S. 1039.

The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 666. Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled,[3] the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. As stated in *Allied Stores of Ohio* v. *Bowers,* 358 U. S. 522, 526–527:

> "The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and

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a petition to file original suit with that court by one Maynard, who owned nonbusiness personal property, and by three school districts. That petition was dismissed.

[3] Classic examples are the taxes that discriminated against newspapers, struck down under the First Amendment (*Grosjean* v. *American Press Co.,* 297 U. S. 233) or that discriminated against interstate commerce (see *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157) or required licenses to engage in interstate commerce.

> professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value."

In that case we used the phrase "palpably arbitrary" or "invidious" as defining the limits placed by the Equal Protection Clause on state power. *Id.*, at 530. State taxes which have the collateral effect of restricting or even destroying an occupation or a business have been sustained, so long as the regulatory power asserted is properly within the limits of the federal-state regime created by the Constitution. *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44–47. When it comes to taxes on corporations and taxes on individuals, great leeway is permissible so far as equal protection is concerned. They may be classified differently with respect to their right to receive or earn income. In *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 283, a state statute relieved domestic corporations of an income tax derived from activities carried on outside the State, but imposed the tax on individuals obtaining such income. We upheld the tax against the claim that it violated the Equal Protection Clause, saying:

> "We cannot say that investigation in these fields would not disclose a basis for the legislation which would lead reasonable men to conclude that there is just ground for the difference here made. The existence, unchallenged, of differences between the taxation of incomes of individuals and of corporations in every federal revenue act since the adoption of the Sixteenth Amendment, demonstrates that there may be." *Id.*, at 283–284.

It is true that in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, the Court held that a gross receipts tax

levied on corporations doing a taxi business violated the Equal Protection Clause of the Fourteenth Amendment, when no such tax was levied on individuals and partnerships operating taxicabs in competition with the corporate taxpayers. Justices Holmes, Brandeis, and Stone dissented. *Id.*, at 403–412. Mr. Justice Holmes stated:

> "If usually there is an important difference of degree between the business done by corporations and that done by individuals, I see no reason why the larger businesses may not be taxed and the small ones disregarded, and I think it would be immaterial if here and there exceptions were found to the general rule. . . . Furthermore if the State desired to discourage this form of activity in corporate form and expressed its desire by a special tax I think that there is nothing in the Fourteenth Amendment to prevent it." *Id.*, at 403.

Each of these dissenters thought *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, should govern *Quaker City Cab.* The *Flint* case involved a federal tax upon the privilege of doing business in a corporate capacity, but it was not laid on businesses carried on by a partnership or private individual. It was, therefore, contended that the tax was "so unequal and arbitrary" as to be beyond the power of Congress. *Id.*, at 158. We had not yet held that the Fifth Amendment in its use of due process carries a mandate of equal protection.[4] But the Court in dictum stated:

> "[I]t could not be said, even if the principles of the Fourteenth Amendment were applicable to the present case, that there is no substantial difference be-

[4] See *Bolling* v. *Sharpe*, 347 U. S. 497, decided May 17, 1954, which held that federal discrimination (in that case racial in nature) may be so arbitrary as to be violative of due process as the term is used in the Fifth Amendment.

tween the carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals." *Id.*, at 161–162.

While *Quaker City Cab* came after *Flint*, cases following *Quaker City Cab* have somewhat undermined it. *White River Co.* v. *Arkansas*, 279 U. S. 692, involved a state statute for collection of back taxes on lands owned by corporations but not individuals. The Court sustained the statute. Mr. Justice Butler, Mr. Chief Justice Taft, and Mr. Justice Van Devanter dissented, asserting that *Quaker City Cab* was not distinguishable. The majority made no effort to distinguish *Quaker City Cab* beyond saying that it did not involve, as did *White River*, back taxes. *Id.*, at 696.

In *Rapid Transit Co.* v. *New York,* 303 U. S. 573, an excise tax was levied on every utility but not on other business units. In sustaining the tax against the claim of lack of equal protection, the Court said:

> "Since carriers or other utilities with the right of eminent domain, the use of public property, special franchises or public contracts, have many points of distinction from other businesses, including relative freedom from competition, especially significant with increasing density of population and municipal expansion, these public service organizations have no valid ground by virtue of the equal protection clause to object to separate treatment related to such distinctions." *Id.,* at 579.

We reached the same result in *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362, where Tennessee had used one system for making assessments under its ad valorem tax law as respects most taxpayers and a totally different one for public service corporations. So far as equal protection was concerned, we said that the grievance of the particular complainant was "common to the whole class" and not "invidious to a particular taxpayer." [5] *Id.,* at 368.

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[5] In *Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412, a State classified chain stores for purposes of a chain store tax according to the number of stores—inside and outside the State. The Court sustained the tax, saying: "The statute bears equally upon all who fall into the same class, and this satisfies the guaranty of equal protection." *Id.,* at 424. In *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, a State laid an unemployment tax on employers, excluding, *inter alia,* agriculture, domestic service, crews of vessels on navigable waters, and eleemosynary institutions. The Court sustained the tax, saying: "This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation." *Id.,* at 509. And it added: "A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when

Approval of the treatment "with that separateness" which distinguishes public service corporations from others, *ibid.*, leads us to conclude in the present cases that making corporations and like entities, but not individuals, liable for ad valorem taxes on personal property does not transcend the requirements of equal protection.

In *Madden* v. *Kentucky*, 309 U. S. 83, a State laid an ad valorem tax of 50¢ per $100 on deposits in banks outside the State and only 10¢ per $1,000 on deposits within the State. The classification was sustained against the charge of invidious discrimination, the Court noting that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Id.*, at 88. There is a presumption of constitutionality which can be overcome "only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." *Ibid.* And the Court added, "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Ibid.* That idea has been elaborated. Thus, in *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, the Court, in sustaining an unemployment tax on employers,[6] said:

> "A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legis-

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subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it." *Ibid.*

[6] Note 5, *supra*.

> lation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Id.*, at 510.

Illinois tells us that the individual personal property tax was discriminatory, unfair, almost impossible to administer, and economically unsound. Assessment practices varied from district to district. About a third of the individuals paid no personal property taxes at all, while the rest paid on their bank accounts, automobiles, household furniture, and other resources, and in rural areas they paid on their livestock, grain, and farm implements as well. As respects corporations, the State says, the tax is uniformly enforceable. Illinois says, moreover, that Art. IX–A is only the first step in totally eliminating the ad valorem personal property tax by 1979 but for fiscal reasons it was impossible to abolish the tax all at once.

We could strike down this tax as discriminatory only if we substituted our judgment on facts of which we can be only dimly aware for a legislative judgment that reflects a vivid reaction to pressing fiscal problems. *Quaker City Cab Co.* v. *Pennsylvania* is only a relic of a bygone era. We cannot follow it and stay within the narrow confines of judicial review, which is an important part of our constitutional tradition.

Reversed.

OTTER TAIL POWER CO. *v.* UNITED STATES

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

No. 71-991. Argued December 5, 1972—Decided February 22, 1973

In this Sherman Act suit, brought by the Government, the District Court enjoined as violative of § 2 the following practices in which appellant, Otter Tail Power Co. (Otter Tail), engaged to prevent towns from establishing their own power systems when Otter Tail's retail franchises expired: refusals to wholesale power to the municipal systems or transfer ("wheel") it over Otter Tail's facilities from other sources, litigation intended to delay establishment of municipal systems, and invocation of transmission contract provisions to forestall supplying by other power companies. *Held:*

1. Otter Tail is not insulated from antitrust regulation by reason of the Federal Power Act, whose legislative history manifests no purpose to make the antitrust laws inapplicable to power companies. The essential thrust of the authority of the Federal Power Commission (FPC) is to encourage voluntary interconnections. Though the FPC may order interconnections if "necessary or appropriate in the public interest" antitrust considerations, though relevant under that standard, are not determinative. Pp. 372–375.

2. The District Court's decree does not conflict with the regulatory responsibilities of the FPC. Pp. 375–377.

(a) The court's order for wheeling to correct Otter Tail's anticompetitive and monopolistic practices is not counter to the authority of the FPC, which lacks the power to impose such a requirement. Pp. 375–376.

(b) Appellant's argument that the decree overrides FPC's power over interconnections is premature, there being no present conflict between the court's decree and any contrary ruling by the FPC. Pp. 376–377.

3. The record supports the District Court's findings that Otter Tail—solely to prevent the municipal systems from eroding its monopolistic position—refused to sell at wholesale or to wheel, and that Otter Tail to the same end invoked restrictive provisions in its contracts with the Bureau of Reclamation and other suppliers, the court correctly concluding that such provisions, *per se*, violated the Sherman Act. Pp. 377–379.

4. The District Court should determine on remand whether the litigation that Otter Tail was found to have instituted for the purpose of maintaining its monopolistic position was "a mere sham" within the meaning of *Eastern Railroad Conference* v. *Noerr Motor Freight,* 365 U. S. 127, so that the litigation would lose its constitutional protection in line with the Court's decision in *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508, which was decided after the District Court had entered its decree. Pp. 379–380.

5. The District Court's retention of jurisdiction to afford the parties "necessary and appropriate relief" provides an adequate safeguard against the possibility that compulsory interconnections or wheeling might threaten Otter Tail's ability adequately to serve the public. Pp. 380–382.

331 F. Supp. 54, affirmed in part and vacated and remanded in part.

DOUGLAS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, and MARSHALL, JJ., joined. STEWART, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and REHNQUIST, J., joined, *post,* p. 382. BLACKMUN and POWELL, JJ., took no part in the consideration or decision of the case.

Milton Handler argued the cause for appellant. With him on the briefs were *Cyrus A. Field, David F. Lundeen,* and *Michael D. Blechman.*

Lawrence G. Wallace argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Kauper, Samuel Huntington, Howard E. Shapiro,* and *Kenneth C. Anderson.**

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*Briefs of *amici curiae* urging reversal were filed by *Leo E. Forquer* and *George W. McHenry, Jr.,* for the Federal Power Commission; by *George D. Gibson, John H. Shenefield, Frederick T. Searls, William B. Kuder, Malcolm H. Furbush,* and *C. Hayden Ames* for General Public Utilities Corp. et al.; and by *H. Thomas Austern* and *E. Edward Bruce* for Seventeen Investor-Owned Electrical Utilities.

Briefs of *amici curiae* urging affirmance were filed by *John P. McKenna, John C. Scott,* and *Osee R. Fagan* for the City of Gainesville, Florida; by *Herbert L. Meschke* and *Jan M. Sebby* for the Village of Elbow Lake, Minnesota; by *C. Emerson Duncan II* and *Donald R. Allen* for Missouri Basin Municipal Power Agency; and by *Northcutt Ely* for American Public Power Association.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In this civil antitrust suit brought by appellee against Otter Tail Power Co. (Otter Tail), an electric utility company, the District Court found that Otter Tail had attempted to monopolize and had monopolized the retail distribution of electric power in its service area in violation of § 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 2. The District Court found that Otter Tail had attempted to prevent communities in which its retail distribution franchise had expired from replacing it with a municipal distribution system. The principal means employed were (1) refusals to sell power at wholesale to proposed municipal systems in the communities where it had been retailing power; (2) refusals to "wheel" power to such systems, that is to say, to transfer by direct transmission or displacement electric power from one utility to another over the facilities of an intermediate utility; (3) the institution and support of litigation designed to prevent or delay establishment of those systems; and (4) the invocation of provisions in its transmission contracts with several other power suppliers for the purpose of denying the municipal systems access to other suppliers by means of Otter Tail's transmission systems.

Otter Tail sells electric power at retail in 465 towns in Minnesota, North Dakota, and South Dakota. The District Court's decree enjoins it from refusing to sell electric power at wholesale to existing or proposed municipal electric power systems in the areas serviced by Otter Tail, from refusing to wheel electric power over the lines from the electric power suppliers to existing or proposed municipal systems in the area, from entering into or enforcing any contract which prohibits use of Otter Tail's lines

to wheel electric power to municipal electric power systems, or from entering into or enforcing any contract which limits the customers to whom and areas in which Otter Tail or any other electric power company may sell electric power.

The decree also enjoins Otter Tail from instituting, supporting, or engaging in litigation, directly or indirectly, against municipalities and their officials who have voted to establish municipal electric power systems for the purpose of delaying, preventing, or interfering with the establishment of a municipal electric power system. 331 F. Supp. 54. Otter Tail took a direct appeal to this Court under § 2 of the Expediting Act, as amended, 62 Stat. 989, 15 U. S. C. § 29; and we noted probable jurisdiction, 406 U. S. 944.

In towns where Otter Tail distributes at retail, it operates under municipally granted franchises which are limited from 10 to 20 years. Each town in Otter Tail's service area generally can accommodate only one distribution system, making each town a natural monopoly market for the distribution and sale of electric power at retail. The aggregate of towns in Otter Tail's service area is the geographic market in which Otter Tail competes for the right to serve the towns at retail.[1] That competition is generally for the right to serve the entire

[1] Northern States Power Co. also supplies some towns in Otter Tail's area with electric power at retail. But the District Court excluded these towns from Otter Tail's area because the two companies do not compete in the towns served by each other. Of the 615 remaining towns in the area, 465 are served at retail by Otter Tail, 45 by municipal systems, and 105 by rural electric cooperatives. The cooperatives are barred by § 4 of the Rural Electrification Act of 1936, 49 Stat. 1365, as amended, 7 U. S. C. § 904, from borrowing federal funds to provide power to towns already receiving central station service. For this and related reasons, the District Court excluded the rural cooperatives from the relevant market.

retail market within the composite limits of a town, and that competition is generally between Otter Tail and a prospective or existing municipal system. These towns number 510 and of those Otter Tail serves 91%, or 465.

Otter Tail's policy is to acquire, when it can, existing municipal systems within its service areas. It has acquired six since 1947. Between 1945 and 1970, there were contests in 12 towns served by Otter Tail over proposals to replace it with municipal systems. In only three—Elbow Lake, Minnesota, Colman, South Dakota, and Aurora, South Dakota—were municipal systems actually established. Proposed municipal systems have great obstacles; they must purchase the electric power at wholesale. To do so they must have access to existing transmission lines. The only ones available [2] belong to Otter Tail. While the Bureau of Reclamation has high-voltage bulk-power supply lines in the area, it does not operate a subtransmission network, but relies on wheeling contracts with Otter Tail and other utilities to deliver power for its bulk supply lines to its wholesale customers.[3]

The antitrust charge against Otter Tail does not involve the lawfulness of its retail outlets, but only its methods of preventing the towns it served from establishing their own municipal systems when Otter Tail's

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[2] Subtransmission lines, with voltages from 34.5 kv to 69 kv are used for moving power from the bulk supply lines to points of local distribution. Of Otter Tail's basic subtransmission system in this area, two-thirds of those lines are 41.6 kv subtransmission lines.

[3] The 38 distribution rural cooperatives in Otter Tail's area generally own only low-voltage distribution lines, which in most instances could not be used to supply power to proposed municipal utilities. The few rural cooperatives that have generation and transmission services do not, it was found, cut significantly into Otter Tail's dominant position in subtransmission.

franchises expired. The critical events centered largely in four towns—Elbow Lake, Minnesota, Hankinson, North Dakota, Colman, South Dakota, and Aurora, South Dakota. When Otter Tail's franchise in each of these towns terminated, the citizens voted to establish a municipal distribution system. Otter Tail refused to sell the new systems energy at wholesale and refused to agree to wheel power from other suppliers of wholesale energy.

Colman and Aurora had access to other transmission. Against them, Otter Tail used the weapon of litigation.

As respects Elbow Lake and Hankinson, Otter Tail simply refused to deal, although according to the findings it had the ability to do so. Elbow Lake, cut off from all sources of wholesale power, constructed its own generating plant. Both Elbow Lake and Hankinson requested the Bureau of Reclamation and various cooperatives to furnish them with wholesale power; they were willing to supply it if Otter Tail would wheel it. But Otter Tail refused, relying on provisions in its contracts which barred the use of its lines for wheeling power to towns which it had served at retail. Elbow Lake after completing its plant asked the Federal Power Commission, under § 202 (b) of the Federal Power Act, 49 Stat. 848, 16 U. S. C. § 824a (b), to require Otter Tail to interconnect with the town and sell it power at wholesale. The Federal Power Commission ordered first a temporary [4] and then a permanent connection.[5] Hankinson tried unsuccessfully to get relief from the North Dakota Commission and then filed a complaint with the federal com-

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[4] *Elbow Lake* v. *Otter Tail Power Co.*, 40 F. P. C. 1262, aff'd, *Otter Tail Power Co.* v. *FPC*, 429 F. 2d 232 (CA8), cert. denied, 401 U. S. 947.

[5] *Elbow Lake* v. *Otter Tail Power Co.*, 46 F. P. C. 675.

mission seeking an order to compel Otter Tail to wheel. While the application was pending, the town council voted to withdraw it and subsequently renewed Otter Tail's franchise.

It was found that Otter Tail instituted or sponsored litigation involving four towns in its service area which had the effect of halting or delaying efforts to establish municipal systems. Municipal power systems are financed by the sale of electric revenue bonds. Before such bonds can be sold, the town's attorney must submit an opinion which includes a statement that there is no pending or threatened litigation which might impair the value or legality of the bonds. The record amply bears out the District Court's holding that Otter Tail's use of litigation halted or appreciably slowed the efforts for municipal ownership. "The delay thus occasioned and the large financial burden imposed on the towns' limited treasury dampened local enthusiasm for public ownership." 331 F. Supp. 54, 62.

I

Otter Tail contends that by reason of the Federal Power Act it is not subject to antitrust regulation with respect to its refusal to deal. We disagree with that position.

"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 and regulatory provisions." *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 350–351. See also *Silver* v. *New York Stock Exchange,* 373 U. S. 341, 357–361. Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.

In *California* v. *FPC,* 369 U. S. 482, 489, the Court held that approval of an acquisition of the assets of a natural gas company by the Federal Power Commission pursuant to § 7 of the Natural Gas Act "would be no bar to [an] antitrust suit." Under § 7, the standard for approving such acquisitions is "public convenience and necessity." Although the impact on competition is relevant to the Commission's determination, the Court noted that there was "no 'pervasive regulatory scheme' including the antitrust laws that ha[d] been entrusted to the Commission." *Id.,* at 485. Similarly, in *United States* v. *Radio Corp. of America,* 358 U. S. 334, the Court held that an exchange of radio stations that had been approved by the Federal Communications Commission as in the "public interest" was subject to attack in an antitrust proceeding.

The District Court determined that Otter Tail's consistent refusals to wholesale or wheel power to its municipal customers constituted illegal monopolization. Otter Tail maintains here that its refusals to deal should be immune from antitrust prosecution because the Federal Power Commission has the authority to compel involuntary interconnections of power pursuant to § 202 (b) of the Federal Power Act. The essential thrust of § 202, however, is to encourage voluntary interconnections of power. See S. Rep. No. 621, 74th Cong., 1st Sess., 19–20, 48–49; H. R. Rep. No. 1318, 74th Cong., 1st Sess., 8. Only if a power company refuses to interconnect voluntarily may the Federal Power Commission, subject to limitations unrelated to antitrust considerations, order the interconnection. The standard which governs its decision is whether such action is "necessary or appropriate in the public interest." Although antitrust considerations may be relevant, they are not determinative.

There is nothing in the legislative history which re-

veals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest. As originally conceived, Part II would have included a "common carrier" provision making it "the duty of every public utility to . . . transmit energy for any person upon reasonable request . . . ." In addition, it would have empowered the Federal Power Commission to order wheeling if it found such action to be "necessary or desirable in the public interest." H. R. 5423, 74th Cong., 1st Sess.; S. 1725, 74th Cong., 1st Sess. These provisions were eliminated to preserve "the voluntary action of the utilities." S. Rep. No. 621, 74th Cong., 1st Sess., 19.

It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws. See *United States* v. *Radio Corp. of America, supra,* at 351. This is particularly true in this instance because Congress, in passing the Public Utility Holding Company Act, which included Part II of the Federal Power Act, was concerned with "restraint of free and independent competition" among public utility holding companies. See 15 U. S. C. § 79a (b)(2).

Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for, or

to immunize Otter Tail from, antitrust regulation for refusing to deal with municipal corporations.

II

The decree of the District Court enjoins Otter Tail from "[r]efusing to sell electric power at wholesale to existing or proposed municipal electric power systems in cities and towns located in [its service area]" and from refusing to wheel electric power over its transmission lines from other electric power lines to such cities and towns. But the decree goes on to provide:

> "The defendant shall not be compelled by the Judgment in this case to furnish wholesale electric service or wheeling service to a municipality except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission."

So far as wheeling is concerned, there is no authority granted the Commission under Part II of the Federal Power Act to order it, for the bills originally introduced contained common carrier provisions which were deleted.[6] The Act as passed contained only the interconnection provision set forth in § 202 (b).[7] The common carrier

[6] See S. Rep. No. 621, 74th Cong., 1st Sess.; H. R. Rep. No. 1318, 74th Cong., 1st Sess.; *Elbow Lake* v. *Otter Tail Power Co.*, 46 F. P. C., at 679.

[7] Section 202 (b) provides: "Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the

provision in the original bill and the power to direct wheeling were left to the "voluntary coordination of electric facilities." [8] Insofar as the District Court ordered wheeling to correct anticompetitive and monopolistic practices of Otter Tail, there is no conflict with the authority of the Federal Power Commission.

As respects the ordering of interconnections, there is no conflict on the present record. Elbow Lake applied to the Federal Power Commission for an interconnection with Otter Tail and, as we have said, obtained it. Hankinson renewed Otter Tail's franchise. So the decree of the District Court, as far as the present record is concerned, presents no actual conflict between the federal judicial decree and an order of the Federal Power Commission. The argument concerning the pre-emption of the area by the Federal Power Commission concerns only instances which may arise in the future, if Otter Tail continues its hostile attitude and conduct against "existing or proposed municipal electric power systems." The decree of the District Court has an open end by which that court retains jurisdiction "necessary or appropriate" to carry out the decree or "for the modification of any of the provisions." It also contemplates that future disputes over interconnections and the terms

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transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided,* That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them."

[8] S. Rep. No. 621, *supra,* n. 6, at 19.

and conditions governing those interconnections will be subject to Federal Power Commission perusal. It will be time enough to consider whether the antitrust remedy may override the power of the Commission under § 202 (b) as, if, and when the Commission denies the interconnection and the District Court nevertheless undertakes to direct it. At present, there is only a potential conflict, not a present concrete case or controversy concerning it.

III

The record makes abundantly clear that Otter Tail used its monopoly power in the towns in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws. See *United States* v. *Griffith,* 334 U. S. 100, 107. The District Court determined that Otter Tail has "a strategic dominance in the transmission of power in most of its service area" and that it used this dominance to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply. 331 F. Supp., at 60. Use of monopoly power "to destroy threatened competition" is a violation of the "attempt to monopolize" clause of § 2 of the Sherman Act. *Lorain Journal* v. *United States,* 342 U. S. 143, 154; *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U. S. 359, 375. So are agreements not to compete, with the aim of preserving or extending a monopoly. *Schine Chain Theatres* v. *United States,* 334 U. S. 110, 119. In *Associated Press* v. *United States,* 326 U. S. 1, a cooperative news association had bylaws that permitted member newspapers to bar competitors from joining the association. We held that that practice violated the Sherman Act, even though the transgressor "had not yet achieved a complete monopoly." *Id.,* at 13.

When a community serviced by Otter Tail decides not to renew Otter Tail's retail franchise when it expires, it may generate, transmit, and distribute its own electric power. We recently described the difficulties and problems of those isolated electric power systems. See *Gainesville Utilities* v. *Florida Power Corp.,* 402 U. S. 515, 517–520. Interconnection with other utilities is frequently the only solution. *Id.,* at 519 n. 3. That is what Elbow Lake in the present case did. There were no engineering factors that prevented Otter Tail from selling power at wholesale to those towns that wanted municipal plants or wheeling the power. The District Court found—and its findings are supported—that Otter Tail's refusals to sell at wholesale or to wheel were solely to prevent municipal power systems from eroding its monopolistic position.

Otter Tail relies on its wheeling contracts with the Bureau of Reclamation and with cooperatives which it says relieve it of any duty to wheel power to municipalities served at retail by Otter Tail at the time the contracts were made. The District Court held that these restrictive provisions were "in reality, territorial allocation schemes," 331 F. Supp., at 63, and were *per se* violations of the Sherman Act, citing *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1. Like covenants were there held to "deny defendant's competitors access to the fenced-off market on the same terms as the defendant." *Id.,* at 12. We recently re-emphasized the vice under the Sherman Act of territorial restrictions among potential competitors. *United States* v. *Topco Associates,* 405 U. S. 596, 608. The fact that some of the restrictive provisions were contained in a contract with the Bureau of Reclamation is not material to our problem for, as the Solicitor General says, "government con-

tracting officers do not have the power to grant immunity from the Sherman Act." Such contracts stand on their own footing and are valid or not, depending on the statutory framework within which the federal agency operates. The Solicitor General tells us that these restrictive provisions operate as a "hindrance" to the Bureau and were "agreed to by the Bureau only at Otter Tail's insistence," as the District Court found. The evidence supports that finding.

IV

The District Court found that the litigation sponsored by Otter Tail had the purpose of delaying and preventing the establishment of municipal electric systems "with the expectation that this would preserve its predominant position in the sale and transmission of electric power in the area." [9] 331 F. Supp., at 62. The District Court in discussing *Eastern Railroad Conference* v. *Noerr Motor Freight,* 365 U. S. 127, explained that it was applicable "only to efforts aimed at influencing the legislative and executive branches of the government." *Ibid.*

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[9] After noting that the "pendency of litigation has the effect of preventing the marketing of the necessary bonds thus preventing the establishment of a municipal system," 331 F. Supp., at 62, the District Court went on to find:

"Most of the litigation sponsored by the defendant was carried to the highest available appellate court and although all of it was unsuccessful on the merits, the institution and maintenance of it had the effect of halting, or appreciably slowing, efforts for municipal ownership. The delay thus occasioned and the large financial burden imposed on the towns' limited treasury dampened local enthusiasm for public ownership. In some instances, Otter Tail made offers to the towns to absorb the towns' costs and expenses, and enhance the quality of its service in exchange for a new franchise. Hankinson, after several years of abortive effort, accepted this type of offer and renewed defendant's franchise." *Ibid.*

That was written before we decided *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508, 513, where we held that the principle of *Noerr* may also apply to the use of administrative or judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims and thus is within the "mere sham" exception announced in *Noerr.* 365 U. S., at 144. On that phase of the order, we vacate and remand for consideration in light of our intervening decision in *California Motor Transport Co.*

V

Otter Tail argues that, without the weapons which it used, more and more municipalities will turn to public power and Otter Tail will go downhill. The argument is a familiar one. It was made in *United States* v. *Arnold, Schwinn & Co.,* 388 U. S. 365, a civil suit under § 1 of the Sherman Act dealing with a restrictive distribution program and practices of a bicycle manufacturer. We said: "The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." *Id.,* at 375.

The same may properly be said of § 2 cases under the Sherman Act. That Act assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency. Otter Tail's theory collided with the Sherman Act as it sought to substitute for competition anticompetitive uses of its dominant economic power.[10]

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[10] The Federal Power Commission said in *Elbow Lake* v. *Otter Tail Power Co.,* 46 F. P. C., at 678:

"The public interest is far broader than the economic interest of a particular power supplier. It is our legal responsibility, as the Supreme Court made clear in *Pennsylvania Water & Power Co.* v.

The fact that three municipalities which Otter Tail opposed finally got their municipal systems does not excuse Otter Tail's conduct. That fact does not condone the antitrust tactics which Otter Tail sought to impose. Moreover, the District Court repeated what we said in *FTC* v. *National Lead Co.*, 352 U. S. 419, 431, "those caught violating the Act must expect some fencing in." The proclivity for predatory practices has always been a consideration for the District Court in fashioning its antitrust decree. See *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 190.

We do not suggest, however, that the District Court, concluding that Otter Tail violated the antitrust laws, should be impervious to Otter Tail's assertion that compulsory interconnection or wheeling will erode its integrated system and threaten its capacity to serve adequately the public. As the dissent properly notes, the Commission may not order interconnection if to do so "would impair [the utility's] ability to render adequate service to its customers." 16 U. S. C. § 824a (b). The District Court in this case found that the "pessimistic view" advanced in Otter Tail's "erosion study" "is not supported by the record." Furthermore, it concluded that "it does not appear that Bureau of Reclamation power is a serious threat to the defendant nor that it will be in the foreseeable future." Since the District

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FPC, 343 U. S. 414 (1952), to use our statutory authority to assure 'an abundant supply of electric energy throughout the United States,' and particularly to use our statutory power under Section 202 (b) to compel interconnection and coordination when the public interest requires it. The exercise of that authority may well require, as it does here, that we order a public utility to interconnect with an isolated municipal system. The private company's lack of enthusiasm for the arrangement cannot deter us, so long as the public interest requires it."

Court has made future connections subject to Commission approval and in any event has retained jurisdiction to enable the parties to apply for "necessary or appropriate" relief and presumably will give effect to the policies embodied in the Federal Power Act, we cannot say under these circumstances that it has abused its discretion.

Except for the provision of the order discussed in part IV of this opinion, the judgment is

Affirmed.

MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in part and dissenting in part.

I join Part IV of the Court's opinion, which sets aside the judgment and remands the case to the District Court for consideration of the appellant's litigation activities in light of our decision in *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508. As to the rest of the Court's opinion, however, I respectfully dissent.

The Court in this case has followed the District Court into a misapplication of the Sherman Act to a highly regulated, natural-monopoly industry wholly different from those that have given rise to ordinary antitrust principles. In my view, Otter Tail's refusal to wholesale power through interconnection or to perform wheeling services was conduct entailing no antitrust violation.

It is undisputed that Otter Tail refused either to wheel power or to sell it at wholesale to the towns of Elbow Lake, Minnesota, and Hankinson, North Dakota, both of which had formerly been its customers and had elected to establish municipally owned electric utility systems. The District Court concluded that Otter Tail had substantial monopoly power at retail and "strategic domi-

nance" in the subtransmission of power in most of its market area.[1] 331 F. Supp. 54, 58–60. The District Court then mechanically applied the familiar Sherman Act formula: since Otter Tail possessed monopoly power and had acted to preserve that power, it was guilty of an antitrust violation. Nowhere did the District Court come to grips with the significance of the Federal Power Act, either in terms of the specific regulatory apparatus it established or the policy considerations that moved the Congress to enact it. Yet it seems to me that these concerns are central to the disposition of this case.

In considering the bill that became the Federal Power Act of 1935, the Congress had before it the report of the National Power Policy Committee on Public-Utility Holding Companies. That report chiefly concerned patterns of ownership in the power industry and the evils of concentrated ownership by holding companies. The problem that Congress addressed in fashioning a regulatory system reflected a purpose to prevent unnecessary financial concentration while recognizing the "natural monopoly" aspects, and concomitant efficiencies, of power generation and transmission. The report stated that

> "[w]hile the distribution of gas or electricity in any given community is tolerated as a 'natural monopoly' to avoid local duplication of plants, there is no

[1] The District Court looked to Otter Tail's service area, and measured market dominance in terms of the number of towns within that area served by Otter Tail. Computed this way, Otter Tail provides 91% of the retail market. 331 F. Supp. 54, 59. As the appellant points out, however, these towns vary in size from more than 29,000 to 20 inhabitants. If Otter Tail's size were measured by actual retail sales, its market share would be only 28.9% of the electricity sold at retail within its geographic market area. It is important to note that another reasonable geographical market unit might be each individual municipality. Viewed this way, whichever power company sells electricity at retail in a town has a complete monopoly.

> justification for an extension of that idea of local monopoly to embrace the common control, by a few powerful interests, of utility plants *scattered over many States and totally unconnected in operation.*" S. Rep. No. 621, 74th Cong., 1st Sess., 55 (emphasis added).

The resulting statutory system left room for the development of economies of large scale, single company operations. One of the stated mandates to the Federal Power Commission was for it to assure "an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources," 16 U. S. C. § 824a. In the face of natural monopolies at retail and similar economies of scale in the subtransmission of power, Congress was forced to address the very problem raised by this case—use of the lines of one company by another. One obvious solution would have been to impose the obligations of a common carrier upon power companies owning lines capable of the wholesale transmission of electricity. Such a provision was originally included in the bill. One proposed section provided that:

> "It shall be the duty of every public utility to furnish energy to, exchange energy with, and transmit energy for any person upon reasonable request therefor . . . ." S. 1725, 74th Cong., 1st Sess., § 213.

Another proposed provision was that:

> "Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a public utility to make additions, extensions, repairs, or improvements to or changes in its facilities, to establish physical connection with the fa-

> cilities of one or more other persons, to permit the use of its facilities by one or more persons, or to utilize the facilities of, sell energy to, purchase energy from, transmit energy for, or exchange energy with, one or more other persons." [2] *Ibid.*

Had these provisions been enacted, the Commission would clearly have had the power to order interconnections and wheeling for the purpose of making available to local power companies wholesale power obtained from or through companies with subtransmission systems. The latter companies would equally clearly have had an obligation to provide such services upon request. Yet, after substantial debate,[3] the Congress declined to follow this path. As the Senate report indicates in discussing § 202 as enacted:

> "The committee is confident that enlightened self-interest will lead the utilities to cooperate with the commission and with each other in bringing about the economies which can alone be secured through the planned coordination which has long been advocated by the most able and progressive thinkers on this subject.
>
> "When interconnection cannot be secured by voluntary action, subsection (b) gives the Commission limited authority to compel inter-state utilities to connect their lines and sell or exchange energy. The power may only be invoked upon complaint by a State commission or a utility subject to the act." S. Rep. No. 621, 74th Cong., 1st Sess., 49.

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[2] Both of these provisions had identical counterparts in H. R. 5423, 74th Cong., 1st Sess.

[3] Hearings on S. 1725 before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess. (1935); Hearings on H. R. 5423 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. (1935).

This legislative history, especially when viewed in the light of repeated subsequent congressional refusals to impose common carrier obligations in this area,[4] indicates a clear congressional purpose to allow electric utilities to decide for themselves whether to wheel or sell at wholesale as they see fit. This freedom is qualified by a grant of authority to the Commission to order interconnection (but not wheeling) in certain circum-

[4] See, *e. g.*, S. 350 and H. R. 2101, 88th Cong., 1st Sess., providing that:

"Any certificate issued under the provisions of this subsection authorizing the operation of transmission facilities shall be subject to the condition that any capacity of such facilities not required for the transmission of electric energy in the ordinary scope of such applicant's business shall be made available on a common carrier basis for the transmission of other electric energy."

This bill was re-introduced as S. 1472 and H. R. 2072 in the 89th Congress, 1st Session, and also failed to pass. See also S. 2140 and H. R. 7791, 89th Cong., 1st Sess.

These bills were all reintroduced in the 90th Congress, as was H. R. 12322, proposing an Electric Power Reliability Act that would have specifically provided the Commission with authority to order wheeling. In the 91st Congress, bills to establish an Electric Power Reliability Act were again introduced. Section 3 of that proposed Act included a grant of authority for the FPC to order wheeling, see, *e. g.*, S. 1071, 91st Cong., 1st Sess. Yet another bill, H. R. 12585, 91st Cong., 1st Sess., included a very broad provision establishing open access to transmission networks at reasonable rates.

The proposed Electric Power Reliability Act was reintroduced in the 92d Congress, 1st Session, as S. 294 and H. R. 605. H. R. 12585 from the 91st Congress was also reintroduced, as H. R. 6972, 92d Cong., 1st Sess. Still another bill would have prevented proposed regional bulk-power supply corporations from contracting with an electric utility unless that utility "permit[s] . . . the use of its excess transmission capacity for the purpose of wheeling power from facilities of such corporation . . . to load centers of other electric utilities contracting to purchase electric power from such corporation." S. 2324, H. R. 9970, 92d Cong., 1st Sess., § 103 (c)(1)(B). None of these bills was enacted.

stances. But the exercise of even that power is limited by a consideration of the ability of the regulated utility to function. The Commission may not order interconnection where this would entail an "undue burden" on the regulated utility. In addition, the Commission has

> "no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers." 16 U. S. C. § 824a (b).

As the District Court found, Otter Tail is a vertically integrated power company. But the bulk of its business—some 90% of its income—derives from sales of power at retail. Left to its own judgment in dealing with its customers, it seems entirely predictable that Otter Tail would decline wholesale dealing with towns in which it had previously done business at retail. If the purpose of the congressional scheme is to leave such decisions to the power companies in the absence of a contrary requirement imposed by the Commission, it would appear that Otter Tail's course of conduct in refusing to deal with the municipal system at Elbow Lake and in refusing to promise to deal with the proposed system at Hankinson, was foreseeably within the zone of freedom specifically created by the statutory scheme.[5] As a re-

[5] The District Court was persuaded that the restrictions on wheeling contained in Otter Tail's contracts with the Bureau of Reclamation were "in reality, territorial allocation schemes." 331 F. Supp., at 63. I think this finding was clearly erroneous. Territorial allocation arrangements that have run afoul of the antitrust laws have traditionally been horizontal, and have involved the elimination of competition between two enterprises that were similarly situated in the market. *United States* v. *Topco Associates,* 405 U. S. 596; *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593; cf.

tailer of power, Otter Tail asserted a legitimate business interest in keeping its lines free for its own power sales and in refusing to lend a hand in its own demise by wheeling cheaper power from the Bureau of Reclamation to municipal consumers which might otherwise purchase power at retail from Otter Tail itself.

The opinion of the Court emphasizes that Otter Tail's actions were not simple refusals to deal—they resulted in Otter Tail's maintenance of monopoly control by hindering the emergence of municipal power companies. The Court cites *Lorain Journal* v. *United States,* 342 U. S. 143, for the proposition that "[u]se of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of § 2 of the Sherman Act." This proposition seems to me defective. *Lorain Journal* dealt neither with a natural monopoly at retail nor with a congressionally approved system predicated on the existence of such monopolies. In *Lorain Journal,* a newspaper in Lorain, Ohio, used its monopoly position to discourage advertisers from supporting a nearby radio station seen by the newspaper to be a competitor. The theory of the case was that competition in the communications business was being foreclosed by the newspaper's exercise of monopoly power. Here,

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White Motor Co. v. *United States,* 372 U. S. 253, 261–264. Otter Tail and the Bureau of Reclamation stand in a vertical, not a horizontal, relationship. Furthermore, though Otter Tail refused to wheel power to towns whose consumers it formerly served at retail, it did not exact from the Bureau a promise that the latter would not provide power to such towns by alternative means. Hence, I cannot see how these contracts operate as territorial-allocation schemes. If Otter Tail had demanded that the Bureau not sell to former Otter Tail customers, or if Otter Tail had combined with other retailers of electricity and undertaken mutual noncompetition agreements, this would be a different case.

by contrast, a monopoly is sure to result either way. If the consumers of Elbow Lake receive their electric power from a municipally owned company or from Otter Tail, there will be a monopoly at the retail level, for there will in any event be only one supplier. The very reason for the regulation of private utility rates—by state bodies and by the Commission—is the inevitability of a monopoly that requires price control to take the place of price competition. Antitrust principles applicable to other industries cannot be blindly applied to a unilateral refusal to deal on the part of a power company, operating in a regime of rate regulation and licensed monopolies.

The Court's opinion scoffs at Otter Tail's defense of business justification. *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, is cited for the proposition that "[t]he promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." This facet of the Court's reasoning also escapes me in the case before us, where the health of power companies and the abundance of our energy supply were considerations central to the congressional purpose in devising the regulatory scheme. As noted above, the Commission is specifically prohibited from imposing interconnection requirements that are unduly burdensome or that interfere with a public utility's ability to serve its customers efficiently. The District Court noted that Otter Tail had offered a "so-called 'erosion study' " documenting the way in which its business would suffer if it were forced to wholesale and wheel power to municipally owned companies. The District Court gave little credence to the report's predictions. "But regardless," the court went on, "even the threat of losing business does not justify or excuse violating the law." 331 F. Supp., at 64–65. This question-begging disregard of the economic health of Otter Tail is wholly at odds with the congressional purpose in

specifying the conditions under which interconnections can be required.

This is not to say that Otter Tail's financial health is paramount in all instances,[6] or that the electric power industry as regulated by the Commission is *per se* exempt from the antitrust laws. In the absence of a specific statutory immunity, cf. *Hughes Tool Co.* v. *Trans World Airlines,* 409 U. S. 363, such exemptions are not lightly to be implied, *United States* v. *Philadelphia National Bank,* 374 U. S. 321. Furthermore, no sweeping antitrust exemption is warranted, as it has been in cases involving certain pervasively regulated industries, under the doctrine of "primary jurisdiction."[7] Cf. *United*

[6] In ordering permanent interconnection between Otter Tail and the town of Elbow Lake municipal system, for example, the Commission correctly noted that, "The public interest is far broader than the economic interest of a particular power supplier. . . . The private company's lack of enthusiasm for . . . [the interconnection order] cannot deter us, so long as the public interest requires it." *Elbow Lake* v. *Otter Tail Power Co.,* 46 F. P. C. 675, 678.

[7] The Federal Power Commission, as noted above, only orders interconnection under the provisions of § 202 (b), 16 U. S. C. § 824a (b), though it has broader powers in times of war or other emergency. 16 U. S. C. § 824a (c). The Commission does not normally set rates, though utilities subject to its jurisdiction must file proposed rate schedules with it, and it has the opportunity of assessing the lawfulness of those rates. 16 U. S. C. § 824d. In the event the Commission concludes that any rate or practice is "unjust, unreasonable, unduly discriminatory or preferential," it determines the "just and reasonable rate . . . ." 16 U. S. C. § 824e (a). Under these same provisions, the Commission regulates the terms and conditions of interconnections and wheeling arrangements voluntarily entered into.

The resulting system of regulation is thus more comprehensive than the regulatory apparatus applicable to bank mergers which was held to be insufficient to oust antitrust jurisdiction in *United States* v. *Philadelphia National Bank,* 374 U. S. 321, and the regulatory scheme with respect to broadcasters which similarly failed to displace the antitrust laws in *United States* v. *Radio Corp. of*

States v. *Radio Corp of America,* 358 U. S. 334, 346–352. See *Far East Conference* v. *United States,* 342 U. S. 570; *Terminal Warehouse Co.* v. *Pennsylvania R. Co.,* 297 U. S. 500; *United States Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474; *Keogh* v. *Chicago & N. W. R. Co.,* 260 U. S. 156; *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426; cf. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213. Our duty in attempting to reconcile the Federal Power Act with the Sherman Act on the facts of the case before us requires a judgment regarding the "character and objectives" of the regulatory scheme and the extent to which they "are incompatible with the maintenance of an antitrust action." *Silver* v. *New York Stock Exchange,* 373 U. S. 341, 358. "Repeal [of the antitrust laws] is to be regarded as implied only if necessary to make the . . . [Act] work, and even then only to the minimum extent necessary." *Id.,* at 357.

With respect to decisions by regulated electric utilities as to whether or not to provide nonretail services, I think that in the absence of horizontal conspiracy, the teaching of the "primary jurisdiction" cases argues for leaving governmental regulation to the Commission instead of the invariably less sensitive and less specifically expert process of antitrust litigation. I believe this is

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America, 358 U. S. 334. Nevertheless, the considerable freedom allowed to electric utilities with respect to coordination of service persuades me that the antitrust laws apply to the extent they are not repugnant to specific features of the regulatory scheme. For this reason, litigation and political activities that come within the so-called "sham" exception in *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508, might constitute an antitrust violation. Similarly, a genuine territorial allocation agreement might be prohibited under the Sherman Act, see n. 5, *supra.* Were it not for the legislative history noted above, a consistent refusal to deal with municipally owned power companies might also be impermissible under the Sherman Act. For me, however, the legislative history with respect to wheeling and interconnection is dispositive.

what Congress intended by declining to impose common carrier obligations on companies like Otter Tail, and by entrusting the Commission with the burden of "assuring an abundant supply of electric energy throughout the United States" and with the power to order interconnections when necessary in the public interest. This is an area where "sporadic action by federal courts" *can* "work mischief." Cf. *United States* v. *Radio Corp. of America*, 358 U. S., at 350.[8]

Even assuming that Otter Tail's refusals to wholesale or wheel power to Elbow Lake and Hankinson were colorably within the reach of the antitrust laws, I cannot square the opinion of the Court with our recent decision in *Ricci* v. *Chicago Mercantile Exchange*, 409 U. S. 289. Otter Tail's refusal to wholesale or wheel power to Elbow Lake was the subject of two concurrent proceedings—one in the District Court, and another in the Federal Power Commission. It seems to me that the principles of *Ricci*, related to but not identical with the traditional doctrine of "primary jurisdiction," should require a District Court in a case like this one to defer to the Commission proceeding then in progress. Surely the regulatory authority of the Commission with respect to inter-

[8] Unlike the situation presented in *R. C. A.*, *supra*, where the regulatory agency filed a brief in this Court disavowing any conflict between its regulatory functions and the operation of the antitrust laws, *id.*, at 350 n. 18, in this case the Federal Power Commission has taken the unusual step of filing a brief as *amicus curiae* in support of Otter Tail. The Commission points out that it was considering an application for interconnection filed by the town of Elbow Lake at the same time this lawsuit was progressing in the District Court. An order requiring long-term interconnection by Otter Tail with the Elbow Lake municipal system was entered by the Commission on September 13, 1971—just four days after the District Court entered judgment. The Commission reads its authority to order interconnection, 16 U. S. C. § 824a, as a grant of exclusive jurisdiction in matters involving interconnection.

connection is at least as substantial as the responsibility of the Commodity Exchange Commission, in *Ricci,* for the implementation of reasonable membership practices by its regulated contract markets. *Id.*, at 310–311 (MARSHALL, J., dissenting). The responsibility of the Commission for "assuring an abundant supply of electric energy throughout the United States" and its authority to order compulsory wholesaling satisfy the three criteria enunciated in *Ricci* for a deferral of antitrust jurisdiction to an administrative agency: (1) that the court must first decide whether the conduct complained of, in light of the regulatory statute, is immune from the antitrust laws; (2) that "some facets of the dispute" are "within the statutory jurisdiction" of the agency; and (3) "that adjudication of that dispute . . . promises to be of material aid in resolving the immunity question." *Id.*, at 302.

With respect to the last of the *Ricci* criteria, it is useful to contrast the cursory treatment given to Otter Tail's business-justification defense by the Court today with the opinion of the Commission ordering permanent interconnection:

> "[W]e cannot disagree with the Examiner's view that Elbow Lake has engaged in 'an ill-advised excursion into the power business.' Given the facts of record before us, it is plain that Elbow Lake's effort has not brought it the rewards it expected; indeed, its first year of operations, during which it perpetuated the rates formerly charged by Otter Tail, resulted in a financial loss. Unlike Otter Tail's earlier service to Elbow Lake, Elbow Lake's own system is of doubtful reliability, as evidenced by its presence before us now. . . . While it is our responsibility to take all possible steps to insure to Elbow Lake's customers a high standard of service

reliability, our terms and conditions must not invite improvident ventures elsewhere.

"We also share the Examiner's view that Otter Tail is legitimately concerned about the possible erosion of its system. If other communities were to follow Elbow Lake's route, and if, having miscalculated the results, they could expect to be rescued by overly-generous interconnection terms, then Otter Tail's fears that it will lose its customers, seriatim, seem to us to be supported. We do not mean by this that we accept a captive market concept, however. . . . The exercise of that [statutory] authority may well require, as it does here, that we order a public utility to interconnect with an isolated municipal system." *Elbow Lake* v. *Otter Tail Power Co.*, 46 F. P. C. 675, 677–678.

The opinion of the Court attempts to sidestep the *Ricci* problem by noting that the Commission has in fact ordered interconnection with Elbow Lake, resulting in the absence of a present actual conflict with the decree entered by the District Court. The Court goes on vaguely to suggest that there will be time to cope with the problem of a Commission refusal to order interconnection which conflicts with this antitrust decree when such a conflict arises.

But the basic conflict between the Commission's authority and the decree entered in the District Court cannot be so easily wished away. The decree enjoins Otter Tail from "[r]efusing to sell electric power at wholesale to existing or proposed municipal electric power systems in cities and towns located in any area serviced by Defendant."[9] This injunction is qualified by a provision that such wholesaling be done at "compensatory" rates and under "terms and conditions which are filed

[9] The decree of the District Court is unreported.

with and subject to approval by the Federal Power Commission." The setting of rates, terms, and conditions, however, is but part of the Commission's authority under § 202 (b), 16 U. S. C. § 824a (b). The Court's decree plainly ignores the Commission's authority to decide *whether* involuntary interconnection is warranted under the enunciated statutory criteria. Unless the decree is modified, its future implementation will starkly conflict with the explicit statutory mandate of the Federal Power Commission.

Both because I believe Otter Tail's refusal to wheel or wholesale power was conduct exempt from the antitrust laws and because I believe the District Court's decree improperly pre-empted the jurisdiction of the Federal Power Commission, I would reverse the judgment before us.

UNITED STATES *v.* ENMONS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

No. 71–1193. Argued December 4, 1972—
Decided February 22, 1973

The Hobbs Act, which makes it a federal crime to obstruct interstate commerce by robbery or extortion, does not reach the use of violence (which is readily punishable under state law) to achieve legitimate union objectives, such as higher wages in return for genuine services that the employer seeks. Pp. 399–411.

335 F. Supp. 641, affirmed.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 412. DOUGLAS, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 413.

William Bradford Reynolds argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Petersen,* and *Jerome M. Feit.*

Bernard Dunau argued the cause for appellees. With him on the briefs were *Louis Sherman, Thomas X. Dunn, Elihu I. Leifer, Alex W. Wall,* and *Sam J. D'Amico.**

MR. JUSTICE STEWART delivered the opinion of the Court.

A one-count indictment was returned in the United States District Court for the Eastern District of Loui-

*Briefs of *amici curiae* urging reversal were filed by *Milton Smith* and *Jerry Kronenberg* for the Chamber of Commerce of the United States, and by *Arthur B. Hanson* and *Ralph N. Albright, Jr.*, for the American Newspaper Publishers Association.

J. Albert Woll, Laurence Gold, and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

siana charging the appellees with a violation of the Hobbs Act, 18 U. S. C. § 1951. In pertinent part, that Act provides:

> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

"Extortion" is defined in the Act, as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear . . . ." 18 U. S. C. § 1951 (b)(2).

At the time of the alleged conspiracy, the employees of the Gulf States Utilities Company were out on strike. The appellees are members and officials of labor unions that were seeking a new collective-bargaining agreement with that company. The indictment charged that the appellees and two named coconspirators conspired to obstruct commerce, and that as part of that conspiracy, they

> "would obtain the property of the Gulf States Utilities Company in the form of wages and other things of value with the consent of the Gulf States Utilities Company . . . , such consent to be induced by the wrongful use of actual force, violence and fear of economic injury by [the appellees] and coconspirators, in that [the appellees] and the coconspirators did commit acts of physical violence and destruction against property owned by the Gulf States Utilities Company in order to force said

> Company to agree to a contract with Local 2286 of the International Brotherhood of Electrical Workers calling for higher wages and other monetary benefits."

Five specific acts of violence were charged to have been committed in furtherance of the conspiracy—firing high-powered rifles at three Company transformers, draining the oil from a Company transformer, and blowing up a transformer substation owned by the Company. In short, the indictment charged that the appellees had conspired to use and did in fact use violence to obtain for the striking employees higher wages and other employment benefits from the Company.

The District Court granted the appellees' motion to dismiss the indictment for failure to state an offense under the Hobbs Act. 335 F. Supp. 641. The court noted that the appellees were union members on strike against their employer, Gulf States, and that both the strike and its objective of higher wages were legal. The court expressed the view that if "the wages sought by violent acts are wages to be paid for unneeded or unwanted services, or for no services at all," then that violence would constitute extortion within the meaning of the Hobbs Act. *Id.*, at 645. But in this case, by contrast, the court noted that the indictment alleged the use of force to obtain legitimate union objectives: "The union had a right to disrupt the business of the employer by lawfully striking for higher wages. Acts of violence occurring during a lawful strike and resulting in damage to persons or property are undoubtedly punishable under State law. To punish persons for such acts of violence was not the purpose of the Hobbs Act." *Id.*, at 646. The court found "no case where a court has gone so far as to hold the type of activity involved here to be a violation of the Hobbs Act." *Id.*, at 645.

We noted probable jurisdiction of the Government's appeal, 406 U. S. 916,[1] to determine whether the Hobbs Act proscribes violence committed during a lawful strike for the purpose of inducing an employer's agreement to legitimate collective-bargaining demands.

I

The Government contends that the statutory language unambiguously and without qualification proscribes interference with commerce by "extortion," and that in terms of the statute, "extortion" is "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear . . . ." Wages are the "property" of the employer, the argument continues, and strike violence to obtain such "property" thus falls within the literal proscription of the Act. But the language of the statute is hardly as clear as the Government would make it out to be. Its interpretation of the Act slights the wording of the statute that proscribes obtaining property only by the "wrongful" use of actual or threatened force, violence, or fear. The term "wrongful," which on the face of the statute modifies the use of each of the enumerated means of obtaining property—actual or threatened force, violence, or fear [2]—would be superfluous if it only served to describe the means used. For it would be redundant to speak of "wrongful violence" or "wrongful force" since,

[1] This appeal was taken under 18 U. S. C. § 3731 (1964 ed.). The 1971 amendment to the Criminal Appeals Act, providing that all appeals from dismissals of indictments or informations must be taken to the Courts of Appeals, does not apply to cases instituted before January 2, 1971. Omnibus Crime Control Act of 1970, Pub. Law No. 91–644, § 14 (a), 84 Stat. 1890, codified, 18 U. S. C. § 3731. See *United States* v. *Jorn*, 400 U. S. 470, 474 n. 1, 477–478, n. 6. The present indictment was filed on October 15, 1970.

[2] Congressman Hobbs indicated that "wrongful" was to modify the entire section. 91 Cong. Rec. 11908.

as the Government acknowledges, any violence or force to obtain property is "wrongful." [3] Rather, "wrongful" has meaning in the Act only if it limits the statute's coverage to those instances where the obtaining of the property would itself be "wrongful" because the alleged extortionist has no lawful claim to that property.

Construed in this fashion, the Hobbs Act has properly been held to reach instances where union officials threatened force or violence against an employer in order to obtain personal payoffs,[4] and where unions used the proscribed means to exact "wage" payments from employers in return for "imposed, unwanted, superfluous and fictitious services" of workers.[5] For in those situations, the employer's property has been misappropriated. But the literal language of the statute will not bear the Government's semantic argument that the Hobbs Act reaches the use of violence to achieve legitimate union objectives, such as higher wages in return for genuine services which the employer seeks. In that type of case, there has been no "wrongful" taking of the employer's property; he has paid for the services he bargained for, and the workers receive the wages to which they are entitled in compensation for their services.

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[3] The Government suggests a convoluted construction of "wrongful." It concedes that when the means used are not "wrongful," such as where fear of economic loss from a strike is employed, then the objective must be illegal. If, on the other hand, "wrongful" force and violence are used, even for a legal objective, the Government contends that the statute is satisfied. But that interpretation simply accepts the redundancy of the term "wrongful" whenever it applies to "force" and "violence" in the statute.

[4] See, *e. g.*, *United States* v. *Iozzi*, 420 F. 2d 512; *United States* v. *Kramer*, 355 F. 2d 891, cert. granted and case remanded for resentencing, 384 U. S. 100; *Bianchi* v. *United States*, 219 F. 2d 182.

[5] See, *e. g.*, *United States* v. *Green*, 350 U. S. 415, 417; *United States* v. *Kemble*, 198 F. 2d 889.

II

The legislative framework of the Hobbs Act dispels any ambiguity in the wording of the statute and makes it clear that the Act does not apply to the use of force to achieve legitimate labor ends. The predecessor of the Hobbs Act, § 2 of the Anti-Racketeering Act of 1934, 48 Stat. 979,[6] proscribed, in connection with interstate commerce, the exaction of valuable consideration by force, violence, or coercion, "not including, however, the payment of wages by a bona-fide employer to a bona-fide employee . . . ."[7] In *United States* v. *Local 807*, 315 U. S. 521, the Court held that this exception cov-

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[6] Section 2 of the Act provided:

"Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

"(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

"(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

"(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

"(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both."

[7] See § 2 (a), quoted in n. 6, *supra*. While the specific wage exception was found only in § 2 (a) of the Act, § 3 (b) excluded "wages paid by a bona-fide employer to a bona-fide employee" from the definition of "property," "money," or other "valuable considerations." The wage exception thus permeated the entire Act. *United States* v. *Green*, 350 U. S., at 419 n. 4; *United States* v. *Local 807*, 315 U. S. 521, 527 n. 2.

ered the members of a New York City truck drivers union who, by violence or threats, exacted payments for themselves from out-of-town truckers in return for the unwanted and superfluous service of driving out-of-town trucks to and from the city. The New York City teamsters would lie in wait for the out-of-town trucks, and then demand payment from the owners and drivers in return for allowing the trucks to proceed into the city. The teamsters sometimes drove the arriving trucks into the city, but in other instances, the out-of-town truckers paid the fees but rejected the teamsters' services and drove the trucks themselves. In several cases there was evidence that, having exacted their fees, the city drivers disappeared without offering to perform any services at all. *Id.*, at 526. See also *id.*, at 539 (Stone, C. J., dissenting). The Court held that the activities of the city teamsters were included within the wage exception to the Anti-Racketeering Act although what work they performed was unneeded and unwanted, and although in some cases their work was rejected.

Congressional disapproval of this decision was swift. Several bills [8] were introduced with the narrow purpose of correcting the result in the *Local 807* case.[9] H. R. 32, which became the Hobbs Act, 60 Stat. 420, eliminated the wage exception that had been the basis for the *Local 807* decision.[10] But, as frequently emphasized

[8] S. 2347, 77th Cong., 2d Sess.; H. R. 6872, 77th Cong., 2d Sess.; H. R. 7067, 77th Cong., 2d Sess.; H. R. 653, 78th Cong., 1st Sess.; H. R. 32, 79th Cong., 1st Sess. See *Callanan* v. *United States*, 364 U. S. 587, 591 n. 5; *United States* v. *Green, supra,* at 419 n. 5.

[9] See *United States* v. *Green, supra,* at 419 n. 5; Note, Labor Faces the Amended Anti-Racketeering Act, 101 U. Pa. L. Rev. 1030, 1033–1034 (1953).

[10] The Hobbs Act also eliminated the proviso in § 6 of the Anti-Racketeering Act of 1934: "That no court of the United States shall construe or apply any of the provisions of this Act in such manner as to impair, diminish, or in any manner affect the rights of bona-

on the floor of the House, the limited effect of the bill was to shut off the possibility opened up by the *Local 807* case, that union members could use their protected status to exact payments from employers for imposed, unwanted, and superfluous services. As Congressman Hancock explained:

> "This bill is designed simply to prevent both union members and nonunion people from making use of robbery and extortion under the guise of obtaining wages in the obstruction of interstate commerce. That is all it does.
>
> . . . . .
>
> "[T]his bill is made necessary by the amazing decision of the Supreme Court in the case of the United States against Teamsters' Union 807, 3 years ago. That decision practically nullified the anti-racketeering bill of 1934 . . . . In effect the Supreme Court held that . . . members of the Teamsters' Union . . . were exempt from the provisions of that law when attempting by the use of force or the threat of violence to obtain wages for a job whether they rendered any service or not." 91 Cong. Rec. 11900.

Congressman Hancock proceeded to read approvingly from an editorial which characterized the teamsters' action in the *Local 807* case as "compelling the truckers to pay day's wages to local union drivers whose services were neither wanted nor needed." *Ibid.* Congressman Fellows stressed the fact that the facts of the *Local 807*

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fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States." That proviso was one of the supports for the *Local 807* decision, see 315 U. S., at 535, and it was eliminated to prevent reliance on that clause as a means of resuscitating the *Local 807* decision. See 91 Cong. Rec. 11912 (remarks of Rep. Hobbs).

case showed that "these stick-up men disappeared as soon as the money was paid without rendering or offering to render any service." *Id.*, at 11907. And Congressman Rivers characterized the facts of the *Local 807* case as "nothing short of hijacking, intimidation, extortion, and out-and-out highway robbery." *Id.*, at 11917.[11]

But by eliminating the wage exception to the Anti-Racketeering Act, the Hobbs Act did not sweep within its reach violence during a strike to achieve legitimate collective-bargaining objectives. It was repeatedly emphasized in the debates that the bill did not "interfere in any way with any legitimate labor objective or activity"; [12] "there is not a thing in it to interfere in the slightest degree with any legitimate activity on the part of labor people or labor unions . . . ." [13] And Congressman Jennings, in responding to a question concerning the Act's coverage, made it clear that the Act "does not have a thing in the world to do with strikes." *Id.*, at 11912.

Indeed, in introducing his original bill, Congressman Hobbs [14] explicitly refuted the suggestion that strike vio-

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[11] See also 91 Cong. Rec. 11842 (remarks of Rep. Michener); *id.*, at 11905 (remarks of Rep. Robsion); *id.*, at 11909 (remarks of Rep. Sumners); *id.*, at 11912–11913 (remarks of Rep. Whittington).

In its report on the bill, the House Committee on the Judiciary reproduced this Court's decision in the *Local 807* case and concluded that "[t]he need for the legislation was emphasized by the opinion of the Supreme Court in . . . *United States* v. *Local 807* . . . ." H. R. Rep. No. 238, 79th Cong., 1st Sess., 10. See also S. Rep. No. 1516, 79th Cong., 2d Sess.

[12] 91 Cong. Rec. 11841 (remarks of Rep. Walter).

[13] *Id.*, at 11908 (remarks of Rep. Sumners). See also *id.*, at 11900 (remarks of Rep. Hancock); *id.*, at 11904 (remarks of Rep. Gwynne); *id.*, at 11909 (remarks of Rep. Vursell).

[14] The remarks with respect to that bill, H. R. 653, 78th Cong., 1st Sess., which passed only the House, are wholly relevant to an under-

lence to achieve a union's legitimate objectives was encompassed by the Act: [15]

> "Mr. MARCANTONIO. All right. In connection with a strike, if an incident occurs which involves—
>
> "Mr. HOBBS. The gentleman need go no further. This bill does not cover strikes or any question relating to strikes.
>
> "Mr. MARCANTONIO. Will the gentleman put a provision in the bill stating so?
>
> "Mr. HOBBS. We do not have to, because a strike is perfectly lawful and has been so described by the Supreme Court and by the statutes we have passed. This bill takes off from the springboard that the act must be unlawful to come within the purview of this bill.
>
> "Mr. MARCANTONIO. That does not answer my point. My point is that an incident such as a simple assault which takes place in a strike could happen. Am I correct?
>
> "Mr. HOBBS. Certainly.
>
> "Mr. MARCANTONIO. That then could become an extortion under the gentleman's bill, and

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standing of the Hobbs Act, since the operative language of the original bill was substantially carried forward into the Act. The congressional debates on the Hobbs Act in the 79th Congress repeatedly referred to the legislative history of the original bill. See 91 Cong. Rec. 11842 (remarks of Rep. Michener); *id.*, at 11899–11900 (remarks of Rep. Hancock); *id.*, at 11900 (remarks of Rep. Hobbs). Surely an interpretation placed by the sponsor of a bill on the very language subsequently enacted by Congress cannot be dismissed out of hand, as the dissent would have it, simply because the interpretation was given two years earlier.

[15] See also 89 Cong. Rec. 3202 (remarks of Rep. Gwynne) (Act does not cover "a clash between strikers and scabs during a strike").

that striker as well as his union officials could be charged with violation of sections in this bill.

"Mr. HOBBS. I disagree with that and deny it in toto." 89 Cong. Rec. 3213.[16]

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[16] The proponents of the Hobbs Act defended the Act as no encroachment on the legitimate activities of labor unions on the ground that the statute did no more than incorporate New York's conventional definition of extortion—"the obtaining of property from another . . . with his consent, induced by a wrongful use of force or fear, or under color of official right." N. Y. Penal Law § 850 (1909). See 91 Cong. Rec. 11842 (remarks of Rep. Walter); *id.*, at 11843 (remarks of Rep. Michener); *id.*, at 11900 (remarks of Rep. Hancock); *ibid.* (remarks of Rep. Hobbs); *id.*, at 11906 (remarks of Rep. Robsion). See also *United States* v. *Caldes*, 457 F. 2d 74, 77; *United States* v. *Provenzano*, 334 F. 2d 678, 686.

Judicial construction of the New York statute reinforces the conclusion that, however militant, union activities to obtain higher wages do not constitute extortion. For extortion requires an intent "'to obtain that which in justice and equity the party is not entitled to receive.'" *People* v. *Cuddihy*, 151 Misc. 318, 324, 271 N. Y. S. 450, 456, aff'd, 243 App. Div. 694, 277 N. Y. S. 960; see *People* v. *Weinseimer*, 117 App. Div. 603, 616, 102 N. Y. S. 579, 588, aff'd, 190 N. Y. 537, 83 N. E. 1129. An accused would not be guilty of extortion for attempting to achieve legitimate labor goals; he could not be convicted without sufficient evidence that he "was actuated by the purpose of obtaining a financial benefit for himself . . . and was not attempting in good faith to advance the cause of unionism . . . ." *People* v. *Adelstein*, 9 App. Div. 2d 907, 908, 195 N Y. S. 2d 27, 28, aff'd *sub nom. People* v. *Squillante*, 8 N. Y. 2d 998, 169 N. E. 2d 425.

Hence, New York's highest court has interpreted its extortion statute to apply to a case where the accused received a payoff to buy an end to labor picketing. *People* v. *Dioguardi*, 8 N. Y. 2d 260, 168 N. E. 2d 683.

"The picketing here . . . may have been perfectly lawful in its inception (assuming it was part of a bona fide organizational effort) and may have remained so—despite its potentially ruinous effect on the employers' businesses—so long as it was employed to accomplish the legitimate labor objective of organization. Its entire character changed from legality to criminality, however, when it

The Government would derive a different lesson from the legislative history. It points to statements made during the floor debates that the Act was meant to have "broad coverage" and, unlike its predecessor, to encompass the "employer-employee" relationship. But that proves no more than that the achievement of illegitimate objectives by employees or their representatives, such as the exaction of personal payoffs, or the pursuit of "wages" for unwanted or fictitious services, would not be exempted from the Act solely because the extortionist was an employee or union official and the victim an employer.[17] The Government would also find support for its expansive interpretation of the statute in the rejection of two amendments, one proposed by Congressman Celler, the other by Congressman LaFollette, which would have inserted in the Act an exception for cases where violence was used to obtain the payment of wages by a bona-fide employer to a bona-fide employee. See 91 Cong. Rec. 11913, 11917, and 11919, 11922. But both amendments were rejected

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was used as a pressure device to exact the payment of money as a condition of its cessation . . . ." *Id.*, at 271, 168 N. E. 2d, at 690–691.

In short, when the objectives of the picketing changed from legitimate labor ends to personal payoffs, then the actions became extortionate.

[17] The Government relies heavily on a statement by Congressman Michener, in a dialogue with two of his colleagues, to the effect that union members who "by robbery or exploitation collect a day's wage—a union wage—they are not exempted from the law solely because they are engaging in a legitimate union activity." 91 Cong. Rec. 11843–11844. But Congressman Michener was referring to the activity of "robbery or exploitation," and his statement continued: "I cannot understand how any union man can claim that the conduct described by Mr. Justice Stone is a legitimate union activity." *Id.*, at 11844. Mr. Chief Justice Stone's dissenting opinion in the *Local 807* case described payoffs for the superfluous and unwanted work involved in that case. See 315 U. S., at 539.

solely because they would have operated to continue the effect of the *Local 807* case.[18] Their rejection thus proves nothing more than that Congress was intent on undoing the restrictive impact of that case.

III

In the nearly three decades that have passed since the enactment of the Hobbs Act, no reported case has upheld the theory that the Act proscribes the use of force to achieve legitimate collective-bargaining demands.

The only previous case in this Court relevant to the issue, *United States* v. *Green*, 350 U. S. 415, held no more than that the Hobbs Act had accomplished its objective of overruling the *Local 807* case. The alleged extortions in that case, as in *Local 807*, consisted of attempts to obtain so-called wages for "imposed, unwanted, superfluous and fictitious services of laborers . . . ." *Id.*, at 417. The indictment charged that the employer's consent was obtained "by the wrongful use, to wit, the use for the purposes aforesaid, of actual and threatened force, violence and fear . . . ." *Ibid.* The Government thus did not rely, as it does in the present case, solely on the use of force in an employer-employee relationship; it alleged a wrongful purpose—to obtain money from the employer that the union officials had no legitimate right to demand. We concluded that the Hobbs Act could reach extortion in an employer-employee relationship and that personal profit to the extortionist was not required, but our holding was carefully limited to the charges in that case: "We rule only on the allegations of the indictment and hold that the acts charged against appellees fall within the terms of the Act." *Id.*, at 421.

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[18] See 91 Cong. Rec. 11914 (remarks of Rep. Hobbs); *ibid.* (remarks of Rep. Walter); *id.*, at 11920 (remarks of Rep. Gwynne).

A prior decision in the Third Circuit, *United States* v. *Kemble,* 198 F. 2d 889, on which the Government relied in *Green,* also concerned the exaction, by threats and violence, of wages for superfluous services. In affirming a conviction under the Hobbs Act of a union business agent for using actual and threatened violence against an out-of-town driver in an attempt to force him to hire a local union member, the Court of Appeals carefully limited its holding:

> "We need not consider the normal demand for wages as compensation for services desired by or valuable to the employer. It is enough for this case, and all we decide, that payment of money for imposed, unwanted and superfluous services . . . is within the language and intendment of the statute." *Id.,* at 892.

Most recently, in *United States* v. *Caldes,* 457 F. 2d 74, the Court of Appeals for the Ninth Circuit was squarely presented with the question at issue in this case. Two union officials were convicted of Hobbs Act violations in that they damaged property of a company with which they were negotiating for a collective-bargaining agreement, in an attempt to pressure the company into agreeing to the union contract. Concluding that the Act was not intended to reach militant activity in the pursuit of legitimate unions ends, the court reversed the convictions and ordered the indictment dismissed.

Indeed, not until the indictments were returned in 1970 in this and several other cases has the Government even sought to prosecute under the Hobbs Act actual or threatened violence employed to secure a union contract "calling for higher wages and other monetary benefits." [19]

[19] As noted above, the indictment in *United States* v. *Caldes,* 457 F. 2d 74, was ordered to be dismissed by the Ninth Circuit. Two

Yet, throughout this period, the Nation has witnessed countless economic strikes, often unfortunately punctuated by violence. It is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved. See *United States* v. *Laub,* 385 U. S. 475, 485.

IV

The Government's broad concept of extortion—the "wrongful" use of force to obtain even the legitimate union demands of higher wages—is not easily restricted. It would cover all overtly coercive conduct in the course of an economic strike, obstructing, delaying, or affecting commerce. The worker who threw a punch on a picket line, or the striker who deflated the tires on his employer's truck would be subject to a Hobbs Act prosecution and the possibility of 20 years' imprisonment and a $10,000 fine.[20]

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similar indictments returned in the Southern District of Florida were dismissed by the District Court without opinion in June 1970. *United States* v. *Rutcofsky,* No. 70–101–CR–JE, June 24, 1970; *United States* v. *Schiffman,* No. 70–102–CR–JE, June 25, 1970. An additional indictment, based on a similar theory of the Hobbs Act, was filed in the Eastern District of New York on January 12, 1972, and is currently pending. *United States* v. *Spero,* No. 72–CR–17.

The briefs in the present case advise us of one other Hobbs Act prosecution that may have been brought under this theory—a 1962 indictment in *United States* v. *Webb,* ND Ala., No. 15080.

[20] Realizing the breadth of its argument, the Government's brief concedes that there might be an exception for "the incidental injury to person or property that not infrequently occurs as a consequence of the charged atmosphere attending a prolonged labor dispute . . . ." But nothing, either in the language or the history of the Act, justifies any such exception.

Similarly, there is nothing to support the dissent's exception for

Even if the language and history of the Act were less clear than we have found them to be, the Act could not properly be expanded as the Government suggests—for two related reasons. First, this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity. *United States* v. *Wiltberger,* 5 Wheat. 76, 95; *United States* v. *Halseth,* 342 U. S. 277, 280; *Bell* v. *United States,* 349 U. S. 81, 83; *Arroyo* v. *United States,* 359 U. S. 419, 424; *Rewis* v. *United States,* 401 U. S. 808, 812. Secondly, it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States. See *San Diego Bldg. Trades Council* v. *Garmon,* 359 U. S. 236, 247–248; *United Constr. Workers* v. *Laburnum Constr. Corp.,* 347 U. S. 656, 665; *Garner* v. *Teamsters Local 776,* 346 U. S. 485, 488; *UAW Local 232* v. *Wisconsin Employment Relations Bd.,* 336 U. S. 245, 253.

As we said last Term:

> "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive

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"mischievous" conduct, *post,* at 418 n. 17, even if we could begin to define the meaning and limits of such a term.

relation between federal and state criminal jurisdiction." *United States* v. *Bass,* 404 U. S. 336, 349 (footnotes omitted).

The District Court was correct in dismissing the indictment. Its judgment is affirmed.

It is so ordered.

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion. I readily concede that my visceral reaction to immaturely conceived acts of violence of the kind charged in this indictment is that such acts deserve to be dignified as federal crimes. That reaction on my part, however, is legislative in nature rather than judicial. If Congress wishes acts of that kind to be encompassed by a federal statute, it has the constitutional power in the interstate context to effect that result. The appellees so concede. Tr. of Oral Arg. 18–19. But MR. JUSTICE STEWART has gathered the pertinent and persuasive legislative history demonstrating that Congress did not intend to exercise its power to reach these acts of violence.

The Government's posture, with its concession that certain strike violence (which it would downgrade as "incidental" and the dissent as "low level," *post,* at 418 n. 17), although aimed at achieving a legitimate end, is not covered by the Act, necessarily means that the legislation would be enforced selectively or, at the least, would embroil all concerned with drawing the distinction between major and minor violence. That, for me, is neither an appealing prospect nor solid support for the position taken.

This type of violence, as the Court points out, is subject to state criminal prosecution. That is where it must remain until the Congress acts otherwise in a manner far more clear than the language of the Hobbs Act.

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

The Court today achieves by interpretation what those who were opposed to the Hobbs Act were unable to get Congress to do. The Court considers primarily the legislative history of a predecessor bill considered by the 78th Congress. The bill before us was considered and enacted by the 79th Congress; and, as I read the debates, the opposition lost in the 79th Congress what they win today. All of which makes pertinent Mr. Justice Holmes' admonition in *Missouri, K. & T. R. Co.* v. *May,* 194 U. S. 267, 270, that "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

In *United States* v. *Local 807,* 315 U. S. 521, we had before us the Anti-Racketeering Act of 1934, 48 Stat. 979, which made it a crime to use violence respecting interstate trade or commerce to obtain the "payment of money or other valuable considerations," excluding "the payment of wages by a bona-fide employer to a bona-fide employee." We held that the exception included demands for unwanted or superfluous services and covered those who wanted jobs, not only those who presently had them.

Congress in the Hobbs Act changed the law. The critical change was the exclusion of the employer-employee clause. The Court said in *United States* v. *Green,* 350 U. S. 415, 419: "In the Hobbs Act, 60 Stat. 420, carried forward as 18 U. S. C. § 1951, which amended the Anti-Racketeering Act, the exclusion clause involved in the *Local 807* decision was dropped. The legislative history makes clear that the new Act was meant to eliminate any grounds for future judicial conclusions that

Congress did not intend to cover the employer-employee relationship. The words were defined to avoid any misunderstanding."

In *Green,* the Court held that it was an extortion within the meaning of the Act to use force to obtain payment of wages for unwanted and superfluous services. *Id.,* at 417.

Here, the services were not unwanted or superfluous; they were services being negotiated under a collective-bargaining agreement.

The Court relies mostly on the legislative history of a measure covering the same topic which was passed by the previous House but on which the Senate did not act. Two years later, the bill in its present form was enacted. It was a differently constituted House that debated it and the year was 1945 rather than 1943. So the most relevant legislative history, in my view, concerns the 79th Congress, not the 78th.

The fear was expressed in the House that the elimination of the Exception Clause would open up the prospect of labor's being prosecuted.[1] As a consequence, Congressman Celler sought to amend the measure so as to exempt the use of violence to exact "wages paid by a bona fide employer to a bona fide employee." [2] His precise amendment in that regard would define "property" in the Act as not including "wages paid by a bona fide employer to a bona fide employee." [3] Those who objected said that it would substantially restore the 1934 Act.[4]

Congressman Biemiller, in speaking for the Celler Amendment said:

"We fear, for example, under the bill as it now

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[1] 91 Cong. Rec. 11914 (remarks of Rep. Marcantonio).

[2] *Id.,* at 11913.

[3] *Ibid.*

[4] *Id.,* at 11914; 11914–11915; 11918.

> stands, that a simple, unfortunate altercation on a picket line—and we all know that human beings are frail and when tempers are hot some trouble may develop—under such a situation you may send a man to jail for 20 years or fine him $10,000." [5]

The Celler Amendment was rejected.[6]

As I read the Congressional Record, Congressman Baldwin spoke for the consensus when he said:

> "This bill would not have been presented to the House if organized labor had recognized law and order in striking and in establishing their rights, as they have a right to do. Everyone can remember the taxicab strike in the city of Baltimore, which does not pertain to this bill, where cabs were overthrown, bricks thrown through the windows endangering the lives of people, innocent victims. Those were the tactics of organized labor which you people support outright and which organized labor sanctioned. The leaders were locked up and put in jail for participating in those activities. Yet you stand here on the floor of this House and say they did not do it or they did not know anything about it.
>
> "Mr. Chairman, labor has a right to strike, but when labor perpetrates that sort of thing, they are going far beyond the bounds of reason. Certainly, I do not take the position that labor has not the right to organize or to strike, but when they do so they should abide by the laws of the land and the laws of decency. If they had done that, we would not have this legislation before the House today." [7]

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[5] *Id.*, at 11916.

[6] *Id.*, at 11917.

[7] *Id.*, at 11918.

Congressman Whittington voiced the same sentiments:

> "The pending bill will provide for punishing racketeers who rob or extort. There is no justification for labor unions opposing the bill as it constitutes no invasion of the legitimate rights of labor. Robbery and extortion by members of labor unions must be punished. Labor unions owe that much to the public. In demanding the protection of laws, labor unions should urge that those engaged in legitimate interstate commerce be protected from robbery and extortion." [8]

Congressman Celler offered another amendment which would give as a defense to a charge under the Hobbs Act that the employee "did not violate the provisions of the Norris-LaGuardia Act, the Clayton Act, or the Railway Labor Act, or the National Labor Relations Act." [9] But that amendment was also voted down; [10] the only provision of the Hobbs Act which touched on that problem was 18 U. S. C. § 1951 (c), which stated that this section "shall not be construed to repeal, modify or affect" those laws. References were made in the House debates to the trucking problem in New York, where farmers bringing their produce to market in trucks were held up and money was extorted "from the drivers in order that the shipments might enter the Holland Tunnel and be delivered to their respective destinations in New York." [11]

Congressman LaFollette offered an amendment which would keep the 1934 Act intact but would bar the use of violence by a person not a bona fide employee to obtain

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[8] *Id.*, at 11913.

[9] *Id.*, at 11919.

[10] *Ibid.*

[11] *Id.*, at 11917.

property from a bona fide employer.[12] That, too, was defeated.[13]

In the present case, violence was used during the bargaining—five acts of violence involving the shooting and sabotage of the employer's transformers and the blowing up of a company transformer substation. The violence was used to obtain higher wages and other benefits for union members. The acts literally fit the definition of extortion used in the Hobbs Act, 18 U. S. C. § 1951. The term "extortion" means the use of violence to obtain "property" from another. § 1951 (b)(2). The crime is the use of "extortion" in furtherance of a plan to do anything in violation of the section. § 1951 (a). The prior exception covering those who seek "the payment of wages by a bona-fide employer to a bona-fide employee" was taken out of the Act by Congress. Hence, the use of violence to obtain higher wages is plainly a method of obtaining "property from another" within the meaning of § 1951 (b)(2).

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[12] *Id.*, at 11919. The proposed amendment read as follows:

"(a) The term 'the payment of wages by a bona fide employer to a bona fide employee' shall not be construed so as to include the payment of money or the transfer of a thing of value by a person to another when the latter shall use or attempt to use or threaten to use force or violence against the body or to the physical property (as distinguished from intangible property) of the former or against the body of anyone having the possession, custody, or control of the physical property of the former, in attempting to obtain or obtaining such payment or transfer.

"(b) The term 'the rights of a bona fide labor organization in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States' shall not be construed so as to ignore, void, set aside, or nullify the definitions set out or the words used in or the plain meaning of subsection (a) hereof."

[13] *Id.*, at 11922.

Seeking higher wages is certainly not unlawful. But using violence to obtain them seems plainly within the scope of "extortion" as used in the Act, just as is the use of violence to exact payment for no work or the use of violence to get a sham substitution for no work. The regime of violence, whatever its precise objective, is a common device of extortion and is condemned by the Act.

Congressman Lemke said in the House debates on the Hobbs Act, which he opposed, "The minority is generally right." [14]

Whatever may be thought of the policy which the Court today embroiders into the Act, it was the minority view in the House and clearly did not represent the consensus of the House. No light is thrown on the matter by the Senate, for it summarily approved the House version of the bill.[15]

It is easy in these insulated chambers to put an attractive gloss on an Act of Congress if five votes can be obtained. At times, the legislative history of a measure is so clouded or obscure that we must perforce give some meaning to vague words.[16] But where, as here, the consensus of the House is so clear, we should carry out its purpose no matter how distasteful or undesirable that policy may be to us,[17] unless of course the Act oversteps

[14] *Ibid.*

[15] 92 Cong. Rec. 7308.

[16] See, *e. g.*, *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 615–616, for the use by Congress of the rather opaque phrase "area of production."

[17] The fear was expressed in the House debates by opponents of the measure that a fistfight on a picket line during a strike could bring down on the offender a $10,000 fine and 20 years in jail or both. See 91 Cong. Rec. 11916; *supra*, at 414–415. And the Government actually argued in one case, *United States* v. *Caldes*, 457 F. 2d 74, 78, that a union and its members were guilty of extortion if they used the coercion of a strike to obtain economic benefits from the employer. That, however, is nonsense, as the court in *Caldes*

constitutional boundaries. But none has been so hardy as even to suggest that.

While we said in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 522, that it is "retrospective expansion of meaning which properly deserves the stigma of judicial legislation," the same is true of retrospective contraction of meaning.

I would reverse.

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ruled, *id.,* at 79, for the Hobbs Act specifically does not touch collective bargaining of which the strike is a component part. 18 U. S. C. § 1951 (c). Moreover, the court in *Caldes* held that "mischievous" conduct during a strike and actions which are "the by-product of frustration engendered by a prolonged, bona fide collective bargaining negotiation," *id.,* at 78, are often only low-level acts of violence that may be unfair labor practices or, at best, subject to state, not federal, prosecution. That is my view.

MICHIGAN *v.* OHIO

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT

No. 30, Orig. Argued December 11, 1972—
Decided and Decree entered February 22, 1973

The Special Master's recommendations fixing that portion of the Ohio-Michigan boundary running through Lake Erie adopted and decree issued.

Charles F. Keeley, Assistant Attorney General of Michigan, argued the cause for plaintiff on exceptions to the Report of the Special Master. With him on the brief were *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Jerome Maslowski,* Assistant Attorney General.

Charles S. Rawlings, Assistant Attorney General of Ohio, argued the cause for defendant in answer to exceptions to the Report of the Special Master. With him on the brief was *William J. Brown,* Attorney General.

PER CURIAM and DECREE.

Upon consideration of the Report filed Nov. 9, 1971, by Senior Judge Albert B. Maris, Special Master, exceptions filed thereto, and argument thereon, it is now ordered, adjudged, and decreed as follows:

1. The exceptions filed by the State of Michigan to the report and recommendations of the Special Master are overruled.

2. The boundary line between the States of Ohio and Michigan in Lake Erie follows a line drawn from the point in Maumee Bay where the north cape of that bay was located in 1836 on a course having a bearing North 45° East measured from a true meridian, passing over the center of the existing circular concrete seawall on Turtle Island and continuing on the same course through the

lake to the point where it intersects the boundary line between the United States and Canada.

3. In 1836 the north cape of Maumee Bay was located at the point in that bay where a line drawn North 87° 49′ 44″ East from Post 71 on the land boundary line between the States of Ohio and Michigan intersects a line drawn South 45° West from the center of the existing circular concrete seawall on Turtle Island, both bearings being measured from a true meridian.

4. The costs of this suit, including the expenses of the Special Master, shall be borne by the State of Michigan.

MORRIS *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

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

No. 71–6698. Argued January 17, 1973—
Decided February 22, 1973

455 F. 2d 775, certiorari dismissed as improvidently granted.

E. R. McClelland argued the cause and filed a brief for petitioner.

Walter H. Fleischer argued the cause for respondent. On the brief were *Solicitor General Griswold, Assistant Attorney General Wood, Mark L. Evans, Kathryn H. Baldwin,* and *Michael Kimmel.*

PER CURIAM.

Twenty days after this Court granted a writ of certiorari, 409 U. S. 841, Congress amended the relevant statutory provisions, § 202 (d)(8) of the Social Security Act, 42 U. S. C. § 402 (d)(8). See § 111 (a), Social Security Amendments of 1972 (Oct. 30, 1972), Pub. L. 92–603, 86 Stat. 1329. The writ of certiorari heretofore granted is dismissed as improvidently granted.

MR. JUSTICE DOUGLAS, dissenting.

In this case, petitioner was denied social security benefits for his dependent adopted daughter because her court-approved adoption was not supervised by a child-placement agency. As noted by the Court, the section which barred his claim at the time that it was filed has now been repealed.[1] What the Court does not deal with,

[1] Social Security Amendment of 1972, Pub. L. 92–603, 86 Stat. 1329, § 111.

however, is the patchwork nature of the relief that Congress has provided.

Section 111 (b) of the new Act [2] specifies the dates and circumstances to which § 111 (a) [3] applies. As I read § 111 (b), should petitioner qualify for increased benefits under § 111 (a)'s new standards, he could now secure retroactive application of the revised Act to cover the entire period at issue in this case. It is true that § 111 (a) no longer requires that court-authorized adoptions be supervised by a child-placement agency. Petitioner's lot is not, however, bettered since § 111 (a) now imposes a new requirement which petitioner cannot meet: that benefits may be paid to an adopted child only

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[2] "The amendment made by subsection (a) shall apply with respect to monthly benefits payable under title II of the Social Security Act for months after December 1967 on the basis of an application filed in or after the month in which this Act is enacted; except that such amendments shall not apply with respect to benefits for any month before the month in which this Act is enacted unless such application is filed before the close of the sixth month after the month in which this Act is enacted."

[3] The relevant portion of that section reads:

"(8) In the case of—

"(A) . . . .

"(B) an individual entitled to disability insurance benefits . . . . a child of such individual adopted after such individual became entitled to such . . . benefits shall be deemed not to meet the requirements of clause (i) . . . of paragraph (1)(C) unless such child—

"(C) . . . .

"(D)(i) was legally adopted by such individual in an adoption decreed by a court of competent jurisdiction within the United States,

"(ii) was living with such individual in the United States and receiving at least one-half of his support from such individual . . . for the year immediately before . . . the month in which such individual became entitled to disability insurance benefits, and

"(iii) had not attained the age of 18 before he began living with such individual."

if the child was living with the beneficiary "for the year immediately before the month in which began the period of [compensable] disability . . . ." § 111 (a)(8)(D)(ii)(II). Petitioner began receiving disability insurance benefits in July 1957. His adopted daughter was not born until 1965, however, and petitioner will accordingly not benefit under the terms of § 111 (a).

Section 111 (b) does not alter 42 U. S. C. § 402 (d)(8) as to the applications filed *before* October 1972 for benefits accruing before October 30, 1972. Such an application is before us in this case. Petitioner is therefore entitled to benefits under the former statute, if there is merit to his claim that the old § 402 (d)(8) distinctions among types of adoption supervision are constitutionally infirm.

Because the new Act does not provide coverage for petitioner's child but the old Act remains applicable to the claim before us, I would reach the merits.

Per Curiam

DEPARTMENT OF MOTOR VEHICLES OF CALIFORNIA *v.* RIOS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 72–686. Decided February 26, 1973

Since it is not clear whether the California Supreme Court judgment reversing the lower court is based on federal or state constitutional grounds, or both, and therefore whether this Court has jurisdiction on review, that judgment is vacated and the case remanded.

Certiorari granted; 7 Cal. 3d 792, 499 P. 2d 979, vacated and remanded.

PER CURIAM.

Petitioner, a California motorist, was involved in an automobile collision on March 18, 1971. Both drivers filed accident reports with the California Department of Motor Vehicles as required by the California Financial Responsibility Laws. Without affording petitioner a hearing on the question of potential liability, and based solely on the contents of the accident reports, the Department found that there was a reasonable possibility that a judgment might be recovered against petitioner as a result of the accident. Since petitioner was uninsured and could not deposit security, his license was suspended. The Supreme Court of California reversed, holding that prior to suspension "a hearing is required and that at such a hearing the licensee is entitled to review the reports or other evidence upon which the department contemplates determining that he is possibly responsible for the accident, and to present reports or testimony to establish his claim of nonculpability, all within reasonable due process procedures which the department may employ." *Rios* v. *Cozens,* 7 Cal. 3d 792, 799, 499 P. 2d 979, 984 (1972).

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We are unable to determine, however, whether the California Supreme Court based its holding upon the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, or upon the equivalent provision of the California Constitution, or both. In reaching its result in this case, the California court relied primarily upon this Court's decisions in *Bell* v. *Burson,* 402 U. S. 535 (1971), and *Jennings* v. *Mahoney,* 404 U. S. 25 (1971), but also cited its own decisions in *Randone* v. *Appellate Department,* 5 Cal. 3d 536, 488 P. 2d 13 (1971); *Blair* v. *Pitchess,* 5 Cal. 3d 258, 486 P. 2d 1242 (1971); *McCallop* v. *Carberry,* 1 Cal. 3d 903, 464 P. 2d 122 (1970), and *Cline* v. *Credit Bureau of Santa Clara Valley,* 1 Cal. 3d 908, 464 P. 2d 125 (1970), which apparently were premised upon both the state and federal provisions. In addition, the court in *Rios* specifically overruled its own prior decisions in *Orr* v. *Superior Court,* 71 Cal. 2d 220, 454 P. 2d 712 (1969), and *Escobedo* v. *State of California,* 35 Cal. 2d 870, 222 P. 2d 1 (1950), which had upheld the procedures here under attack under both the state and federal provisions. Thus, as in *Mental Hygiene Dept.* v. *Kirchner,* 380 U. S. 194, 196–197 (1965), "[w]hile we might speculate from the choice of words used in the opinion, and the authorities cited by the court, which provision was the basis for the judgment of the state court, we are unable to say with any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent nonfederal ground." We therefore grant the State of California's petition for certiorari, vacate the judgment of the Supreme Court of California, and remand the cause to that court for such further proceedings as may be appropriate. *California* v. *Krivda,* 409 U. S. 33 (1972); *Mental Hygiene Dept.* v. *Kirchner, supra; Minnesota* v. *National Tea Co.,* 309

U. S. 551 (1940); *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511 (1939).

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL concur, dissenting.

The Court is quite correct in saying that we have vacated and remanded cases from state courts which we took by way of appeal or certiorari, when we were uncertain whether the judgment rested on state or federal grounds. But *Minnesota* v. *National Tea Co.,* 309 U. S. 551, shows how unhappy that practice is.[1] Yet, even assuming it is the proper procedure, we should not use it to determine whether we should take a case. No case from a state court can properly reach here until and unless a federal question is presented. Our Rule 19 (1)(a) states as a standard for granting certiorari from a state court the following:

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The Court in *Commercial Bank* v. *Buckingham's Executors,* 5 How. 317, 341, said that it was not enough

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[1] On remand the Supreme Court of Minnesota said:

"If we were in error, then assuredly the opportunity to be set aright should be cheerfully and thankfully accepted. Having so reëxamined them, we conclude that our prior decision was right. There is no need of further discussion of the problems presented for the former opinion adequately covers the ground. We think that the section of the statute here involved (L. 1933, c. 213, § 2 [b], 3 Mason Minn. St. 1936 Supp. § 5887–2 [b]), is violative of the uniformity clause of our own constitution." *National Tea Co.* v. *State,* 208 Minn. 607, 608, 294 N. W. 230, 231.

that a federal question had been presented to the state court but that "it must appear, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment." In *Brown* v. *Atwell,* 92 U. S. 327, 329, the Court ruled that it must appear that the decision of a federal question "was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

We have at times vacated and remanded prior to our decision to take or deny or to note or dismiss a case, so that the record can be clarified. See *Honeyman* v. *Hanan,* 300 U. S. 14, 25–26.

But we know in this case that a federal question was presented and ruled upon. We know that a state question was also presented and ruled upon. Where arguably "the judgment of the state court rests on two grounds, one involving a federal question and the other not," *Lynch* v. *New York,* 293 U. S. 52, 54, we do not take the case.

The ruling of the Supreme Court of California in the present case involving the revocation of a driver's license without a hearing, was as follows:

> "Petitioner relies on numerous recent cases in which the United States Supreme Court and this court have recognized that an individual is constitutionally entitled to a hearing prior to being deprived of a significant interest. (*Goldberg* v. *Kelly* (1970) 397 U. S. 254, 266; *Sniadach* v. *Family Finance Corp.* (1969) 395 U. S. 337, 342; *Randone* v. *Appellate Department* (1971) 5 Cal. 3d 536, 547.) This principle is applicable to a plethora of vital personal and property rights (see *Randone* v. *Appellate Department, supra,* 5 Cal. 3d 536, 548, fn. 8), but it has most frequently been applied in this state to in-

validate statutes affording a creditor prejudgment remedies against a debtor without prior notice or hearing (see e. g., *Blair* v. *Pitchess* (1971) 5 Cal. 3d 258; *McCallop* v. *Carberry* (1970) 1 Cal. 3d 903; *Cline* v. *Credit Bureau of Santa Clara Valley* (1970) 1 Cal. 3d 908).

"The rule explicated in foregoing cases is applicable to the instant circumstances." 7 Cal. 3d 792, 795, 499 P. 2d 979, 981.

It seems plain that the California Supreme Court decision rested on both federal and state grounds and therefore that the requisite showing of the presence of a controlling federal question which has been on the books since the first Judiciary Act, 1 Stat. 73, 85, has not been made.[2]

The opinion of the Supreme Court of California written by Justice Mosk was agreed to by all. It makes clear that both state and federal grounds were the basis of the judgment. The International Court of Justice that has only a case or two a Term might be tempted to seek a larger docket. Ours is already large; and it hardly comports with the messages of distress which have emanated from here for us to seek to gather in more cases that from the beginning have been sparsely and discretely selected

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[2] Title 28 U. S. C. § 1257 presently provides as to certiorari:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . . . .

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

from the state domain. *Cohens* v. *Virginia,* 6 Wheat. 264, raised a storm of protest against federal intrusion on state rights that has not yet subsided. *Minnesota* v. *National Tea Co., supra,* taught me that it is wise to insist that cases taken from a state court be clearly decided on a federal ground and not, as here, on both state and federal grounds, save where the state and federal questions are so intertwined as to make the state ground not an independent matter. See *Enterprise Irrigation District* v. *Canal Co.,* 243 U. S. 157, 163–165.

I would deny this petition for certiorari.

Syllabus

TILLMAN ET AL. *v.* WHEATON-HAVEN RECREATION ASSN., INC., ET AL.

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

No. 71–1136. Argued November 15, 1972—
Decided February 27, 1973

Respondent association (Wheaton-Haven) operates a community swimming pool, use of which is limited to white members and their white guests. Under Wheaton-Haven's bylaws, a person residing within a geographic preference area, unlike one living outside that area, needs no endorsement for membership from a current member; receives priority (if the membership is full) over all but those who have first options; and (if an owner-member selling his house) can confer a first option for membership on his vendee. Petitioners—the Presses, a Negro couple who bought a home in the preference area from a nonmember, and were denied membership for racial reasons; a white couple, members of Wheaton-Haven, whose Negro guest was refused admission to the pool for racial reasons; and the guest—brought suit for declaratory and injunctive relief under the Civil Rights Acts of 1866, 1870, and 1964, 42 U. S. C. §§ 1982, 1981, and 2000a *et seq.* The District Court granted respondents' motion for summary judgment. The Court of Appeals affirmed, holding that, because Wheaton-Haven membership rights could not be leased or transferred, the case was distinguishable from *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, making § 1982 unavailable to the Presses, and agreeing with the District Court that Wheaton-Haven was a private club within the meaning of 42 U. S. C. § 2000a (e), and therefore implied an exception to § 1982. *Held:*

1. Respondents' racially discriminatory membership policy violates 42 U. S. C. § 1982. The preferences for membership in Wheaton-Haven gave valuable property rights to white residents in the preference area that were not available to the Presses, and this case is therefore not significantly distinguishable from *Sullivan, supra.* Pp. 435–437.

2. Wheaton-Haven is not a private club within the meaning of § 2000a (e), since membership, until the association reaches its full complement, "is open to every white person within the geographic area, there being no selective element other than

race," *Sullivan, supra,* at 236. Wheaton-Haven is thus not even arguably exempt by virtue of § 2000a (e) from § 1982 or § 1981. Pp. 438–440.

451 F. 2d 1211, reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Allison W. Brown, Jr., argued the cause for petitioners. With him on the briefs were *Raymond W. Russell, Samuel A. Chaitovitz, Melvin L. Wulf,* and *Sanford Jay Rosen.*

Henry J. Noyes argued the cause and filed a brief for respondents Wheaton-Haven Recreation Assn., Inc., et al. *John H. Mudd* argued the cause for respondent *E. Richard McIntyre.* With him on the brief was *H. Thomas Howell.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Wheaton-Haven Recreation Association, Inc., a nonprofit Maryland corporation, was organized in 1958 for the purpose of operating a swimming pool. After a membership drive to raise funds, the Association obtained zoning as a "community pool" and constructed its facility near Silver Spring, Maryland. The Association is essentially a single-function recreational club, furnishing only swimming and related amenities.[1]

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Griswold, Assistant Attorney General Norman, Deputy Solicitor General Wallace, William Bradford Reynolds,* and *John C. Hoyle* for the United States; by *Alfred H. Carter* for Montgomery County, Maryland; and by *Philip J. Tierney* and *George D. Solter* for the Maryland Commission on Human Relations.

[1] Candy, ice cream, and soft drinks have been sold on the premises, but these were merely incidentals for the convenience of swimmers during the season. Aside from meetings of the board of directors and of the general membership, the premises apparently have been utilized only for pool-related activities.

Membership is by family units, rather than individuals, and is limited to 325 families.[2] This limit has been reached on at least one occasion. Membership is largely keyed to the geographical area within a three-quarter-mile radius of the pool.[3] A resident (whether or not a homeowner) of that area requires no recommendation before he may apply for membership; the resident receives a preferential place on the waiting list if he applies when the membership is full; and the resident-member who is a homeowner and who sells his home and turns in his membership, confers on the purchaser of his property a first option on the vacancy created by his removal and resignation. A person residing outside the three-quarter-mile area may apply for membership only upon the recommendation of a member; he receives no preferential place on the waiting list if the membership is full; and if he becomes a member, he has no way of conferring an option upon the purchaser of his property. Beyond-the-area members may not exceed 30% of the total. Majority approval of those present at a meeting of the board of directors or of the general membership is required before an applicant is admitted as a member.

Only members and their guests are admitted to the pool. No one else may gain admission merely by payment of an entrance fee.

In the spring of 1968 petitioner, Harry C. Press, a Negro who had purchased from a nonmember a home within the geographical preference area, inquired about

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[2] Wheaton-Haven presently charges an initiation fee of $375 and annual dues ranging from $50 to $60, depending on the number of persons in the family unit.

[3] The Association's bylaws provide that "[m]embership shall be open to bona fide residents (whether or not home owners) of the area within a three-quarter mile radius of the pool," and "may be extended" to others "who shall have been recommended . . . by a member."

membership in Wheaton-Haven. At that time the Association had no Negro member. In November 1968 the general membership rejected a resolution that would have opened the way for Negro members. Dr. Press was never given an application form, and respondents concede that he was discouraged from applying because of his race.

In July 1968 petitioners Murray and Rosalind N. Tillman, who were husband and wife and members in good standing, brought petitioner Grace Rosner, a Negro, to the pool as their guest. Although Mrs. Rosner was admitted on that occasion, the guest policy was changed by the board of directors, at a special meeting the following day, to limit guests to relatives of members. Respondents concede that one reason for the adoption of this policy was to prevent members from having Negroes as guests at the pool. Under this new policy Mrs. Rosner thereafter was refused admission when the Tillmans sought to have her as their guest. In the fall of 1968 the membership, by resolution, reaffirmed the policy.

In October 1969 petitioners (Mr. and Mrs. Tillman, Dr. and Mrs. Press, and Mrs. Rosner) instituted this civil action against the Association and individuals who were its officers or directors, seeking damages and declaratory and injunctive relief, particularly under the Civil Rights Act of 1866, now 42 U. S. C. § 1982,[4] the Civil Rights Act of 1870, now 42 U. S. C. § 1981, and Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U. S. C. § 2000a, *et seq.* The District Court, in an unreported opinion, held that Wheaton-Haven was a private club and exempt from the nondiscrimination provisions of the statutes. It granted summary judgment for defendants. The

[4] "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U. S. C. § 1982.

Court of Appeals affirmed, one judge dissenting. 451 F. 2d 1211 (CA4 1971). It later denied rehearing *en banc* over two dissents, *id.*, at 1225. We granted certiorari, 406 U. S. 916 (1972), to review the case in the light of *Sullivan* v. *Little Hunting Park,* 396 U. S. 229 (1969).

I

In *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409 (1968), this Court, after a detailed review of the legislative history of 42 U. S. C. § 1982, *id.,* at 422–437, held that the statute reaches beyond state action and is not confined to officially sanctioned segregation. The Court subsequently applied § 1982 in *Sullivan* to private racial discrimination practiced by a nonstock corporation organized to operate a community park and playground facilities, including a swimming pool, for residents of a designated area. The Presses contend that their § 1982 claim is controlled by *Sullivan.* We agree.

A. The Court of Appeals held that § 1982 would not apply to the Presses because membership rights in Wheaton-Haven could neither be leased nor transferred incident to the acquisition of property. 451 F. 2d, at 1216–1217. In *Sullivan,* the Court concluded that the right to enjoy a membership share in the corporation, assigned by a property owner as part of a leasehold he was granting, constituted a right "to . . . lease . . . property" protected by § 1982. 396 U. S., at 236–237. The Court of Appeals distinguished property-linked membership shares in *Sullivan* from property-linked membership preferences in Wheaton-Haven by emphasizing the speculative nature of the benefits available to residents of the area around Wheaton-Haven. We conclude that the Court of Appeals erroneously characterized the property-linked preferences conferred by Wheaton-Haven's bylaws.

Under the bylaws, a resident of the area within three-quarters of a mile from the pool receives the three preferences noted above: he is allowed to apply for membership without seeking a recommendation from a current member; he receives preference over others, except those with first options, when applying for a membership vacancy; and, if he is an owner-member, he is able to pass to his successor-in-title a first option to acquire the membership Wheaton-Haven purchases from him.[5] If the membership is full, the preference-area resident is placed on the waiting list; other applicants, however, are required to reapply after those on the waiting list obtain memberships.

The Court of Appeals concluded, incorrectly it later appeared, that the membership had never been full,[6] and that the option possibility, therefore, was "far too tenuous a thread to support a conclusion that there is a transfer of membership incident to the purchase of property." 451 F. 2d, at 1217. Since the Presses had not purchased their area home from a member, the court found no transaction by which the Presses could have acquired a membership preference. 451 F. 2d, at 1217–1218, n. 14.

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[5] Under the Wheaton-Haven system, a within-the-area member selling his home may either retain his membership or seek to sell it back to the Association. If Wheaton-Haven is willing to purchase, it pays 80% of the initial cost if the membership is not full, and 90% if the membership is full. The purchaser of the member's home then has a first option on the membership so released by the seller. The practical effect of this system is to prefer applicants who purchase from members over other applicants, particularly at a time when the membership is full.

[6] In the court's *per curiam* statement responsive to the petition for rehearing, it described its earlier observation that the membership list had never been full as an "inadvertent misstatement . . . now corrected to reflect a full membership list in the spring of 1968." 451 F. 2d 1211, 1225.

We differ from the Court of Appeals in our evaluation of the three rights obtained. The record indicates that the membership was full in the spring of 1968 but dropped, perhaps not unexpectedly in view of the season, in the fall of that year. We cannot be certain, either, that the membership would not have remained full in the absence of racial discrimination,[7] or that the membership will never be full in the future. As was observed in dissent in the Court of Appeals:

> "Several years from now it may well be that a white neighbor can sell his home at a considerably higher price than Dr. and Mrs. Press because the white owner will be able to assure his purchaser of an option for membership in Wheaton-Haven. Dr. and Mrs. Press, however, are denied this advantage." 451 F. 2d, at 1223.

Similarly, the automatic waiting-list preference given to residents of the favored area may have affected the price paid by the Presses when they bought their home. Thus, the purchase price to them, like the rental paid by Freeman in *Sullivan,* may well reflect benefits dependent on residency in the preference area. For them, however, the right to acquire a home in the area is abridged and diluted.

When an organization links membership benefits to residency in a narrow geographical area, that decision infuses those benefits into the bundle of rights for which an individual pays when buying or leasing within the area. The mandate of 42 U. S. C. § 1982 then operates to guarantee a nonwhite resident, who purchases, leases, or holds this property, the same rights as are enjoyed by a white resident.

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[7] The record reveals that a number of members withdrew when the present suit was filed. Tr. of Oral Arg. in District Court 15.

B. Respondents contend that even if 42 U. S. C. § 1982 applies, Wheaton-Haven nevertheless is exempt as a private club under § 201 (e) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a (e),[8] with a consequent implied narrowing effect upon the range and application of the older § 1982. In *Sullivan* we found it unnecessary to consider limits on § 1982 as applied to a truly private association because we found "no plan or purpose of exclusiveness" in Little Hunting Park. 396 U. S., at 236. But here, as there, membership "is open to every white person within the geographic area, there being no selective element other than race." *Ibid.* The only restrictions are the stated maximum number of memberships and, as in *Sullivan, id.*, at 234, the requirement of formal board or membership approval. The structure and practices of Wheaton-Haven thus are indistinguishable from those of Little Hunting Park.[9] We hold, as a consequence, that Wheaton-Haven is not a private club and that it is not necessary in this case to consider the issue of any implied limitation on the

[8] "The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section." 42 U. S. C. § 2000a (e).

[9] Apparently one applicant was formally rejected during the preceding 12 years of Little Hunting Park's operation. App. 127 and Brief for Petitioner 7, *Sullivan* v. *Little Hunting Park,* 396 U. S. 229 (1969). At Wheaton-Haven one applicant was formally rejected in the preceding 11 years.

The Court of Appeals found it "inferable from Little Hunting Park's organization and membership provisions that it was built by the same real estate developers who built the four subdivisions from which members were drawn, as an aid to the sale of homes." 451 F. 2d, at 1215 n. 8. This inference may be erroneous. App. 24–36 and Tr. of Oral Arg. 24, 31–34, *Sullivan* v. *Little Hunting Park, supra.* In any event, *Sullivan* did not rest on any relationship between the club and real estate developers.

sweep of § 1982 when its application to a truly private club, within the meaning of § 2000a (e), is under consideration. Cf. *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163 (1972); *Daniel* v. *Paul,* 395 U. S. 298 (1969).

II

Mrs. Rosner and the Tillmans, relying on 42 U. S. C. §§ 1981,[10] 1982, and 2000a *et seq.,* contend that Wheaton-Haven could not adopt a racially discriminatory policy toward guests. The District Court granted summary judgment for the respondents on these claims also, holding that Wheaton-Haven was a private club and exempt from all three statutes.

The operative language of both § 1981 and § 1982 is traceable to the Act of April 9, 1866, c. 31, § 1, 14 Stat. 27. *Hurd* v. *Hodge,* 334 U. S. 24, 30–31 n. 7 (1948).[11]

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[10] "All persons within the jurisdiction of the United States shall have the same right in every State and Territory 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 persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

[11] The Act of Apr. 9, 1866, § 1, read in part:

"That all persons born in the United States . . . of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." 14 Stat. 27.

The present codification of § 1981 is derived from Revised Statutes § 1977 (1874), which codified the Act of May 31, 1870, § 16, 16 Stat. 144. Although the 1866 Act rested only on the Thirteenth Amendment, *United States* v. *Harris,* 106 U. S. 629, 640 (1883);

In light of the historical interrelationship between § 1981 and § 1982, we see no reason to construe these sections differently when applied, on these facts, to the claim of Wheaton-Haven that it is a private club. Consequently, our discussion and rejection of Wheaton-Haven's claim that it is exempt from § 1982 disposes of the argument that Wheaton-Haven is exempt from § 1981. On remand the District Court will develop any necessary facts concerning the adoption of the guest policy and will evaluate the claims of the parties [12] free of the misconception that Wheaton-Haven is exempt from §§ 1981, 1982, and 2000a.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

Civil Rights Cases, 109 U. S. 3, 22 (1883); *United States* v. *Morris,* 125 F. 322, 323 (ED Ark. 1903), and, indeed, was enacted before the Fourteenth Amendment was formally proposed, *United States* v. *Price,* 383 U. S. 787, 804 (1966); *Hurd* v. *Hodge,* 334 U. S. 24, 32 n. 11 (1948); *Oyama* v. *California,* 332 U. S. 633, 640 (1948); *Civil Rights Cases, supra,* 109 U. S., at 22, the 1870 Act was passed pursuant to the Fourteenth, and changes in wording may have reflected the language of the Fourteenth Amendment. See *United States* v. *Wong Kim Ark,* 169 U. S. 649, 695–696 (1898). The 1866 Act was re-enacted in 1870, and the predecessor of the present § 1981 was to be "enforced according to the provisions" of the 1866 Act. Act of May 31, 1870, § 18, 16 Stat. 144.

[12] Respondent McIntyre urges that the judgment in his favor should be affirmed as to him because he was merely a director of Wheaton-Haven and was later defeated in his bid for re-election to its board, and because, in his deposition, he stated that he opposed the Association's exclusionary practices. Neither the District Court nor the Court of Appeals discussed Mr. McIntyre's individual liability, and we find it inappropriate to attempt resolution of this issue on the present record.

Syllabus

UNITED STATES *v.* BASYE ET AL.

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

No. 71–1022. Argued December 11, 1972—
Decided February 27, 1973

A medical partnership (Permanente), in which respondent physicians were partners, made an agreement to supply medical services to members of a health foundation (Kaiser). A portion of Kaiser's compensation to Permanente was in the form of payments into a retirement trust for the benefit of Permanente's physicians, none of whom was eligible to receive the amounts in his tentative account prior to retirement after specified years of service. No interest in the account was deemed to vest in a particular beneficiary before retirement, and a physician's preretirement severance from Permanente would occasion the forfeiture of his interest, with redistribution to the remaining participants. Under no circumstances, however, could Kaiser recoup the payments once made. The Commissioner of Internal Revenue assessed a deficiency against each partner-respondent for his distributive share of the amount paid by Kaiser, which he had not reported as taxable income. In this refund suit the District Court, with the Court of Appeals affirming, held that the payments to the fund were not income to the partnership because it did not receive and had no "right to receive" them. *Held:* The retirement fund payments, notwithstanding the fact that they were contributed directly to the trust, were compensation for services that Permanente rendered under the medical-service agreement and should have been reported as income to Permanente; and the individual partners should have included their shares of that income in their individual returns, since the existence of conditions upon the actual receipt by a partner of income fully earned by the partnership is not a relevant factor in determining its taxability to him. Pp. 448–457.

450 F. 2d 109, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., dissented.

Solicitor General Griswold argued the cause for the United States. With him on the briefs were *Assistant*

Attorney General Crampton, Richard B. Stone, Meyer Rothwacks, and *Ernest J. Brown.*

Valentine Brookes argued the cause for respondents. With him on the brief were *Leonard A. Marcussen,* and *Lawrence V. Brookes.**

MR. JUSTICE POWELL delivered the opinion of the Court.

This is a partnership income tax case brought here by the United States on a petition for writ of certiorari from the Court of Appeals for the Ninth Circuit. Respondents, physicians and partners in a medical partnership, filed suit in the District Court for the Northern District of California seeking the refund of income taxes previously paid pursuant to a deficiency assessed by the Commissioner of Internal Revenue. The case was heard on an agreed statement of facts and the District Court ruled in respondents' favor. 295 F. Supp. 1289 (1968). The Government appealed to the Ninth Circuit and that court affirmed the lower court's judgment. 450 F. 2d 109 (1971). We agreed to hear this case to consider whether, as the Government contends, the decision below is in conflict with precedents of this Court. 405 U. S. 1039 (1972). Because we find that the decision is incompatible with basic principles of income taxation as developed in our prior cases, we reverse.

I

Respondents, each of whom is a physician,[1] are partners in a limited partnership known as Permanente

**George E. Link* filed a brief for Kaiser Foundation Health Plan, Inc., as *amicus curiae* urging affirmance.

[1] Technically, the married respondents' spouses are also parties because they filed joint income tax returns for the years in question here. Any reference to respondents in this opinion, however, refers only to the partner physicians.

Medical Group, which was organized in California in 1949. Associated with the partnership are over 200 partner physicians, as well as numerous nonpartner physicians and other employees. In 1959, Permanente entered into an agreement with Kaiser Foundation Health Plan, Inc., a nonprofit corporation providing prepaid medical care and hospital services to its dues-paying members.

Pursuant to the terms of the agreement, Permanente agreed to supply medical services for the 390,000 member-families, or about 900,000 individuals, in Kaiser's Northern California Region which covers primarily the San Francisco Bay area. In exchange for those services, Kaiser agreed to pay the partnership a "base compensation" composed of two elements. First, Kaiser undertook to pay directly to the partnership a sum each month computed on the basis of the total number of members enrolled in the health program. That number was multiplied by a stated fee, which originally was set at a little over $2.60. The second item of compensation—and the one that has occasioned the present dispute—called for the creation of a program, funded entirely by Kaiser, to pay retirement benefits to Permanente's partner and nonpartner physicians.

The pertinent compensation provision of the agreement did not itself establish the details of the retirement program; it simply obligated Kaiser to make contributions to such a program in the event that the parties might thereafter agree to adopt one.[2] As might be expected, a separate trust agreement establishing the con-

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[2] The pertinent portion of the Kaiser-Permanente medical service contract states:

"Article H

"Base Compensation to Medical Group

"As base compensation to [Permanente] for Medical Services to

templated plan soon was executed by Permanente, Kaiser, and the Bank of America Trust and Savings Association, acting as trustee. Under this agreement Kaiser agreed to make payments to the trust at a predetermined rate, initially pegged at 12 cents per health plan member per month. Additionally, Kaiser made a flat payment of $200,000 to start the fund and agreed that its pro rata payment obligation would be retroactive to the date of the signing of the medical service agreement.

The beneficiaries of the trust were all partner and nonpartner physicians who had completed at least two years of continuous service with the partnership and who elected to participate. The trust maintained a separate tentative account for each beneficiary. As periodic payments were received from Kaiser, the funds were allocated among these accounts pursuant to a complicated formula designed to take into consideration on a relative basis each participant's compensation level, length of service, and age. No physician was eligible to receive the amounts in his tentative account prior to retirement, and retirement established entitlement only if the participant had rendered at least 15 years of continuous service or 10 years of continuous service and had attained age 65. Prior to such time, however, the trust agreement explicitly provided that no interest in any tentative account was to be regarded as having vested in any par-

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be provided by [Permanente] hereunder, [Kaiser] shall pay to [Permanente] the amounts specified in this Article H.

. . . . . .

"*Section H–4. Provision for Savings and Retirement Program for Physicians.*

"In the event that [Permanente] establishes a savings and retirement plan or other deferred compensation plan approved by [Kaiser], [Kaiser] will pay, in addition to all other sums payable by [Kaiser] under this Agreement, the contributions required under such plan to the extent that such contributions exceed amounts, if any, contributed by Physicians . . . ."

ticular beneficiary.[3] The agreement also provided for the forfeiture of any physician's interest and its redistribution among the remaining participants if he were to terminate his relationship with Permanente prior to retirement.[4] A similar forfeiture and redistribution also would occur if, after retirement, a physician were to render professional services for any hospital or health plan other than one operated by Kaiser. The trust agreement further stipulated that a retired physician's right to receive benefits would cease if he were to refuse any reasonable request to render consultative services to any Kaiser-operated health plan.

The agreement provided that the plan would continue irrespective either of changes in the partnership's personnel or of alterations in its organizational structure. The plan would survive any reorganization of the partnership so long as at least 50% of the plan's participants remained associated with the reorganized entity. In the event of dissolution or of a nonqualifying reorganization, all of the amounts in the trust were to be divided among the participants entitled thereto in amounts governed by each participant's tentative account. Under no circumstances, however, could payments from Kaiser to the trust be recouped by Kaiser: once compensation was paid into the trust it was thereafter committed exclu-

[3] The trust agreement states:

"The tentative accounts and suspended tentative accounts provided for Participants hereunder are solely for the purpose of facilitating record keeping and necessary computations, and confer no rights in the trust fund upon the individuals for whom they are established. . . ."

[4] If, however, termination were occasioned by death or permanent disability, the trust agreement provided for receipt of such amounts as had accumulated in that physician's tentative account. Additionally, if, after his termination for reasons of disability prior to retirement, a physician should reassociate with some affiliated medical group his rights as a participant would not be forfeited.

sively to the benefit of Permanente's participating physicians.

Upon the retirement of any partner or eligible nonpartner physician, if he had satisfied each of the requirements for participation, the amount that had accumulated in his tentative account over the years would be applied to the purchase of a retirement income contract. While the program thus provided obvious benefits to Permanente's physicans, it also served Kaiser's interests. By providing attractive deferred benefits for Permanente's staff of professionals, the retirement plan was designed to "create an incentive" for physicians to remain with Permanente and thus "insure" that Kaiser would have a "stable and reliable group of physicians." [5]

During the years from the plan's inception until its discontinuance in 1963, Kaiser paid a total of more than $2,000,000 into the trust. Permanente, however, did not report these payments as income in its partnership returns. Nor did the individual partners include these payments in the computations of their distributive shares of the partnership's taxable income. The Commissioner assessed deficiencies against each partner-respondent for his distributive share of the amount paid by Kaiser. Respondents, after paying the assessments under protest, filed these consolidated suits for refund.

The Commissioner premised his assessment on the conclusion that Kaiser's payments to the trust constituted a form of compensation to the partnership for the services it rendered and therefore was income to the

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[5] The agreed statement of facts filed by the parties in the District Court states:

"The primary purpose of the retirement plan was to create an incentive for physicians to remain with [Permanente] . . . and thus to insure [Kaiser] that it would have a stable and reliable group of physicians providing medical services to its members with a minimum of turn-over. . . ."

partnership. And, notwithstanding the deflection of those payments to the retirement trust and their current unavailability to the partners, the partners were still taxable on their distributive shares of that compensation. Both the District Court and the Court of Appeals disagreed. They held that the payments to the fund were not income to the partnership because it did not receive them and never had a "right to receive" them. 295 F. Supp., at 1292–1294; 450 F. 2d, at 114–115. They reasoned that the partnership, as an entity, should be disregarded and that each partner should be treated simply as a potential beneficiary of his tentative share of the retirement fund.[6] Viewed in this light, no presently taxable income could be attributed to these cash basis[7] taxpayers because of the contingent and forfeitable nature of the fund allocations. 295 F. Supp., at 1294–1296; 450 F. 2d, at 112.

We hold that the courts below erred and that respondents were properly taxable on the partnership's retirement fund income. This conclusion rests on two familiar principles of income taxation, first, that income is taxed to the party who earns it and that liability may not be avoided through an anticipatory assignment of that income, and, second, that partners are taxable on

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[6] The Court of Appeals purported not to decide, as the District Court had, whether the partnership should be viewed as an "entity" or as a "conduit." 450 F. 2d 109, 113 n. 5, and 115. Yet, its analysis indicates that it found it proper to disregard the partnership as a separate entity. After explaining its view that Permanente never had a right to receive the payments, the Court of Appeals stated: "When the transaction is viewed in this light, the partnership becomes a mere *agent* contracting on behalf of its members for payments to the trust for their ultimate benefit, rather than a *principal* which itself realizes taxable income." *Id.*, at 115 (emphasis supplied).

[7] Each respondent reported his income for the years in question on the cash basis. The partnership reported its taxable receipts under the accrual method.

their distributive or proportionate shares of current partnership income irrespective of whether that income is actually distributed to them. The ensuing discussion is simply an application of those principles to the facts of the present case.

II

Section 703 of the Internal Revenue Code of 1954, insofar as pertinent here, prescribes that "[t]he taxable income of a partnership shall be computed in the same manner as in the case of an individual." 26 U. S. C. § 703 (a). Thus, while the partnership itself pays no taxes, 26 U. S. C. § 701, it must report the income it generates and such income must be calculated in largely the same manner as an individual computes his personal income. For this purpose, then, the partnership is regarded as an independently recognizable entity apart from the aggregate of its partners. Once its income is ascertained and reported, its existence may be disregarded since each partner must pay a tax on a portion of the total income as if the partnership were merely an agent or conduit through which the income passed.[8]

[8] There has been a great deal of discussion in the briefs and in the lower court opinions with respect to whether a partnership is to be viewed as an "entity" or as a "conduit." We find ourselves in agreement with the Solicitor General's remark during oral argument when he suggested that "[i]t seems odd that we should still be discussing such things in 1972." Tr. of Oral Arg. 14. The legislative history indicates, and the commentators agree, that partnerships are entities for purposes of calculating and filing informational returns but that they are conduits through which the tax-paying obligation passes to the individual partners in accord with their distributive shares. See, *e. g.*, H. R. Rep. No. 1337, 83d Cong., 2d Sess., 65–66 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., 89–90 (1954); 6 J. Mertens, Law of Federal Income Taxation § 35.01 (1968); S. Surrey & W. Warren, Federal Income Taxation 1115–1116 (1960); Jackson, Johnson, Surrey, Tenen & Warren, The Internal Revenue Code of 1954: Partnerships, 54 Col. L. Rev. 1183 (1954).

In determining any partner's income, it is first necessary to compute the gross income of the partnership. One of the major sources of gross income, as defined in § 61 (a)(1) of the Code, is "[c]ompensation for services, including fees, commissions, and similar items." 26 U. S. C. § 61 (a)(1). There can be no question that Kaiser's payments to the retirement trust were compensation for services rendered by the partnership under the medical service agreement. These payments constituted an integral part of the employment arrangement. The agreement itself called for two forms of "base compensation" to be paid in exchange for services rendered—direct per-member, per-month payments to the partnership and other, similarly computed, payments to the trust. Nor was the receipt of these payments contingent upon any condition other than continuation of the contractual relationship and the performance of the prescribed medical services. Payments to the trust, much like the direct payments to the partnership, were not forfeitable by the partnership or recoverable by Kaiser upon the happening of any contingency.

Yet the courts below, focusing on the fact that the retirement fund payments were never actually received by the partnership but were contributed directly to the trust, found that the payments were not includable as income in the partnership's returns. The view of tax accountability upon which this conclusion rests is incompatible with a foundational rule, which this Court has described as "the first principle of income taxation: that income must be taxed to him who earns it." *Commissioner* v. *Culbertson,* 337 U. S. 733, 739–740 (1949). The entity earning the income—whether a partnership or an individual taxpayer—cannot avoid taxation by entering into a contractual arrangement whereby that income is diverted to some other person or entity. Such arrangements, known to the tax law as "anticipatory assign-

ments of income," have frequently been held ineffective as means of avoiding tax liability. The seminal precedent, written over 40 years ago, is Mr. Justice Holmes' opinion for a unanimous Court in *Lucas* v. *Earl,* 281 U. S. 111 (1930). There the taxpayer entered into a contract with his wife whereby she became entitled to one-half of any income he might earn in the future. On the belief that a taxpayer was accountable only for income actually received by him, the husband thereafter reported only half of his income. The Court, unwilling to accept that a reasonable construction of the tax laws permitted such easy deflection of income tax liability, held that the taxpayer was responsible for the entire amount of his income.

The basis for the Court's ruling is explicit and controls the case before us today:

> "[T]his case is not to be decided by attenuated subtleties. It turns on the import and reasonable construction of the taxing act. There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew." *Id.,* at 114–115.

The principle of *Lucas* v. *Earl,* that he who earns income may not avoid taxation through anticipatory arrangements no matter how clever or subtle, has been repeatedly invoked by this Court and stands today as a cornerstone of our graduated income tax system. See, *e. g., Commissioner* v. *Harmon,* 323 U. S. 44 (1944);

United States v. *Joliet & Chicago R. Co.*, 315 U. S. 44 (1942); *Helvering* v. *Eubank*, 311 U. S. 122 (1940); *Burnet* v. *Leininger*, 285 U. S. 136 (1932). And, of course, that principle applies with equal force in assessing partnership income.

Permanente's agreement with Kaiser, whereby a portion of the partnership compensation was deflected to the retirement fund, is certainly within the ambit of *Lucas* v. *Earl*. The partnership earned the income and, as a result of arm's-length bargaining with Kaiser,[9] was responsible for its diversion into the trust fund. The Court of Appeals found the *Lucas* principle inapplicable because Permanente "never had the right itself to receive the payments made into the trust as current income." 450 F. 2d, at 114. In support of this assertion, the court relied on language in the agreed statement of facts stipulating that "[t]he payments . . . were paid solely to fund the retirement plan, and were not otherwise available to [Permanente] . . . ." *Ibid.* Emphasizing that the fund was created to serve Kaiser's interest in a stable source of qualified, experienced physicians,[10] the court found that Permanente could not have received that income except in the form in which it was received.

The court's reasoning seems to be that, before the partnership could be found to have received income, there must be proof that "Permanente agreed to accept less direct compensation from Kaiser in exchange for the retirement plan payments." *Id.*, at 114–115. Apart from the inherent difficulty of adducing such evidence, we know of no authority imposing this burden upon the Government. Nor do we believe that the guiding principle of *Lucas* v. *Earl* may be so easily circumvented.

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[9] The agreed statement of facts states that the contracting parties were "separate organizations independently contracting with one another at arms' length."

[10] See n. 5, *supra*.

Kaiser's motives for making payments are irrelevant to the determination whether those amounts may fairly be viewed as compensation for services rendered.[11] Neither does Kaiser's apparent insistence upon payment to the trust deprive the agreed contributions of their character as compensation. The Government need not prove that the taxpayer had complete and unrestricted power to designate the manner and form in which his income is received. We may assume, especially in view of the relatively unfavorable tax status of self-employed persons with respect to the tax treatment of retirement plans,[12] that many partnerships would eagerly accept conditions similar to those prescribed by this trust in consideration for tax-deferral benefits of the sort suggested here. We think it clear, however, that the tax laws permit no such easy road to tax avoidance or defer-

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[11] Respondents do not contend that such payments were gifts or some other type of nontaxable contribution. See *Commissioner* v. *LoBue*, 351 U. S. 243 (1956); *Bingler* v. *Johnson*, 394 U. S. 741 (1969).

[12] Disparities have long existed between the tax treatment of pension plans for corporate employees and the treatment of similar plans for the self-employed and for members of partnerships. S. Surrey & W. Warren, *supra*, n. 8, at 598–599. In 1962, Congress endeavored to ameliorate these differences by enacting corrective legislation, Pub. L. 87–792, 76 Stat. 809. While that legislation, commonly known as H. R. 10 or the Jenkins-Keogh Bill, provided some relief, it fell far short of affording a parity of treatment for professionals and other self-employed individuals. Internal Revenue Code of 1954, § 404. For a detailed review of the intricate provisions of the applicable statute and for a close comparison of the present differences, see Grayck, Tax Qualified Retirement Plans for Professional Practitioners: A Comparison of the Self-Employed Individuals Tax Requirement Act of 1962 and the Professional Association, 63 Col. L. Rev. 415 (1963); Note, Federal Tax Policy and Retirement Benefits—A New Approach, 59 Geo. L. J. 1299 (1971); Note, Tax Parity for Self-Employed Retirement Plans, 58 Va. L. Rev. 338 (1972).

ment.[13] Despite the novelty and ingenuity of this arrangement, Permanente's "base compensation" in the form of payments to a retirement fund was income to the partnership and should have been reported as such.

III

Since the retirement fund payments should have been reported as income to the partnership, along with other income received from Kaiser, the individual partners should have included their shares of that income in their individual returns. 26 U. S. C. §§ 61 (a)(13), 702, 704. For it is axiomatic that each partner must pay taxes on his distributive share of the partnership's income without regard to whether that amount is actually distributed to him. *Heiner* v. *Mellon*, 304 U. S. 271 (1938), decided under a predecessor to the current partnership provisions of the Code,[14] articulates the salient proposi-

[13] Respondents contend in this Court that this case is controlled by *Commissioner* v. *First Security Bank of Utah*, 405 U. S. 394 (1972), decided last Term. We held there that the Commissioner could not properly allocate income to one of a controlled group of corporations under 26 U. S. C. § 482 where that corporation could not have received that income as a matter of law. The "assignment-of-income doctrine" could have no application in that peculiar circumstance because the taxpayer had no legal right to receive the income in question. *Id.*, at 403–404. In essence, that case involved a deflection of income imposed by law, not an assignment arrived at by the consensual agreement of two parties acting at arm's length as we have in the present case. See n. 5, *supra*.

[14] Revenue Act of 1918, § 218 (a), 40 Stat. 1070:

"There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year . . . ."

Other predecessor statutes contained similar explicit indications that a partner's distributive share was to be computed without reference to actual distribution. See Income Tax Act of 1913, § II D, 38 Stat. 169 ("whether divided or otherwise"); Revenue Act of 1938, § 182, 52 Stat. 521 ("whether or not distribution is made to

tion. After concluding that "distributive" share means the "proportionate" share as determined by the partnership agreement, *id.*, at 280, the Court stated:

> "The tax is thus imposed upon the partner's proportionate share of the net income of the partnership, and the fact that it may not be currently distributable, whether by agreement of the parties or by operation of law, is not material." *Id.*, at 281.

Few principles of partnership taxation are more firmly established than that no matter the reason for nondistribution each partner must pay taxes on his distributive share. Treas. Reg. § 1.702–1, 26 CFR § 1.702–1 (1972).[15] See, *e. g., Hulbert* v. *Commissioner,* 227 F. 2d 399 (CA7 1955); *Bell* v. *Commissioner,* 219 F. 2d 442 (CA5 1955); *Stewart* v. *United States,* 263 F. Supp. 451 (SDNY 1967); *Freudmann* v. *Commissioner,* 10 T. C. 775 (1948); S. Surrey & W. Warren, Federal Income Taxation 1115 (1960); 6 J. Mertens, Law of Federal Income Taxation §§ 35.01, 35.22 (1968); A. Willis, On Partnership Taxation § 5.01 (1971).

The courts below reasoned to the contrary, holding that the partners here were not properly taxable on the amounts contributed to the retirement fund. This view, apparently, was based on the assumption that each partner's distributive share prior to retirement was too con-

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him"). Nothing in the legislative history suggests that any substantive change was intended by the deletion of this phrase from the 1954 Code revisions. See H. R. Rep. No. 1337, 83d Cong., 2d Sess., 65 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., 89 (1954).

[15] The regulation states as follows:

"Each partner is required to take into account separately in his return his distributive share, whether or not distributed, of each class or item of partnership income . . . ."

tingent and unascertainable to constitute presently recognizable income. It is true that no partner knew with certainty exactly how much he would ultimately receive or whether he would in fact be entitled to receive anything. But the existence of conditions upon the actual receipt by a partner of income fully earned by the partnership is irrelevant in determining the amount of tax due from him. The fact that the courts below placed such emphasis on this factor suggests the basic misapprehension under which they labored in this case. Rather than being viewed as responsible contributors to the partnership's total income, respondent-partners were seen only as contingent beneficiaries of the trust. In some measure, this misplaced focus on the considerations of uncertainty and forfeitability may be a consequence of the erroneous manner in which the Commissioner originally assessed the partners' deficiencies. The Commissioner divided Kaiser's trust fund payments into two categories: (1) payments earmarked for the tentative accounts of *nonpartner* physicians; and (2) those allotted to *partner* physicians. The payments to the trust for the former category of nonpartner physicians were correctly counted as income to the partners in accord with the distributive-share formula as established in the partnership agreement.[16] The latter payments to the tentative accounts of the individual partners, however, were improperly allocated to each partner pursuant to the complex formula in the retirement plan itself, just as if that agreement operated as an amendment to the partnership agreement. 295 F. Supp., at 1292.

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[16] These amounts would be divided equally among the partners pursuant to the partnership agreement's stipulation that all income above each partner's drawing account "shall be distributed equally."

The Solicitor General, alluding to this miscomputation during oral argument, suggested that this error "may be what threw the court below off the track." [17] It should be clear that the contingent and unascertainable nature of each partner's share under the retirement trust is irrelevant to the computation of his distributive share. The partnership had received as income a definite sum which was not subject to diminution or forfeiture. Only its ultimate disposition among the employees and partners remained uncertain. For purposes of income tax computation it made no difference that some partners might have elected not to participate in the retirement program or that, for any number of reasons, they might not ultimately receive any of the trust's benefits. Indeed, as the Government suggests, the result would be quite the same if the "potential beneficiaries included no partners at all, but were children, relatives, or other objects of the partnership's largesse." [18] The sole operative consideration is that the income had been received by the partnership, not what disposition might have been effected once the funds were received.

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[17] Tr. of Oral Arg. 13–14. As the Solicitor General has also pointed out, the parties have, by stipulation in their agreed statement of facts, foreseen that recomputations might be necessary in light of the ultimate resolution of this controversy and have taken precautions to assure that any necessary reallocations may be handled expeditiously. Agreed Statement of Facts ¶ 24, App. 87–88.

[18] Brief for United States 21. For this reason, the cases relied on by the Court of Appeals, 450 F. 2d, at 113, which have held that payments made into deferred compensation programs having contingent and forfeitable features are not taxable until received, are inapposite. *Schaefer* v. *Bowers*, 50 F. 2d 689 (CA2 1931); *Perkins* v. *Commissioner*, 8 T. C. 1051 (1947); *Robertson* v. *Commissioner*, 6 T. C. 1060 (1946). Indeed, the Government notes, possibly as a consequence of these cases, that the Commissioner has not sought to tax the *nonpartner* physicians on their contingent accounts under the retirement plan. Brief for United States 21.

IV

In summary, we find this case controlled by familiar and long-settled principles of income and partnership taxation. There being no doubt about the character of the payments as compensation, or about their actual receipt, the partnership was obligated to report them as income presently received. Likewise, each partner was responsible for his distributive share of that income. We, therefore, reverse the judgments and remand the case with directions that judgments be entered for the United States.

It is so ordered.

MR. JUSTICE DOUGLAS dissents.

ILLINOIS *v.* SOMERVILLE

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

No. 71–692. Argued November 13, 1972—
Decided February 27, 1973

Respondent was brought to trial under an indictment which, it developed before any evidence was presented, contained a defect that under Illinois law could not be cured by amendment and that on appeal could be asserted to overturn any judgment of conviction. The trial judge declared a mistrial over respondent's objection, following which respondent was reindicted, tried, and convicted. He thereafter petitioned for habeas corpus, which was ultimately granted on the ground that, jeopardy having attached when the jury was initially impaneled and sworn, the second trial constituted double jeopardy. *Held:* Under the circumstances of this case, the trial judge's action in declaring a mistrial was a rational determination designed to implement a legitimate state policy, with no suggestion that the policy was manipulated to respondent's prejudice. The declaration of a mistrial was therefore required by "manifest necessity" and the "ends of public justice," and the Double Jeopardy Clause of the Fifth Amendment as made applicable to the States by the Fourteenth did not bar respondent's retrial. Pp. 461–471.

447 F. 2d 733, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and POWELL, JJ., joined. WHITE, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post,* p. 471. MARSHALL, J., filed a dissenting opinion, *post,* p. 477.

E. James Gildea, Assistant Attorney General of Illinois, argued the cause for petitioner. With him on the brief were *William J. Scott,* Attorney General, and *James B. Zagel,* Assistant Attorney General.

Ronald P. Alwin argued the cause for respondent. With him on the brief was *Martin S. Gerber.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We must here decide whether declaration of a mistrial over the defendant's objection, because the trial court concluded that the indictment was insufficient to charge a crime, necessarily prevents a State from subsequently trying the defendant under a valid indictment. We hold that the mistrial met the "manifest necessity" requirement of our cases, since the trial court could reasonably have concluded that the "ends of public justice" would be defeated by having allowed the trial to continue. Therefore, the Double Jeopardy Clause of the Fifth Amendment, made applicable to the States through the Due Process Clause of the Fourteenth Amendment, *Benton* v. *Maryland,* 395 U. S. 784 (1969), did not bar retrial under a valid indictment.

I

On March 19, 1964, respondent was indicted by an Illinois grand jury for the crime of theft. The case was called for trial and a jury impaneled and sworn on November 1, 1965. The following day, before any evidence had been presented, the prosecuting attorney realized that the indictment was fatally deficient under Illinois law because it did not allege that respondent intended to permanently deprive the owner of his property. Under the applicable Illinois criminal statute, such intent is a necessary element of the crime of theft,[1] and failure to allege intent renders the indictment insufficient to charge a crime. But under the Illinois Constitution at that time,[2] an indictment was the sole means by which a crimi-

[1] Ill. Rev. Stat., c. 38, § 16–1 (d)(1) (1963).

[2] See Constitution of Illinois, Art. II, § 8 (1967). When the State Constitution was amended in 1970, this provision was retained as the first paragraph of Art. I, § 7.

nal proceeding such as this might be commenced against a defendant. Illinois further provides that only formal defects, of which this was not one, may be cured by amendment. The combined operation of these rules of Illinois procedure and substantive law meant that the defect in the indictment was "jurisdictional"; it could not be waived by the defendant's failure to object, and could be asserted on appeal or in a post-conviction proceeding to overturn a final judgment of conviction.

Faced with this situation, the Illinois trial court concluded that further proceedings under this defective indictment would be useless and granted the State's motion for a mistrial. On November 3, the grand jury handed down a second indictment alleging the requisite intent. Respondent was arraigned two weeks after the first trial was aborted, raised a claim of double jeopardy which was overruled, and the second trial commenced shortly thereafter. The jury returned a verdict of guilty, sentence was imposed, and the Illinois courts upheld the conviction. Respondent then sought federal habeas corpus, alleging that the conviction constituted double jeopardy contrary to the prohibition of the Fifth and Fourteenth Amendments. The Seventh Circuit affirmed the denial of habeas corpus prior to our decision in *United States* v. *Jorn*, 400 U. S. 470 (1971). The respondent's petition for certiorari was granted, and the case remanded for reconsideration in light of *Jorn* and *Downum* v. *United States*, 372 U. S. 734 (1963). On remand, the Seventh Circuit held that respondent's petition for habeas corpus should have been granted because, although he had not been tried and *acquitted* as in *United States* v. *Ball*, 163 U. S. 662 (1896), and *Benton* v. *Maryland*, 395 U. S. 784 (1969), jeopardy had attached when the jury was impaneled and sworn, and a declaration of mistrial over respondent's objection precluded a retrial

under a valid indictment. 447 F. 2d 733 (1971). For the reasons stated below, we reverse that judgment.

II

The fountainhead decision construing the Double Jeopardy Clause in the context of a declaration of a mistrial over a defendant's objection is *United States* v. *Perez,* 9 Wheat. 579 (1824). Mr. Justice Story, writing for a unanimous Court, set forth the standards for determining whether a retrial, following a declaration of a mistrial over a defendant's objection, constitutes double jeopardy within the meaning of the Fifth Amendment. In holding that the failure of the jury to agree on a verdict of either acquittal or conviction did not bar retrial of the defendant, Mr. Justice Story wrote:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office." *Id.,* at 580.

This formulation, consistently adhered to by this Court in subsequent decisions, abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial. The broad discretion reserved to the trial judge in such circumstances has been consistently reiterated in decisions of this Court. In *Wade* v. *Hunter,* 336 U. S. 684 (1949), the Court, in reaffirming this flexible standard, wrote:

> "We are asked to adopt the *Cornero* [v. *United States,* 48 F. 2d 69,] rule under which petitioner contends the absence of witnesses can never justify discontinuance of a trial. Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula. The value of the *Perez* principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interest." *Id.,* at 691.

Similarly, in *Gori* v. *United States,* 367 U. S. 364 (1961), the Court again underscored the breadth of a trial judge's discretion, and the reasons therefor, to declare a mistrial.

> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." *Id.,* at 368.

In reviewing the propriety of the trial judge's exercise of his discretion, this Court, following the counsel of Mr.

Justice Story, has scrutinized the action to determine whether, in the context of that particular trial, the declaration of a mistrial was dictated by "manifest necessity" or the "ends of public justice." The interests of the public in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction, need not be forsaken by the formulation or application of rigid rules that necessarily preclude the vindication of that interest. This consideration, whether termed the "ends of public justice," *United States* v. *Perez, supra,* at 580, or, more precisely, "the public's interest in fair trials designed to end in just judgments," *Wade* v. *Hunter, supra,* at 689, has not been disregarded by this Court.

In *United States* v. *Perez, supra,* and *Logan* v. *United States,* 144 U. S. 263 (1892), this Court held that "manifest necessity" justified the discharge of juries unable to reach verdicts, and, therefore, the Double Jeopardy Clause did not bar retrial. Cf. *Keerl* v. *Montana,* 213 U. S. 135 (1909); *Dreyer* v. *Illinois,* 187 U. S. 71 (1902). In *Simmons* v. *United States,* 142 U. S. 148 (1891), a trial judge dismissed the jury, over defendant's objection, because one of the jurors had been acquainted with the defendant, and, therefore, was probably prejudiced against the Government; this Court held that the trial judge properly exercised his power "to prevent the defeat of the ends of public justice." *Id.,* at 154. In *Thompson* v. *United States,* 155 U. S. 271 (1894), a mistrial was declared after the trial judge learned that one of the jurors was disqualified, he having been a member of the grand jury that indicted the defendant. Similarly, in *Lovato* v. *New Mexico,* 242 U. S. 199 (1916), the defendant demurred to the indictment, his demurrer was overruled, and a jury sworn. The district attorney, realizing that the defendant had not pleaded to the indictment after the demurrer had been overruled, moved for the discharge of the jury and arraignment of the defendant for pleading; the jury

was discharged, the defendant pleaded not guilty, the same jury was again impaneled, and a verdict of guilty rendered. In both of those cases this Court held that the Double Jeopardy Clause did not bar reprosecution.

While virtually all of the cases turn on the particular facts and thus escape meaningful categorization, see *Gori* v. *United States, supra; Wade* v. *Hunter, supra,* it is possible to distill from them a general approach, premised on the "public justice" policy enunciated in *United States* v. *Perez,* to situations such as that presented by this case. A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve "the ends of public justice" to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court. This was substantially the situation in both *Thompson* v. *United States, supra,* and *Lovato* v. *New Mexico, supra.* While the declaration of a mistrial on the basis of a rule or a defective procedure that would lend itself to prosecutorial manipulation would involve an entirely different question, cf. *Downum* v. *United States, supra,* such was not the situation in the above cases or in the instant case.

In *Downum* v. *United States,* the defendant was charged with six counts of mail theft, and forging and uttering stolen checks. A jury was selected and sworn in the morning, and instructed to return that afternoon. When the jury returned, the Government moved for the discharge of the jury on the ground that a key prosecution witness, for two of the six counts against defendant, was not present. The prosecution knew, prior to the selection and swearing of the jury, that this witness

could not be found and had not been served with a subpoena. The trial judge discharged the jury over the defendant's motions to dismiss two counts for failure to prosecute and to continue the other four. This Court, in reversing the convictions on the ground of double jeopardy, emphasized that "[e]ach case must turn on its facts," 372 U. S., at 737, and held that the second prosecution constituted double jeopardy, because the absence of the witness and the reason therefor did not there justify, in terms of "manifest necessity," the declaration of a mistrial.

In *United States* v. *Jorn, supra,* the Government called a taxpayer witness in a prosecution for willfully assisting in the preparation of fraudulent income tax returns. Prior to his testimony, defense counsel suggested he be warned of his constitutional right against compulsory self-incrimination. The trial judge warned him of his rights, and the witness stated that he was willing to testify and that the Internal Revenue Service agent who first contacted him warned him of his rights. The trial judge, however, did not believe the witness' declaration that the IRS had so warned him, and refused to allow him to testify until after he had consulted with an attorney. After learning from the Government that the remaining four witnesses were "similarly situated," and after surmising that they, too, had not been properly informed of their rights, the trial judge declared a mistrial to give the witnesses the opportunity to consult with attorneys. In sustaining a plea in bar of double jeopardy to an attempted second trial of the defendant, the plurality opinion of the Court, emphasizing the importance to the defendant of proceeding before the first jury sworn, concluded:

> "It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed, the trial judge acted so abruptly in

discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so. When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial. *United States* v. *Perez,* 9 Wheat., at 580. Therefore, we must conclude that in the circumstances of this case, appellee's reprosecution would violate the double jeopardy provision of the Fifth Amendment." 400 U. S., at 487.

III

Respondent advances two arguments to support the conclusion that the Double Jeopardy Clause precluded the second trial in the instant case. The first is that since *United States* v. *Ball,* 163 U. S. 662 (1896), held that jeopardy obtained even though the indictment upon which the defendant was first acquitted had been defective, and since *Downum* v. *United States, supra,* held that jeopardy "attaches" when a jury has been selected and sworn, the Double Jeopardy Clause precluded the State from instituting the second proceeding that resulted in respondent's conviction. Alternatively, respondent argues that our decision in *United States* v. *Jorn, supra,* which respondent interprets as narrowly limiting the circumstances in which a mistrial is manifestly necessary, requires affirmance. Emphasizing the " 'valued right to have his trial completed by a particular tribunal,' " *United States* v. *Jorn, supra,* at 484, quoting *Wade* v. *Hunter,* 336 U. S., at 689, respondent contends that the circumstances did not justify depriving him of that right.

Respondent's first contention is precisely the type of rigid, mechanical rule which the Court had eschewed since the seminal decision in *Perez.* The major premise of the syllogism—that trial on a defective indictment precludes retrial—is not applicable to the instant case because it overlooks a crucial element of the Court's reasoning in *United States* v. *Ball, supra.* There, three men were indicted and tried for murder; two were convicted by a jury and one acquitted. This Court reversed the convictions on the ground that the indictment was fatally deficient in failing to allege that the victim died within a year and a day of the assault. *Ball* v. *United States,* 140 U. S. 118 (1891). A proper indictment was returned and the Government retried all three of the original defendants; that trial resulted in the conviction of all. This Court reversed the conviction of the one defendant who originally had been acquitted, sustaining his plea of double jeopardy. But the Court was obviously and properly influenced by the fact that the first trial had proceeded to verdict. This focus of the Court is reflected in the opinion:

> "[W]e are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing.
>
> ". . . [T]he accused, *whether convicted or acquitted,* is equally put in jeopardy at the first trial. . . ." 163 U. S., at 669 (emphasis added).

In *Downum,* the Court held, as respondent argues, that jeopardy "attached" when the first jury was selected and sworn. But in cases in which a mistrial has been declared prior to verdict, the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial.

That, indeed, was precisely the rationale of *Perez* and subsequent cases. Only if jeopardy has attached is a court called upon to determine whether the declaration of a mistrial was required by "manifest necessity" or the "ends of public justice."

We believe that in light of the State's established rules of criminal procedure, the trial judge's declaration of a mistrial was not an abuse of discretion. Since this Court's decision in *Benton* v. *Maryland, supra,* federal courts will be confronted with such claims that arise in large measure from the often diverse procedural rules existing in the 50 States. Federal courts should not be quick to conclude that simply because a state procedure does not conform to the corresponding federal statute or rule, it does not serve a legitimate state policy. Last Term, recognizing this fact, we dismissed a writ of certiorari as improvidently granted in a case involving a claim of double jeopardy stemming from the dismissal of an indictment under the "rules of criminal pleading peculiar to" an individual State followed by a retrial under a proper indictment. *Duncan* v. *Tennessee,* 405 U. S. 127 (1972).

In the instant case, the trial judge terminated the proceeding because a defect was found to exist in the indictment that was, as a matter of Illinois law, not curable by amendment. The Illinois courts have held that even after a judgment of conviction has become final, the defendant may be released on habeas corpus, because the defect in the indictment deprives the trial court of "jurisdiction." The rule prohibiting the amendment of all but formal defects in indictments is designed to implement the State's policy of preserving the right of each defendant to insist that a criminal prosecution against him be commenced by the action of a grand jury. The trial judge was faced with a situation similar to those in *Simmons, Lovato,* and *Thompson,* in which a

procedural defect might or would preclude the public from either obtaining an impartial verdict or keeping a verdict of conviction if its evidence persuaded the jury. If a mistrial were constitutionally unavailable in situations such as this, the State's policy could only be implemented by conducting a second trial after verdict and reversal on appeal, thus wasting time, energy, and money for all concerned. Here, the trial judge's action was a rational determination designed to implement a legitimate state policy, with no suggestion that the implementation of that policy in this manner could be manipulated so as to prejudice the defendant. This situation is thus unlike *Downum,* where the mistrial entailed not only a delay for the defendant, but also operated as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case. Here, the delay was minimal, and the mistrial was, under Illinois law, the only way in which a defect in the indictment could be corrected. Given the established standard of discretion set forth in *Perez, Gori,* and *Hunter,* we cannot say that the declaration of a mistrial was not required by "manifest necessity" or the "ends of public justice."

Our decision in *Jorn,* relied upon by the court below and respondent, does not support the opposite conclusion. While it is possible to excise various portions of the plurality opinion to support the result reached below, divorcing the language from the facts of the case serves only to distort its holdings. That opinion dealt with action by a trial judge that can fairly be described as erratic. The Court held that the lack of apparent harm to the defendant from the declaration of a mistrial did not itself justify the mistrial, and concluded that there was no "manifest necessity" for the mistrial, as opposed to less drastic alternatives. The Court emphasized that the absence of any manifest need for the mistrial had

deprived the defendant of his right to proceed before the first jury, but it did not hold that that right may never be forced to yield, as in this case, to "the public's interest in fair trials designed to end in just judgments." The Court's opinion in *Jorn* is replete with approving references to *Wade* v. *Hunter, supra,* which latter case stated:

> "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. And there have been instances where a trial judge has discovered facts during a trial which indicated that one or more members of the jury might be biased against the Government or the defendant. It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial. *What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.*" *Wade* v. *Hunter,* 336 U. S., at 688–689 (footnote omitted; emphasis added).

The determination by the trial court to abort a criminal proceeding where jeopardy has attached is not one to be lightly undertaken, since the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one. *United States* v. *Jorn, supra.* Nor will the lack of demonstrable additional prejudice preclude the defendant's invocation of the double jeopardy bar in the absence of some important countervailing interest of proper judicial administration. *Ibid.* But where the declaration of a mistrial implements a reasonable state policy and aborts a proceeding that at best would have produced a verdict that could have been upset at will by one of the parties, the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice. *Wade* v. *Hunter, supra.*

Reversed.

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

For the purposes of the Double Jeopardy Clause, jeopardy attaches when a criminal trial commences before judge or jury, *United States* v. *Jorn,* 400 U. S. 470, 479–480 (1971); *Green* v. *United States,* 355 U. S. 184, 188 (1957); *Wade* v. *Hunter,* 336 U. S. 684, 688 (1949), and this point has arrived when a jury has been selected and sworn, even though no evidence has been taken. *Downum* v. *United States,* 372 U. S. 734 (1963). Clearly, Somerville was placed in jeopardy at his first trial despite the fact that the indictment against him was defective under Illinois law. *Benton* v. *Maryland,* 395 U. S. 784, 796–797 (1969); *United States* v. *Ball,* 163 U. S. 662 (1896). The question remains, however, whether the facts of this case present one of those circumstances where a trial, once begun, may be aborted over the defendant's objection and the defendant retried

without twice being placed in jeopardy contrary to the Constitution.

The Court has frequently addressed itself to the general problem of mistrials and the Double Jeopardy Clause, most recently in *United States* v. *Jorn, supra.* We have abjured mechanical, *per se* rules and have preferred to rely upon the approach first announced in *United States* v. *Perez,* 9 Wheat. 579 (1824). Under the *Perez* analysis, a trial court has authority to discharge a jury prior to verdict, and the Double Jeopardy Clause will not prevent retrial, only if the trial court takes "all the circumstances into consideration" and in its "sound discretion" determines that "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *Id.,* at 580. See also *United States* v. *Jorn, supra,* at 480–481 (opinion of Harlan, J.); *id.,* at 492 (STEWART, J., dissenting); *Gori* v. *United States,* 367 U. S. 364, 367–369 (1961); *id.,* at 370–373 (DOUGLAS, J., dissenting); *Downum* v. *United States, supra,* at 735–736, *id.,* at 740 (Clark, J., dissenting). Despite the generality of the *Perez* standard, some guidelines have evolved from past cases, as this Court has reviewed the exercise of trial court discretion in a variety of circumstances.

United States v. *Jorn, supra,* and *Downum* v. *United States, supra,* for example, make it abundantly clear that trial courts should have constantly in mind the purposes of the Double Jeopardy Clause to protect the defendant from continued exposure to embarrassment, anxiety, expense, and restrictions on his liberty, as well as to preserve his " 'valued right to have his trial completed by a particular tribunal.' " *United States* v. *Jorn, supra,* at 484, quoting from *Wade* v. *Hunter,* 336 U. S., at 689.

> "[I]n the final analysis, the judge must always temper the decision whether or not to abort the trial

> by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States* v. *Jorn, supra,* at 486.

It was in light of this interest that the Court in *Downum* reversed a conviction on double jeopardy grounds where a mistrial was declared to permit further efforts to secure the attendance of a key prosecution witness who should have been, but was not, subpoenaed. Although no prosecutorial misconduct other than mere oversight and mistake was claimed or proved, the policies of the Double Jeopardy Clause, and the interest of the defendant in taking his case to the jury that he had just accepted, were sufficient to raise the double jeopardy barrier to a second trial.

Similarly, in *Jorn,* a trial was terminated when the trial judge, *sua sponte* and mistakenly, declared a mistrial, apparently to protect nonparty witnesses from the possibility of self-incrimination. There was no showing of intent by the prosecutor or the judge to harass the defendant or to enhance chances of conviction at a second trial; the defendant was given a complete preview of the Government's case, and no specific prejudice to the defense at a second trial was shown. Noting that the courts "must bear in mind the potential risks of abuse by the defendant of society's unwillingness to unnecessarily subject him to repeated prosecutions," 400 U. S., at 486, this Court held that the defendant's interest in submitting his case to the initial jury was itself sufficient to invoke the Double Jeopardy Clause and, as in *Downum,* to override the Government's concern with enforcing the criminal laws by having another chance to try the defendant for the crime with which he was charged. In neither case was there "manifest necessity" for a mistrial and a double trial of the defendant.

Very similar considerations govern this case. Somerville asserts a right to but one trial and to a verdict by the initial jury. A mistrial was directed at the instance of the State, over Somerville's objection, and was occasioned by official error in drafting the indictment—error unaccompanied by bad faith, overreaching, or specific prejudice to the defense at a later trial. The State may no more try the defendant a second time in these circumstances than could the United States in *Downum* and *Jorn*. Although the exact extent of the emotional and physical harm suffered by Somerville during the period between his first and second trial is open to debate, it cannot be gainsaid that Somerville lost "his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal." *United States* v. *Jorn*, 400 U. S., at 484. *Downum* and *Jorn*, over serious dissent, rejected the view that the Double Jeopardy Clause protects only against those mistrials that lend themselves to prosecutorial manipulation and underwrote the independent right of a defendant in a criminal case to have the verdict of the initial jury. Both cases made it quite clear that the discretion of the trial court to declare mistrials is reviewable and that the defendant's right to a verdict by his first jury is not to be overridden except for "manifest necessity." There was not, in this case any more than in *Downum* and *Jorn*, "manifest necessity" for the loss of that right.

The majority recognizes that "the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one," but finds that interest outweighed by the State's desire to avoid "conducting a second trial after verdict and reversal on appeal [on the basis of a defective indictment], thus wasting time, energy, and money for all concerned." The majority finds paramount the interest of the State in "keeping a verdict of conviction if its evidence persuaded the jury." Such

analysis, however, completely ignores the possibility that the defendant might be acquitted by the initial jury. It is, after all, that possibility—the chance to "end the dispute then and there with an acquittal," *United States* v. *Jorn, supra,* at 484—that makes the right to a trial before a particular tribunal of importance to a defendant. In addition, the majority's balancing gives too little weight to the fundamental place of the Double Jeopardy Clause, and the purposes which it seeks to serve, in "the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial." *Id.,* at 479.

Apparently the majority finds "manifest necessity" for a mistrial and the retrial of the defendant in "the State's policy of preserving the right of each defendant to insist that a criminal prosecution against him be commenced by the action of a grand jury" and the implementation of that policy in the absence from Illinois procedural rules of any procedure for the amendment of indictments. Conceding the reasonableness of such a policy, it must be remembered that the inability to amend an indictment does not come into play, and a mistrial is not necessitated, unless an error on the part of the State in the framing of the indictment is committed. Only when the indictment is defective—only when the State has failed to properly execute its responsibility to frame a proper indictment—does the State's procedural framework necessitate a mistrial.

Although recognizing that "a criminal trial is, even in the best of circumstances, a complicated affair to manage," *ibid.,* the Court has not previously thought prosecutorial error sufficient excuse for not applying the Double Jeopardy Clause. In *Jorn,* for instance, the Court declared that "unquestionably an important factor to be considered is the need to hold litigants on both sides to standards of responsible professional conduct in the clash of an ad-

versary criminal process," *id.*, at 485–486, and cautioned, "The trial judge must recognize that lack of preparedness by the Government . . . directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee." *Id.*, at 486. See also *id.*, at 487–488 (BURGER, C. J., concurring); *Downum* v. *United States*, 372 U. S., at 737. Here, the prosecutorial error, not the independent operation of a state procedural rule, necessitated the mistrial. Judged by the standards of *Downum* and *Jorn* I cannot find, in the words of the majority, an "important countervailing interest of proper judicial administration" in this case; I cannot find "manifest necessity" for a mistrial to compensate for prosecutorial mistake.

Finally, the majority notes that "the declaration of a mistrial on the basis of a rule or a defective procedure that would lend itself to prosecutorial manipulation would involve an entirely different question." See *United States* v. *Jorn*, 400 U. S., at 479; *Downum* v. *United States*, *supra*; *Green* v. *United States*, 355 U. S., at 187–188. Surely there is no evidence of bad faith or overreaching on this record. However, the words of the Court in *Ball* seem particularly appropriate.

> "This case, in short, presents the novel and unheard of spectacle, of a public officer, whose business it was to frame a correct bill, openly alleging his own inaccuracy or neglect, as a reason for a second trial, when it is not pretended that the merits were not fairly in issue on the first. . . . If this practice be tolerated, when are trials of the accused to end? If a conviction take place, whether an indictment be good, or otherwise, it is ten to one that judgment passes; for, if he read the bill, it is not probable he will have penetration enough to discern its defects. His counsel, if any be assigned to him, will be content with hearing the substance of the charge with-

> out looking farther; and the court will hardly, of its own accord, think it a duty to examine the indictment to detect errors in it. Many hundreds, perhaps, are now in the state prison on erroneous indictments, who, however, have been fairly tried on the merits." 163 U. S., at 667–668.

I respectfully dissent.

MR. JUSTICE MARSHALL, dissenting.

The opinion of the Court explicitly disclaims the suggestion that it overrules the recent cases of *United States* v. *Jorn*, 400 U. S. 470 (1971), and *Downum* v. *United States*, 372 U. S. 734 (1963). *Ante*, at 469. But the Court substantially eviscerates the rationale of those cases. *Jorn* and *Downum* appeared to give judges some guidance in determining what constituted a "manifest necessity" for declaring a mistrial over a defendant's objection. Today the Court seems to revert to a totally unstructured analysis of such cases. I believe that one of the strengths of the articulation of legal rules in a series of cases is that successive cases present in a clearer focus considerations only vaguely seen earlier. Cases help delineate the factors to be considered and suggest how they ought to affect the result in particular situations. That is what *Jorn* and *Downum* did. The Court, it seems to me, today abandons the effort in those cases to suggest the importance of particular factors, and adopts a general "balancing" test which, even on its own terms, the Court improperly applies to this case.

The majority purports to balance the manifest necessity for declaring a mistrial, *ante*, at 463, the public interest "in seeing that a criminal prosecution proceed to verdict," *ibid.*, and the interest in assuring impartial verdicts, *ante*, at 464. The second interest is obviously present in every case, and placing it in the balance cannot alter the result of the analysis of differ-

ent cases. It is, at most, a constant whose importance a judge must consider when weighing other factors on which the availability of the double jeopardy defense depends.

At the same time, the balance that the majority strikes essentially ignores the importance of a factor which was determinative in *Jorn* and *Downum:* the accused's interest in his "valued right to have his trial completed by a particular tribunal," *Wade* v. *Hunter,* 336 U. S. 684, 689 (1949), quoted in *United States* v. *Jorn,* 400 U. S., at 484. This is not a factor which is excised from isolated passages of *Jorn,* as the majority would have it, *ante,* at 469; it is the core of that case, as even the most cursory reading will disclose. See, *e. g.,* 400 U. S., at 479, 484–486.

By mischaracterizing *Jorn* and *Downum,* the Court finds it possible to reach today's result. A fair reading of those cases shows how the balance should properly be struck here. The first element to be considered is the necessity for declaring a mistrial. That I take to mean consideration of the alternatives available to the judge confronted with a situation in the midst of trial that seems to require correction. In *Downum,* for example, a key prosecution witness was not available when the case was called for trial, because of the prosecutor's negligence. Because the witness was essential to presentation of only two of the six counts concerning *Downum,* there was no necessity to declare a mistrial as to all six. Trial could have proceeded on the four counts for which the prosecution was ready. *Downum* v. *United States,* 372 U. S., at 737. Similarly, in *Jorn,* the District Judge precipitately aborted the trial in order to protect the rights of prospective witnesses. Again, the alternative of interrupting the trial briefly so that the witnesses might consult with attorneys was available but not invoked. *United States* v. *Jorn,* 400 U. S., at 487.

A superficial examination of this case might suggest that there were no alternatives except to proceed where "reversal on appeal [would be] a certainty" *ante,* at 464. Respondent had been indicted for "knowingly obtain[ing] unauthorized control over stolen property, to wit: thirteen hundred dollars in United States Currency, the property of Zayre of Bridgeview, Inc., a corporation, knowing the same to have been stolen by another in violation of Chapter 38, Section 16–1 (d) of the Illinois Revised Statutes." Petition for Writ of Certiorari 3. The statute named in the indictment requires that the defendant have "[i]ntend[ed] to deprive the owner permanently of the use or benefit of the property." Ill. Rev. Stat., c. 38, § 16–1 (d)(1) (1963).

The majority treats it as unquestionably clear that the failure to allege that intent in the indictment made the indictment fatally defective. And indeed, since the time of the trial of this case, Illinois courts have so held. See, *e. g., People* v. *Matthews,* 122 Ill. App. 2d 264, 258 N. E. 2d 378 (1970); *People* v. *Hayn,* 116 Ill. App. 2d 241, 253 N. E. 2d 575 (1969). But the answer was not so clear when the trial judge made his decision. The Illinois Code of Criminal Procedure had just recently been amended to require that an indictment name the offense and the statutory provision alleged to have been violated, and that it set forth the nature and elements of the offense charged. Ill. Rev. Stat., c. 38, § 111–3 (a) (1963). The indictment here was sufficiently detailed to meet the federal requirement that the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,' " *Hagner* v. *United States,* 285 U. S. 427, 431 (1932); see also *Russell* v. *United States,* 369 U. S. 749 (1962).

Had the Illinois courts been made aware of the substantial constitutional questions raised by rigid applica-

tion of an archaic mode of reading indictments, they might well have refused to hold that the defect in the indictment here was jurisdictional and nonwaivable. Conscientious state trial judges certainly must attempt to anticipate the course of interpretation of state law. But they must also contribute to that course by pointing out the constitutional implications of alternative interpretations. By doing so, they would themselves help shape the interpretation of state law. Here, for example, had the trial judge refused to declare a mistrial because of his constitutional misgivings about the implications of that course, he might have prevented what Chief Justice Underwood has called a "reversion to an overly technical, highly unrealistic and completely undesirable type of formalism in pleading which . . . serves no useful purpose," in interpreting the Code of Criminal Procedure. *People ex rel. Ledford* v. *Brantley,* 46 Ill. 2d 419, 423, 263 N. E. 2d 27, 29 (1970) (Underwood, C. J., dissenting). A trial judge in 1965 might have forestalled that unhappy development. Thus, he could have proceeded to try the case on the first indictment, risking reversal as any trial judge does when making rulings of law, but with no guarantee of reversal. In proceeding with the trial, he would have fully protected the defendant's interest in having his trial completed by the jury already chosen.

If the only alternative to declaring a mistrial did require the trial judge to ignore the tenor of previous state decisional law, though, perhaps declaring a mistrial would have been a manifest necessity. But there obviously was another alternative. The trial judge could have continued the trial. The majority suggests that this would have been a useless charade. But to a defendant, forcing the Government to proceed with its proof would almost certainly not be useless. The Government might not persuade the jury of the defendant's guilt. The majority

concedes that the Double Jeopardy Clause would then bar a retrial. *Ante,* at 467; *United States* v. *Ball,* 163 U. S. 662 (1896). To assume that continuing the trial would be useless is to assume that conviction is inevitable. I would not structure the analysis of problems under the Double Jeopardy Clause on an assumption that appears to be inconsistent with the presumption of innocence.

Once it is shown that alternatives to the declaration of a mistrial existed, as they did here, we must consider whether the reasons which led to the declaration were sufficient, in light of those alternatives, to overcome the defendant's interest in trying the case to the jury. Here *Jorn* and *Downum* run directly counter to the holding today.

I would not characterize the District Judge's behavior in *Jorn* as "erratic," as the Court does, *ante,* at 469. His desire to protect the rights of prospective witnesses, who might have unknowingly implicated them in criminal activities if they testified, was hardly irrational. It, too, was "a legitimate state policy." *Ibid.* The defect in *Jorn* was the District Judge's failure to consider alternative courses of action, not the irrationality of the policy he sought to promote.

But even if I agreed with the majority's description of *Jorn,* that would not end the inquiry. I would turn to a consideration of the importance of the state policy that seemed to require declaring a mistrial, when weighed against the defendant's interest in concluding the trial with the jury already chosen.

Here again the majority mischaracterizes the state policy at stake here. What is involved is not, as the majority says, "the right of each defendant to insist that a criminal prosecution against him be commenced by the action of a grand jury." *Ante,* at 468. Rather, the interest is in making the defect in the indictment here jurisdictional and not waivable by a defendant.

Ordinarily, a defect in jurisdiction means that one institution has invaded the proper province of another. Such defects are not waivable because the State has an interest in preserving the allocation of competence between those institutions. Here, for example, the petit jury would invade the province of the grand jury if it returned a verdict of guilty on an improper indictment. However, allocation of jurisdiction is most important when one continuing body acts in the area of competence reserved to another continuing body. While it may be desirable to keep a single petit jury from invading the province of a single grand jury, surely that interest is not so substantial as to outweigh the "defendant's valued right to have his trial completed by a particular tribunal." *Wade* v. *Hunter,* 336 U. S. 684, 689 (1949). Cf. *Henry* v. *Mississippi,* 379 U. S. 443 (1965).

Downum v. *United States,* 372 U. S. 734 (1963), is an even harder case for the majority, which succeeds in distinguishing it only by misrepresenting the facts of the case. The majority treats *Downum* as a case involving a procedure "that would lend itself to prosecutorial manipulation." *Ante,* at 464. However, the facts in *Downum,* set out at 372 U. S., at 740–742 (Clark, J., dissenting), clearly show that the prosecutor's failure to have a crucial witness present was a negligent oversight. Except in the most attenuated sense that it may induce a prosecutor to fail to take steps to prevent such oversights, I cannot understand how negligence lends itself to manipulation. And even if I could understand that, I cannot understand how negligence in failing to draw an adequate indictment is different from negligence in failing to assure the presence of a crucial witness.[1]

[1] *Downum* may perhaps be read as stating a prophylactic rule. While the evil to be avoided is the intentional manipulation by the prosecutor of the availability of his witnesses, it may be extremely difficult to secure a determination of intentional manipulation. Proof

I believe that *Downum* and *Jorn* are controlling.[2] As in those cases, the trial judge here did not pursue an available alternative, and the reason which led him to declare a mistrial was prosecutorial negligence, a reason that this Court found insufficient in *Downum*. *Jorn* and *Downum* were in the tradition of elaboration of rules which give increasing guidance as case after case is decided. I see no reason to abandon that tradition in this case and to adopt a new balancing test whose elements are stated on such a high level of abstraction as to give judges virtually no guidance at all in deciding subsequent cases. I therefore respectfully dissent.

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will inevitably be hard to come by. And the relations between judges and prosecutors in many places may make judges reluctant to find intentional manipulation. Thus, a general rule that the absence of crucial prosecution witnesses is not a reason for declaring a mistrial is necessary. Although the abuses of misdrawing indictments are less apparent than those of manipulating the availability of witnesses, I believe that, even if *Downum* is based on the foregoing analysis—an analysis which appears nowhere in the opinion—a similar prophylactic rule is desirable here.

For example, in this case the State gained two weeks to strengthen a weak case. This is far longer than the two-day delay in *Downum*, and, to the extent that the time was used to strengthen the case, the prosecutor could have capitalized on his previous negligence in drawing the indictment.

[2] So far I have read *Jorn* and *Downum* as restrictively as they can be fairly read. But those cases, I believe, should be read more expansively. They show to me that "manifest necessity" cannot be created by errors on the part of the prosecutor or judge; it must arise from some source outside their control. *Wade* v. *Hunter*, 336 U. S. 684 (1949), was clearly such a case. So were the cases that the majority says involved situations where "an impartial verdict cannot be reached," *ante*, at 464. In those cases, a juror or the jury as a whole, uncontrolled by the judge or prosecutor, prevented the trial from proceeding to a verdict. *United States* v. *Perez*, 9 Wheat. 579 (1824); *Simmons* v. *United States*, 142 U. S. 148 (1891); *Thompson* v. *United States*, 155 U. S. 271 (1894).

BRADEN *v.* 30TH JUDICIAL CIRCUIT COURT OF KENTUCKY

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

No. 71-6516. Argued December 5, 1972—Decided February 28, 1973

Petitioner, imprisoned in Alabama, applied to the District Court for the Western District of Kentucky for a writ of federal habeas corpus to compel the Commonwealth of Kentucky to grant him a speedy trial on an indictment returned by the grand jury of respondent court regarding which Kentucky had lodged a detainer with Alabama. The District Court granted the writ, but the Court of Appeals reversed on the ground that 28 U. S. C. § 2241 (a), which provides that "[w]rits of habeas corpus may be granted by the . . . district courts . . . within their respective jurisdictions" precluded granting the writ to a prisoner who was not physically present within the territorial limits of the district court. *Held:*

1. Under *Peyton* v. *Rowe*, 391 U. S. 54, which discarded the "prematurity doctrine" of *McNally* v. *Hill*, 293 U. S. 131, the petitioner was "in custody" within the meaning of 28 U. S. C. § 2241 (c)(3) for purposes of a habeas corpus attack on the Kentucky indictment underlying the detainer, even though he was confined in an Alabama prison. Pp. 488–489.

2. The exhaustion doctrine of *Ex parte Royall*, 117 U. S. 241, does not bar a petition for federal habeas corpus alleging, under *Smith* v. *Hooey*, 393 U. S. 374, a constitutional claim of present denial of a speedy trial, even though the petitioner has not yet been brought to trial on the state charge. The petitioner must, however, have exhausted available state court remedies for consideration of that constitutional claim. Pp. 489–493.

3. The jurisdiction of a district court considering a habeas corpus petition requires only that the court issuing the writ have jurisdiction over the custodian of the prisoner. Pp. 494–495.

4. *Ahrens* v. *Clark*, 335 U. S. 188, on which respondent relies, can no longer be viewed as requiring that habeas corpus petitions be brought only in the district of the petitioner's confinement. Here, since respondent was properly served with process in the Western District of Kentucky, the Court of Appeals erred in con-

cluding that the District Court should have dismissed the petition for lack of jurisdiction. Pp. 495–501.

454 F. 2d 145, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, and MARSHALL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, *post,* p. 501. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL, J., joined, *post,* p. 502.

David R. Hood argued the cause and filed a brief for petitioner.

John M. Famularo, Assistant Attorney General of Kentucky, argued the cause for respondent *pro hac vice.* With him on the brief was *Ed W. Hancock,* Attorney General.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner is presently serving a sentence in an Alabama prison. He applied to the District Court for the Western District of Kentucky for a writ of federal habeas corpus, alleging denial of his constitutional right to a speedy trial, *Smith* v. *Hooey,* 393 U. S. 374 (1969), and praying that an order issue directing respondent to afford him an immediate trial on a then three-year-old Kentucky indictment. We are to consider whether, as petitioner was not physically present within the territorial limits of the District Court for the Western District of Kentucky, the provision of 28 U. S. C. § 2241 (a) that "[w]rits of habeas corpus may be granted by the . . . district courts . . . *within their respective jurisdictions*" (emphasis supplied), precluded the District Court from

**Melvin L. Wulf, Sanford Jay Rosen,* and *Joel M. Gora* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

entertaining petitioner's application. The District Court held that the section did not bar its determination of the application. The court held further that petitioner had been denied a speedy trial and ordered respondent either to secure his presence in Kentucky for trial within 60 days or to dismiss the indictment. The Court of Appeals for the Sixth Circuit reversed on the ground that "the habeas corpus jurisdiction conferred on the federal courts by 28 U. S. C. § 2241 (a) is 'limited to petitions filed by persons physically present within the territorial limits of the District Court.'" 454 F. 2d 145, 146 (1972). We granted certiorari. 407 U. S. 909 (1972). We reverse.

I

On July 31, 1967, the grand jury of the Jefferson County Circuit Court (30th Judicial Circuit of Kentucky) indicted petitioner on one count of storehouse breaking and one count of safebreaking. At the time of the indictment, petitioner was in custody in California, and he was returned to Kentucky to stand trial on the indictment. But on November 13, 1967, he escaped from the custody of Kentucky officials and remained at large until his arrest in Alabama on February 24, 1968. Petitioner was convicted of certain unspecified felonies in the Alabama state courts, and was sentenced to the Alabama state prison, where he was confined when he filed this action.

The validity of petitioner's conviction on the Alabama felonies is not at issue here, just as it was not at issue before the District Court for the Western District of Kentucky. Nor does petitioner challenge the "present effect being given the [Kentucky] detainer by the [Alabama] authorities . . . ." *Nelson* v. *George,* 399 U. S. 224, 225 (1970). He attacks, rather, the validity of the

Kentucky indictment which underlies the detainer lodged against him by officials of that State.

In a *pro se* application for habeas corpus relief to the Federal District Court in the Western District of Kentucky, petitioner alleged that he had made repeated demands for a speedy trial on the Kentucky indictment, that he had been denied his right to a speedy trial, that further delay in trial would impair his ability to defend himself, and that the existence of the Kentucky indictment adversely affected his condition of confinement in Alabama by prejudicing his opportunity for parole. In response to an order to show cause, respondent argued that the District Court lacked jurisdiction because the petitioner was not confined within the district. Respondent added that "petitioner in the case at bar may challenge the legality of any of the adverse effects of any Kentucky detainer against him in Alabama by habeas corpus in the Alabama Federal District Court." App. 6–7. The District Court held, citing *Smith* v. *Hooey*, 393 U. S. 374 (1969), that Kentucky must "attempt to effect the return of a prisoner from a foreign jurisdiction for trial on pending state charges when such prisoner so demands . . . . Since it is the State of Kentucky which must take action, it follows that jurisdiction rests in this district which has jurisdiction over the necessary state officials." App. 9.

Under the constraint of its earlier decision,[1] the Court of Appeals reversed but stated that it "reach[ed] this conclusion reluctantly" because of the possibility that the decision would "result in Braden's inability to find a forum in which to assert his constitutional right to a speedy trial—a right which he is legally entitled to assert at this time under Peyton v. Rowe, 391 U. S. 54

[1] *White* v. *Tennessee*, 447 F. 2d 1354 (CA6 1971).

(1968). This is a possibility because the rule in the Fifth Circuit, where [Braden] is incarcerated, appears to be that a district court in the state that has filed the detainer is the proper forum in which to file the petition. *See* May v. Georgia, 409 F. 2d 203 (5th Cir. 1969). *See also* Rodgers v. Louisiana, 418 F. 2d 237 (5th Cir. 1969). Braden thus may find himself ensnared in what has aptly been termed 'Catch 2254'—unable to vindicate his constitutional rights in either of the only two states that could possibly afford a remedy. *See* Tuttle, Catch 2254: Federal Jurisdiction and Interstate Detainers, 32 U. Pitt. L. Rev. 489, 502–03 (1971)." 454 F. 2d, at 146–147.

II

We granted certiorari to resolve a sharp conflict among the federal courts [2] on the choice of forum where a prisoner attacks an interstate detainer on federal habeas corpus. Before turning to that question, we must make clear that petitioner is entitled to raise his speedy trial claim on federal habeas corpus at this time. First, he is currently "in custody" within the meaning of the federal habeas corpus statute, 28 U. S. C. § 2241 (c)(3). Prior to our decision in *Peyton* v. *Rowe,* 391 U. S. 54 (1968), the "prematurity doctrine" of *McNally* v. *Hill,* 293 U. S. 131 (1934), would, of course, have barred his petition for relief.[3] But our decision in *Peyton* v. *Rowe* discarded the prematurity doctrine, which had permitted

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[2] Compare *United States ex rel. Meadows* v. *New York,* 426 F. 2d 1176 (CA2 1970), and *Word* v. *North Carolina,* 406 F. 2d 352 (CA4 1969) (proper forum is in the demanding State), with *United States ex rel. Van Scoten* v. *Pennsylvania,* 404 F. 2d 767 (CA3 1968), *Ashley* v. *Washington,* 394 F. 2d 125 (CA9 1968), and *Booker* v. *Arkansas,* 380 F. 2d 240 (CA8 1967) (proper forum is in the State of confinement).

[3] See generally Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1087–1093 (1970).

a prisoner to attack on habeas corpus only his current confinement, and not confinement that would be imposed in the future, and opened the door to this action.[4]

Second, petitioner has exhausted all available state remedies as a prelude to this action. It is true, of course, that he has not yet been tried on the Kentucky indictment, and he can assert a speedy trial defense when, and if, he is finally brought to trial. It is also true, as our Brother REHNQUIST points out in dissent, that federal habeas corpus does not lie, absent "special circumstances," to adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court. *Ex parte Royall,* 117 U. S. 241, 253 (1886). Petitioner does not, however, seek at this time to litigate a federal defense to a criminal charge, but only

[4] In *Smith* v. *Hooey,* 393 U. S. 374 (1969), we considered a speedy trial claim similar to the one presented in the case before us, and we held that a State which had lodged a detainer against a petitioner in another State must, on the prisoner's demand, "make a diligent, good-faith effort" to bring the prisoner to trial. *Id.,* at 383. But that case arose on direct review of the denial of relief by the state court, and we had no occasion to consider whether the same or similar claims could have been raised on federal habeas corpus. Yet it logically follows from *Peyton* v. *Rowe,* 391 U. S. 54 (1968), that the claims can be raised on collateral attack. In this context, as opposed to the situation presented in *Peyton,* the "future custody" under attack will not be imposed by the same sovereign which holds the petitioner in his current confinement. Nevertheless, the considerations which were held in *Peyton* to warrant a prompt resolution of the claim also apply with full force in this context. 391 U. S., at 63–64. See *United States ex rel. Meadows* v. *New York, supra,* at 1179. *Word* v. *North Carolina, supra,* at 353–355. Since the Alabama warden acts here as the agent of the Commonwealth of Kentucky in holding the petitioner pursuant to the Kentucky detainer, we have no difficulty concluding that petitioner is "in custody" for purposes of 28 U. S. C. § 2241 (c)(3). On the facts of this case, we need not decide whether, if no detainer had been issued against him, petitioner would be sufficiently "in custody" to attack the Kentucky indictment by an action in habeas corpus.

to demand enforcement of the Commonwealth's affirmative constitutional obligation to bring him promptly to trial. *Smith* v. *Hooey,* 393 U. S. 374 (1969). He has made repeated demands for trial to the courts of Kentucky, offering those courts an opportunity to consider on the merits his constitutional claim of the *present* denial of a speedy trial. Under these circumstances it is clear that he has exhausted all available state court remedies for consideration of that constitutional claim, even though Kentucky has not yet brought him to trial.

The exhaustion doctrine is a judicially crafted instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a "swift and imperative remedy in all cases of illegal restraint or confinement." *Secretary of State for Home Affairs* v. *O'Brien,* [1923] A. C. 603, 609 (H. L.). It cannot be used as a blunderbuss to shatter the attempt at litigation of constitutional claims without regard to the purposes that underlie the doctrine and that called it into existence. As applied in our earlier decisions, the doctrine

> "preserves the role of the state courts in the application and enforcement of federal law. Early federal intervention in state criminal proceedings would tend to remove federal questions from the state courts, isolate those courts from constitutional issues, and thereby remove their understanding of and hospitality to federally protected interests. Second, [the doctrine] preserves orderly administration of state judicial business, preventing the interruption of state adjudication by federal habeas proceedings. It is important that petitioners reach state appellate courts, which can develop and correct errors of state and federal law and most effectively supervise and

> impose uniformity on trial courts." Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1094 (1970).

See *Darr* v. *Burford,* 339 U. S. 200, 204–206 (1950), and the case which overruled it, *Fay* v. *Noia,* 372 U. S. 391, 417–420 (1963). See also *Ex parte Royall, supra,* at 251–252; *Ex parte Hawk,* 321 U. S. 114 (1944); cf. *Younger* v. *Harris,* 401 U. S. 37 (1971); *Stefanelli* v. *Minard,* 342 U. S. 117 (1951).

The fundamental interests underlying the exhaustion doctrine have been fully satisfied in petitioner's situation. He has already presented his federal constitutional claim of a *present* denial of a speedy trial to the courts of Kentucky. The state courts rejected the claim, apparently on the ground that since he had once escaped from custody the Commonwealth should not be obligated to incur the risk of another escape by returning him for trial. Petitioner exhausted all available state court opportunities to establish his position that the prior escape did not obviate the Commonwealth's duty under *Smith* v. *Hooey, supra.* Moreover, petitioner made no effort to abort a state proceeding or to disrupt the orderly functioning of state judicial processes. He comes to federal court, not in an effort to forestall a state prosecution, but to enforce the Commonwealth's obligation to provide him with a state court forum. He delayed his application for federal relief until the state courts had conclusively determined that his prosecution was temporarily moribund. Since petitioner began serving the second of two 10-year Alabama sentences in March 1972, the revival of the prosecution may be delayed until as late as 1982. A federal habeas corpus action at this time and under these circumstances

does not jeopardize any legitimate interest of federalism.[5] Respondent apparently shares that view since it specifically concedes that petitioner has exhausted all available state remedies, Tr. of Oral Arg. 41.

In the case before us, the Court of Appeals held—not surprisingly, in view of the considerations discussed above—that even though petitioner had chosen the wrong forum, his speedy trial claim was one "which he is legally entitled to assert at this time under Peyton v. Rowe, 391 U. S. 54 (1968)." 454 F. 2d, at 146. And the District Court, which upheld on the merits petitioner's speedy

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[5] Cf. *Baker* v. *Grice*, 169 U. S. 284 (1898), where this Court held that a petitioner for a writ of habeas corpus had failed to exhaust state court remedies. In rejecting each of the grounds relied on by the federal court below in concluding that special circumstances warranted that court's immediate intervention, this Court stated:

"It is also said that since the trial of Hathaway and the granting of a new trial to him the case of the petitioner [Grice] has not been called for trial, and that two terms of court since the granting of a new trial to Hathaway had come and the second one was about expiring at the time when the petitioner filed his petition in the Circuit Court for this writ. Here, again, there is no allegation and no proof that any attempt had been made on the part of this petitioner to obtain a trial in the state court or that he had been refused such trial by that court upon any application which he made. It is the simple case of a failure to call the indictment for trial, the petitioner being in the meantime on bail and making no effort to obtain a trial and evincing no desire by way of a demand that a trial in his case should be had.

"We do not say that a refusal to try a person who is on bail can furnish any foundation for a resort to the Federal courts, even in cases in which a trial may involve Federal questions, but in this case no refusal is shown. A mere omission to move the case for trial (the party being on bail) is all that is set up, coupled with the assertion that defendant was eager and anxious for trial, but showing no action whatever on his part which might render such anxiety and eagerness known to the state authorities." *Id.*, at 292–293.

Cf. *Young* v. *Ragen*, 337 U. S. 235, 238–239 (1949); *Marino* v. *Ragen*, 332 U. S. 561, 563–570 (1947) (Rutledge, J., concurring).

trial claim, necessarily adopted that view. Indeed, the great majority of lower federal courts which have considered the question since *Smith* v. *Hooey, supra,* have reached this same, and indisputably correct, conclusion.[6]

We emphasize that nothing we have said would permit the derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court. The contention in dissent that our decision converts federal habeas corpus into "a pretrial-motion forum for state prisoners," wholly misapprehends today's holding.

III

Accordingly, we turn to the determination of the forum in which the petition for habeas corpus should be brought. In terms of traditional venue considerations, the District Court for the Western District of Kentucky is almost surely the most desirable forum for the adjudication of the claim.[7] It is in Kentucky, where all of the material events took place, that the records and witnesses perti-

[6] See *Chauncey* v. *Second Judicial District Court,* 453 F. 2d 389, 390 n. 1 (CA9 1971); *Beck* v. *United States,* 442 F. 2d 1037 (CA5 1971); *Kane* v. *Virginia,* 419 F. 2d 1369 (CA4 1970); *May* v. *Georgia,* 409 F. 2d 203 (CA5 1969); *White* v. *Coleman,* 341 F. Supp. 272, 274 (WD Ky. 1971) (dictum); *United States ex rel. Pitts* v. *Rundle,* 325 F. Supp. 480 (ED Pa. 1971) (dictum); *Williams* v. *Pennsylvania,* 315 F. Supp. 1261 (WD Mo. 1970) (dictum); *Varallo* v. *Ohio,* 312 F. Supp. 45 (ED Tex. 1970) (dictum); *Campbell* v. *Smith,* 308 F. Supp. 796 (SD Ga. 1970); *Piper* v. *United States,* 306 F. Supp. 1259 (Conn. 1969) (dictum); *United States ex rel. White* v. *Hocker,* 306 F. Supp. 485 (Nev. 1969). But see *Lawrence* v. *Blackwell,* 298 F. Supp. 708 (ND Ga. 1969); *Carnage* v. *Sanborn,* 304 F. Supp. 857 (ND Ga. 1969); *Kirk* v. *Oklahoma,* 300 F. Supp. 453 (WD Okla. 1969) (alternative holding).

[7] See *United States* v. *Hayman,* 342 U. S. 205 (1952), discussing the legislative history of 28 U. S. C. § 2255; S. Rep. No. 1502, 89th Cong., 2d Sess., 2 (1966), discussing 28 U. S. C. § 2241 (d); Uniform Post-Conviction Procedure Act § 3; American Bar Association Project on Standards for Criminal Justice, Post-Conviction Remedies § 1.4,

nent to petitioner's claim are likely to be found. And that forum is presumably no less convenient for the respondent and the Commonwealth of Kentucky, than for the petitioner. The expense and risk of transporting the petitioner to the Western District of Kentucky, should his presence at a hearing prove necessary, would in all likelihood be outweighed by the difficulties of transporting records and witnesses from Kentucky to the district where petitioner is confined.[8] Indeed, respondent makes clear that "on balance, it would appear simpler and less expensive for the State of Kentucky to litigate such questions [as those involved in this case] in one of its own Federal judicial districts." Brief for Respondent 6.

But respondent insists that however the balance of convenience might be struck with reference to the question of venue, the choice of forum is rigidly and jurisdictionally controlled by the provision of § 2241 (a) that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions.*" 28 U. S. C. § 2241 (a) (emphasis supplied). Relying on our decision in *Ahrens* v. *Clark,* 335 U. S. 188 (1948), respondent contends—and the Court of Appeals held—that the italicized words limit a District Court's habeas corpus jurisdiction to cases where the prisoner seeking relief is confined within its territorial jurisdiction. Since that interpretation is not compelled either by the language of the statute or by the decision in *Ahrens,* and since it is fundamentally at odds with the purposes of the statutory scheme, we cannot agree.

The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds

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p. 28 (approved draft 1968); Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1161 (1970).

[8] S. Rep. No. 1526, 80th Cong., 2d Sess., 3 (1948).

him in what is alleged to be unlawful custody. *Wales* v. *Whitney,* 114 U. S. 564, 574 (1885). In the classic statement:

> "The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent." *In the Matter of Jackson,* 15 Mich. 417, 439–440 (1867), quoted with approval in *Ex parte Endo,* 323 U. S. 283, 306 (1944).

See also *Ahrens* v. *Clark,* 335 U. S., at 196–197 (Rutledge, J., dissenting).

Read literally, the language of § 2241 (a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.

Nevertheless, there is language in our opinion in *Ahrens* v. *Clark, supra,* indicating that the prisoner's presence within the territorial confines of the district is an invariable prerequisite to the exercise of the District Court's habeas corpus jurisdiction. In *Ahrens,* 120 German nationals confined at Ellis Island, New York, pending deportation sought habeas corpus on the principal ground that the removal orders exceeded the President's statutory authority under the Alien Enemy Act of 1798.

They filed their petitions in the District Court for the District of Columbia, naming as respondent the Attorney General of the United States. Construing the statutory predecessor to § 2241 (a), we held that the phrase, "within their respective jurisdictions," precluded the District Court for the District of Columbia from inquiring into the validity of the prisoners' detention at Ellis Island, and we therefore affirmed the dismissal of the petitions on jurisdictional grounds.

Our decision in *Ahrens* rested on the view that Congress' paramount concern was the risk and expense attendant to the "production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ. The opportunities for escape afforded by travel, the cost of transportation, the administrative burden of such an undertaking negate such a purpose." 335 U. S., at 191. And we found support for that assumption in the legislative history of the Act.[9] During the course of Senate debate on the habeas corpus statute of 1867,[10] the bill was criticized on the ground that it would permit "a district judge in Florida to bring before him some men convicted and sentenced and held under imprisonment in the State of Vermont or in any of the further States." Cong. Globe, 39th Cong., 2d Sess., 730. Senator Trumbull, sponsor of the bill, met the objection with an amendment adding the words, "within their respective jurisdictions," as a circumscription of the power of the district courts to issue the writ.[11]

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[9] But see Fairman, Some New Problems of the Constitution Following the Flag, 1 Stan. L. Rev. 587, 633–640 (1949).

[10] Act of Feb. 5, 1867, 14 Stat. 385.

[11] As passed, the statute provided:

"That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdic-

But developments since *Ahrens* have had a profound impact on the continuing vitality of that decision. First, in the course of overruling the application of *Ahrens* to the ordinary case where a prisoner attacks the conviction and sentence of a federal or state court, Congress has indicated that a number of the premises which were thought to require that decision are untenable. A 1950 amendment to the habeas corpus statute requires that a collateral attack on a federal sentence be brought in the sentencing court rather than the district where the prisoner is confined. 28 U. S. C. § 2255. Similarly, a prisoner contesting a conviction and sentence of a state court of a State which contains two or more federal judicial districts, who is confined in a district within the State other than that in which the sentencing court is located, has the option of seeking habeas corpus either in the district where he is confined or the district where the sentencing court is located. 28 U. S. C. § 2241 (d).[12] In enacting these amendments, Congress explicitly recognized the substantial advantages of having these cases resolved in the court which originally imposed the confinement or in the court located nearest the site of the underlying controversy.[13] And Congress has further

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tions . . . shall have power to grant writs of habeas corpus . . . ." 14 Stat. 385.

[12] The amendment was adopted in 1966.

[13] See H. R. Rep. No. 1894, 89th Cong., 2d Sess. (1966); S. Rep. No. 1502, 89th Cong., 2d Sess. (1966) (legislative history of amendments to 28 U. S. C. § 2241 (d)); *United States* v. *Hayman*, 342 U. S. 205 (1952) (discussing legislative history of 28 U. S. C. § 2255). Of course, these amendments were not motivated solely by a desire to insure that the disputes could be resolved in the most convenient forum. It was also a critical part of the congressional purpose to avoid the vastly disproportionate burden of handling habeas corpus petitions which had fallen, prior to the amendments, on those districts in which large numbers of prisoners are confined.

challenged the theoretical underpinnings of the decision by codifying in the habeas corpus statute a procedure we sanctioned in *Walker* v. *Johnston,* 312 U. S. 275, 284 (1941), whereby a petition for habeas corpus can in many instances be resolved without requiring the presence of the petitioner before the court that adjudicates his claim. 28 U. S. C. § 2243. See also *United States* v. *Hayman,* 342 U. S. 205, 222–223 (1952).[14]

This Court, too, has undercut some of the premises of the *Ahrens* decision. Where American citizens confined overseas (and thus outside the territory of any district court) have sought relief in habeas corpus, we have held, if only implicitly, that the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim. *Burns* v. *Wilson,* 346 U. S. 137 (1953), rehearing denied, 346 U. S. 844, 851–852 (opinion of Frankfurter, J.); cf. *Toth* v. *Quarles,* 350 U. S. 11 (1955); *Hirota* v. *MacArthur,* 338 U. S. 197, 199 (1948) (DOUGLAS, J., concurring (1949)).

A further, critical development since our decision in *Ahrens* is the emergence of new classes of prisoners who are able to petition for habeas corpus because of the adoption of a more expansive definition of the "custody" requirement of the habeas statute. See *Peyton* v. *Rowe,* 391 U. S. 54 (1968); *Carafas* v. *LaVallee,* 391 U. S. 234 (1968); *Jones* v. *Cunningham,* 371 U. S. 236 (1963). The overruling of *McNally* v. *Hill,* 293 U. S. 131 (1934), made it possible for prisoners in custody under one sentence to attack a sentence which they had not yet begun to serve. And it also enabled a petitioner held in one State to attack a detainer lodged against him by another State. In such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding

[14] See Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1189–1191 (1970).

State,[15] and the custodian State is presumably indifferent to the resolution of prisoner's attack on the detainer. Here, for example, the petitioner is confined in Alabama, but his dispute is with the Commonwealth of Kentucky, not the State of Alabama. Under these circumstances it would serve no useful purpose to apply the *Ahrens* rule and require that the action be brought in Alabama. In fact, a slavish application of the rule would jar with the very purpose underlying the addition of the phrase, "within their respective jurisdictions." We cannot assume that Congress intended to require the Commonwealth of Kentucky to defend its action in a distant State and to preclude the resolution of the dispute by a federal judge familiar with the laws and practices of Kentucky.[16] See *United States ex rel. Meadows* v. *New York,* 426 F. 2d 1176, 1181 (CA2 1970); *Word* v. *North Carolina,* 406 F. 2d 352 (CA4 1969).

IV

In view of these developments since *Ahrens* v. *Clark,* we can no longer view that decision as establishing an

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[15] Nothing in this opinion should be taken to preclude the exercise of concurrent habeas corpus jurisdiction over the petitioner's claim by a federal district court in the district of confinement. But as we have made clear above, that forum will not in the ordinary case prove as convenient as the district court in the State which has lodged the detainer. Where a prisoner brings an action in the district of confinement attacking a detainer lodged by another State, the court can, of course, transfer the suit to a more convenient forum. 28 U. S. C. § 1404 (a). *Hoffman* v. *Blaski,* 363 U. S. 335 (1960).

[16] Obviously, since petitioner could not have presented his habeas corpus claim prior to our 1968 decision in *Peyton* v. *Rowe, supra,* and since the choice-of-forum provisions in the habeas corpus statute were most recently amended in 1966, see n. 13, *supra,* we can hardly draw any inference from the fact that the amendment did not specifically overrule *Ahrens* with respect to the type of case now before us.

inflexible jurisdictional rule, dictating the choice of an inconvenient forum even in a class of cases which could not have been foreseen at the time of our decision.[17] Of course, in many instances the district in which petitioners are held will be the most convenient forum for the litigation of their claims. On the facts of *Ahrens* itself, for example, petitioners could have challenged their detention by bringing an action in the Eastern District of New York against the federal officials who confined them in that district. No reason is apparent why the District of Columbia would have been a more convenient forum, or why the Government should have undertaken the burden of transporting 120 detainees to a hearing in the District of Columbia. Under these circumstances, traditional principles of venue would have mandated the bringing of the action in the Eastern District of New York, rather than the District of Columbia. *Ahrens* v. *Clark* stands for no broader proposition.

Since the petitioner's absence from the Western District of Kentucky did not deprive the court of jurisdiction, and since the respondent was properly served in that district, see *Strait* v. *Laird,* 406 U. S. 341 (1972); *Schlanger* v. *Seamans,* 401 U. S. 487 (1971), the court below erred in ordering the dismissal of the petition on jurisdictional grounds. The judgment of the Court of

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[17] In *Nelson* v. *George,* 399 U. S. 224, 228 n. 5 (1970), we adverted to, but reserved judgment on, the precise question at issue here. We did point out, however, that the "obvious, logical, and practical solution is an amendment to § 2241 to remedy the shortcoming that has become apparent following the holding in *Peyton* v. *Rowe.* Sound judicial administration calls for such an amendment." We note that an amendment to § 2241 drafted by the Administrative Conference of the United States Courts was introduced during the 92d Congress, but no action was taken upon it.

Appeals is reversed and the case is remanded for proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE BLACKMUN, concurring in the result.

I concur in the result. The conclusion the Court reaches is not unexpected when one notes the extraordinary expansion of the concept of habeas corpus effected in recent years. See *Ex parte Hull,* 312 U. S. 546 (1941); *Ex parte Endo,* 323 U. S. 283 (1944); *Jones* v. *Cunningham,* 371 U. S. 236 (1963); *Peyton* v. *Rowe,* 391 U. S. 54 (1968); *Carafas* v. *LaVallee,* 391 U. S. 234 (1968); *Nelson* v. *George,* 399 U. S. 224 (1970). Cf. *Schlanger* v. *Seamans,* 401 U. S. 487 (1971). A trend of this kind, once begun, easily assumes startling proportions. The present case is but one more step, with the Alabama warden now made the agent of the Commonwealth of Kentucky.

I do not go so far as to say that on the facts of this case the result is necessarily wrong. I merely point out that we have come a long way from the traditional notions of the Great Writ. The common-law scholars of the past hardly would recognize what the Court has developed, see 4 W. Blackstone, Commentaries *131–134, and they would, I suspect, conclude that it is not for the better.

The result in this case is not without its irony. The petitioner's speedy trial claim follows upon his escape from Kentucky custody after that State, at its expense, had returned the petitioner from California to stand trial in Kentucky. Had he not escaped, his Kentucky trial would have taken place five years ago. Furthermore, the petitioner is free to assert his speedy trial claim in the Kentucky courts if and when he is brought to trial there.

And the claim, already strong on the facts here, increases in strength as time goes by.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL concur, dissenting.

Today the Court overrules *Ahrens* v. *Clark,* 335 U. S. 188 (1948), which construed the legislative intent of Congress in enacting the lineal predecessor of 28 U. S. C. § 2241. Although considerations of "convenience" may support the result reached in this case, those considerations are, in this context, appropriate for Congress, not this Court, to make. Congress has not legislatively overruled *Ahrens,* and subsequent "developments" are simply irrelevant to the judicial task of ascertaining the legislative intent of Congress in providing, in 1867, that federal district courts may issue writs of habeas corpus "within their respective jurisdictions" for prisoners in the custody of state authorities. The Court, however, not only accomplishes a feat of judicial prestidigitation but, without discussion or analysis, explicitly extends the scope of *Peyton* v. *Rowe,* 391 U. S. 54 (1968), and implicitly rejects *Ex parte Royall,* 117 U. S. 241 (1886).

I

In order to appreciate the full impact of the Court's decision, a brief reiteration of the procedural stance of the case at the time the petition for habeas corpus was filed is necessary. Petitioner is incarcerated in Alabama pursuant to a state court judgment, the validity of which petitioner does not attack. Petitioner had been indicted in Kentucky and a detainer filed by Kentucky authorities with the Alabama authorities. Kentucky had conducted no proceedings against petitioner; no judgment of conviction on the Kentucky indictment had been obtained. From Alabama, petitioner requested Kentucky authorities to ask the Alabama authorities to de-

liver him to Kentucky so that petitioner could be tried on the Kentucky indictment. No action was taken on this request, and the Kentucky Supreme Court refused to issue a writ of mandamus requiring Kentucky authorities to request that Alabama deliver petitioner for trial in Kentucky. Petitioner then filed the instant habeas corpus proceeding in Kentucky, contending that he was "in custody" of Kentucky authorities and that the "custody" was illegal because he had been denied his right to a speedy trial. Petitioner is not seeking to attack collaterally a state judgment of conviction in federal court. In substance, petitioner is seeking, prior to trial, to force the Commonwealth of Kentucky to litigate a question that otherwise could only be raised as an absolute defense in a state criminal proceeding against petitioner.

II

The first inquiry is whether a state prisoner can, prior to trial, raise the claim of the denial of a right to a speedy trial by petitioning a federal court for writ of habeas corpus. The Court reasons that since *Peyton* v. *Rowe, supra,* "discarded the prematurity doctrine," *ante,* at 488, "petitioner is entitled to raise his speedy trial claim on federal habeas corpus."

Petitioner filed this petition alleging federal jurisdiction pursuant to 28 U. S. C. §§ 2241, 2254. Section 2254 pertains only to a prisoner in custody pursuant to a *judgment of conviction* of a state court; in the context of the attempt to assert a right to a speedy trial, there is simply no § 2254 trap to "ensnare" petitioner, such as the court below felt existed. The issue here is whether habeas corpus is warranted under § 2241 (c)(3); that section empowers district courts to issue the writ, *inter alia,* before a judgment is rendered in a criminal proceeding. It is in the context of an application for federal habeas

corpus by a state prisoner prior to any trial in a state court that the effect of the instant decision must be analyzed.

The Court reasons that since *Smith* v. *Hooey,* 393 U. S. 374 (1969), held that a State must, consistent with the Sixth and Fourteenth Amendments, "make a diligent, good-faith effort to bring" a prisoner to trial on a state indictment even though he is incarcerated in another jurisdiction, *id.,* at 383, and, since *Peyton* v. *Rowe, supra,* overruled "the prematurity doctrine," therefore, a prisoner can attack in a federal habeas corpus proceeding the validity of an indictment lodged against him in one State even though he is imprisoned in another. I cannot agree with this reasoning.

In *Smith,* this Court held that a State must make an effort to try a person even though he was incarcerated in another jurisdiction. That case did not, however, involve federal habeas corpus. It came here on certiorari after the state court had denied a petition for a writ of mandamus seeking to have the underlying indictment dismissed. The Texas Supreme Court had ruled that the state courts had no power to order the federal prisoner produced for trial on the state indictment. This Court reversed, holding that, in view of the Sixth and Fourteenth Amendment guarantees of a speedy trial, the State must, after demand therefor, attempt to obtain the prisoner from the sovereignty with custody over the prisoner.

It by no means follows, however, that a state prisoner can assert the right to a speedy trial in a federal district court. The fundamental flaw in the reasoning of the Court is the assumption that since a prisoner has some "right" under *Smith* v. *Hooey, supra,* he must have some forum in which affirmatively to assert that right, and that therefore the right may be vindicated in a federal district court under § 2241 (c)(3). *Smith* v. *Hooey* did

not, however, establish that a right distinct from the right to a speedy trial existed. It merely held that a State could not totally rely on the fact that it could not order that a prisoner be brought from another jurisdiction as a justification for not attempting to try the defendant as expeditiously as possible. The right to a speedy trial is, like other constitutional rights, a defense to a criminal charge, but one which, unlike others, increases in terms of potential benefit to the accused with the passage of time. *Barker* v. *Wingo,* 407 U. S. 514 (1972). The fact that a State must make an effort to obtain a defendant from another sovereign for trial but fails, after demand, to make an effort would weigh heavily in the defendant's favor. But *Smith* v. *Hooey* does not necessarily imply that federal courts may, as the District Court did in this case, in effect, issue an injunction requiring a state court to conduct a criminal trial. If the State fails to perform its duty, *Smith* v. *Hooey,* it must face the consequences of possibly not obtaining a conviction, *Barker* v. *Wingo.* But the fact that the State has a duty by no means leads to the conclusion that the failure to perform that duty can be raised by a prospective defendant on federal habeas corpus in advance of trial. The history of habeas corpus and the principles of federalism strongly support the approach established by *Ex parte Royall, supra,* that, absent extraordinary circumstances, federal habeas corpus should not be used to adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court.

The Court's reasoning for allowing a state prisoner to resort to federal habeas corpus is that the prisoner is attacking the validity of a "future custody." The Court relies on *Peyton* to justify federal jurisdiction. *Peyton,* however, was in a significantly different procedural posture from the instant case. There, the Court held that a

state prisoner could challenge the constitutional validity of a sentence which he had not yet begun to serve when he was currently incarcerated pursuant to a valid conviction and sentence, but the sentence he sought to attack was to run consecutively to the valid sentence. Even though a person may be "in custody" for purposes of §§ 2241 (c)(3), or 2254, if he has not yet begun to serve a sentence entered after a judgment of conviction, as the Court held in *Peyton,* it by no means follows that he is similarly "in custody" when no judgment of conviction has been entered or even any trial on the underlying charge conducted. The Court's suggestion that a person may challenge by way of federal habeas corpus any custody that might possibly be imposed at some time in the "future," which suggestion unwarrantedly assumes both that a constitutional defense will be rejected and that the jury will convict, is not supported by the language or reasoning of *Peyton.* Mr. Chief Justice Warren, writing for the Court in *Peyton,* emphasized the role of federal habeas corpus for state prisoners as "substantially a post-conviction device," 391 U. S., at 60, and "the instrument for resolving fact issues not adequately developed in the original proceedings." *Id.,* at 63. The Court there stated that the demise of the *McNally* rule would allow prisoners "the opportunity to challenge defective convictions." *Id.,* at 65.

The Court here glosses over the disparate procedural posture of this case, and merely asserts, without analyzing the historical function of federal habeas corpus for state prisoners, that the rationale of *Peyton* is applicable to a pretrial, preconviction situation. Citation to that decision cannot obscure the fact that the Court here makes a significant departure from previous decisions, a departure that certainly requires analysis and justification more detailed than that which the Court puts forth.

There is no doubt that a prisoner such as petitioner can assert, by appropriate motion in the courts of the State in which the indictment was handed down, that he should be brought to trial on that charge. *Smith* v. *Hooey, supra.* There is also no doubt that such a prisoner may *petition* a federal district court for a writ of habeas corpus prior to trial. See 28 U. S. C. § 2241 (c)(3). What the Court here disregards, however, is almost a century of decisions of this Court to the effect that federal habeas corpus for state prisoners, prior to conviction, should not be granted absent truly extraordinary circumstances.

In *Ex parte Royall, supra,* the petitioner was indicted in state court for selling a bond coupon without a license. Prior to trial on that indictment, he petitioned in federal court for a writ of habeas corpus, contending that the statute upon which the indictment was predicated violated the contract clause, insofar as it was applied to owners of coupons. In holding that the (then) Circuit Court had the power to issue the writ but had properly exercised its discretion not to do so, the Court wrote:

> "That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." 117 U. S., at 251.

The judicial approach set forth in *Ex parte Royall*—that federal courts should not, absent extraordinary circumstances, interfere with the judicial administration and process of state courts prior to trial and conviction, even though the state prisoner claims that he is held in violation of the Constitution—has been consistently followed. *Cook* v. *Hart,* 146 U. S. 183 (1892) (custody

alleged to violate Art. 4, § 2); *New York* v. *Eno,* 155 U. S. 89 (1894) (custody alleged to violate Supremacy Clause); *Whitten* v. *Tomlinson,* 160 U. S. 231 (1895) (custody alleged in violation of Constitution due to improper extradition); *Drury* v. *Lewis,* 200 U. S. 1 (1906) (custody alleged to violate Supremacy Clause). Cf. *Ex parte Fonda,* 117 U. S. 516 (1886); *In re Duncan,* 139 U. S. 449 (1891); *In re Wood,* 140 U. S. 278 (1891); *In re Frederich,* 149 U. S. 70 (1893). The situations in which pretrial or preconviction federal interference by way of habeas corpus with state criminal processes is justified involve the lack of jurisdiction, under the Supremacy Clause, for the State to bring any criminal charges against the petitioner. *Wildenhus's Case,* 120 U. S. 1 (1887); *In re Loney,* 134 U. S. 372 (1890); *In re Neagle,* 135 U. S. 1 (1890).

The effect of today's ruling that federal habeas corpus prior to trial is appropriate because it will determine the validity of custody that *may* be imposed in actuality only sometime in the indefinite future constitutes an unjustifiable federal interference with the judicial administration of a State's criminal laws. The use of federal habeas corpus is, presumably, limited neither to the interstate detainer situation nor to the constitutional rights secured by the Sixth and Fourteenth Amendments. The same reasoning would apply to a state prisoner who alleges that "future custody" will result because the State plans to introduce at a criminal trial sometime in the future a confession allegedly obtained in violation of the Fifth and Fourteenth Amendments, or evidence obtained in violation of the Fourth and Fourteenth Amendments. I thoroughly disagree with this conversion of federal habeas corpus into a pretrial-motion forum for state prisoners.

III

In addition to sanctioning an expansion of *when* a federal court may interfere with state judicial administration, the Court overrules *Ahrens* v. *Clark, supra,* and expands the parameters of which federal courts may so intervene. In *Ahrens,* the Court held that "the presence within the territorial jurisdiction of the District Court of the person detained is [a] prerequisite to filing a petition for writ of *habeas corpus.*" 335 U. S., at 189. The Court construed the phrase "within their respective jurisdictions" to mean that Congress intended to limit the jurisdiction of a district court to prisoners in custody within its territorial jurisdiction. *Id.,* at 193.

The Court here says that the "language" of *Ahrens* "indicates" the result reached below. The explicit holding of the Court, however, is plainly much more than an "indication."

> "Thus the view that the jurisdiction of the District Court to issue the writ in cases such as this is restricted to those petitioners who are confined or detained within the territorial jurisdiction of the court is supported by the language of the statute, by considerations of policy, and by the legislative history of the enactment. We therefore do not feel free to weigh the policy considerations which are advanced for giving district courts discretion in cases like this. *If that concept is to be imported into this statute, Congress must do so.*" *Id.,* at 192–193 (emphasis added; footnote omitted).

The result reached today may be desirable from the point of view of sound judicial administration, see *Ahrens* v. *Clark, supra,* at 191; *Nelson* v. *George,* 399 U. S. 224, 228 n. 5 (1970). It is the function of this Court, however, to ascertain the intent of Congress as to the mean-

ing of "within their respective jurisdictions." Having completed that task in *Ahrens,* it is the function of Congress to amend the statute if this Court misinterpreted congressional intent or if subsequent developments suggest the desirability, from a policy viewpoint, of alterations in the statute. See *Cleveland* v. *United States,* 329 U. S. 14 (1946). We noted in *Nelson* that the resolution of any apparent dilemma "caused" by this Court's holding in *Ahrens* is appropriately one to be undertaken by Congress. 399 U. S., at 228 n. 5. Legislative "inaction" in amending a statute to comport with this Court's evaluation of "[s]ound judicial administration" hardly warrants the disingenuous reading of a previous decision to achieve the result that Congress, despite judicial prodding, has refused to mandate. However impatient we may be with a federal statute which sometimes may fail to provide a remedy for every situation, one would have thought it inappropriate for the Court to amend the statute by judicial action.

The Court lists several "developments" that have somehow undercut the validity, in the Court's opinion, of the statutory interpretation of the phrase "within their respective jurisdictions." As the amended § 2255 is relevant only to *federal* prisoners collaterally attacking a conviction, and as § 2241 (d) applies only to *intrastate* jurisdiction, the relevance of the amendments with respect to the jurisdictional requirement of § 2241 (c)(3) is not a little obscure. The interpretation of the phrase "within their respective jurisdictions" in *Ahrens* is hardly incompatible with these recent amendments of statutes dealing with situations not involving the interstate transportation of state prisoners. The further argument that *Burns* v. *Wilson,* 346 U. S. 137 (1953), "undermines" *Ahrens* overlooks the fact that the Court in *Ahrens* specifically reserved that question, 335 U. S., at 192 n. 4, the resolution of which is by no means an explicit rejec-

tion of *Ahrens*. Finally, the fact that this Court has expanded the notion of "custody" for habeas corpus purposes hardly supports, much less compels, the rejection of a statutory construction of an unrelated phrase.

In the final analysis, the Court apparently reasons that since Congress amended other statutory provisions dealing with habeas corpus, therefore the congressional intent with respect to the meaning of an unamended phrase must somehow have changed since the Court previously ascertained that intent. This approach to statutory construction, however, justifies with as much, if not more, force, the result reached below: Congress, aware of this Court's interpretation of the phrase in *Ahrens*, deliberately chose not to amend § 2241 (c)(3) when it selectively amended other statutory provisions dealing with federal habeas corpus. Indeed, the most recent indications of legislative intent support this conclusion rather than that advanced by the Court. See H. R. Rep. No. 1894, 89th Cong., 2d Sess., 1–2 (1966); S. Rep. No. 1502, 89th Cong., 2d Sess. (1966). See also n. 13, *ante*, at 497.

I would adhere to this Court's interpretation of the legislative intent set forth in *Ahrens* v. *Clark*, *supra*, and leave it to Congress, during the process of considering legislation to amend this section, to consider and to weigh the various policy factors that the Court today weighs for itself.

BRENNAN, SECRETARY OF LABOR *v.* ARNHEIM & NEELY, INC., ET AL.

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

No. 71–1598. Argued January 16, 1973—Decided February 28, 1973

Respondent company, a fully integrated real estate management concern directing from its central office manifold operations at nine separately owned buildings, including leasing the properties for the owners and hiring, firing, supervising, and negotiating the wages of those employed in the buildings, *held* to be an "enterprise" within the meaning of § 3 (r) of the Fair Labor Standards Act since respondent conducts related activities through unified operation or control, for a common business purpose. It is irrelevant, for purposes of defining the respondent's enterprise under § 3 (r), that the building owners, who are not defendants in this enforcement action under the Act, have no relationship with one another and no common business purpose, since their activities as employers are not at issue here. Pp. 516–521.

444 F. 2d 609, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, *post*, p. 521.

Andrew L. Frey argued the cause for petitioner. With him on the briefs were *Solicitor General Griswold* and *Richard F. Schubert.*

Eugene B. Strassburger, Jr., argued the cause for respondent Arnheim & Neely, Inc. *Frank L. Seamans* argued the cause for respondent Institute of Real Estate Management. With them on the brief were *Eugene B. Strassburger III* and *Robert P. Lawry.**

**Howard Lichtenstein* and *Marvin Dicker* filed a brief for the Realty Advisory Board on Labor Relations, Inc., as *amicus curiae* urging affirmance.

MR. JUSTICE STEWART delivered the opinion of the Court.

This case began when the Secretary of Labor sued the respondent real estate management company for alleged violations of the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.* The Secretary sought an injunction against future violations of the minimum wage, overtime, and recordkeeping provisions of the Act, as well as back wages for the affected employees. An employee is entitled to the benefits of the minimum wage and maximum hours provisions of the Act if he is, *inter alia,* "employed in an enterprise engaged in commerce or in the production of goods for commerce . . . ." 29 U. S. C. §§ 206 (a), 207 (a).

As stipulated in the District Court, the respondent company manages eight commercial office buildings and one apartment complex in the Pittsburgh area. With the exception of a minor ownership interest in one of the buildings, the respondent does not own these properties. Its services are provided according to management contracts entered into with the owners. Under these contracts, the respondent obtains tenants for the buildings, negotiates and signs leases, institutes whatever legal actions are necessary with respect to these leases, and generally manages and maintains the properties. The respondent collects rental payments on behalf of the owners, and deposits them in separate bank accounts for each building. These accounts, net of management expenses and the respondent's fees, belong to the owners of the properties. Payments are periodically made from the accounts to these owners.

The respondent's services with respect to the supervisory, maintenance, and janitorial staffs of the buildings are similarly extensive. The respondent conducts the hiring, firing, payroll operations, and job supervision of

those employed in the buildings. It also fixes hours of work, and negotiates rates of pay and fringe benefits—subject to the approval of the owners. The respondent engages in collective bargaining on behalf of the owners where the building employees are unionized. 324 F. Supp. 987, 990–991.

The District Court held that the maintenance, custodial, and operational workers at the buildings managed by the respondent were "employees," and that the respondent was an "employer," within the meaning of §§ 3 (d) and 3 (e) of the Act, 29 U. S. C. §§ 203 (d), (e). 324 F. Supp., at 990–993. The District Court also held that gross rentals, rather than commissions obtained, were the proper measure of "annual gross volume of sales made or business done" for purposes of the dollar volume portion of the statutory definition of an "enterprise engaged in commerce." *Id.*, at 993–994.[1] Though it rejected the claim that the respondent was sufficiently engaged in commerce for its employees to be covered for

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[1] In pertinent part, the statute provides that:

"(s) 'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

"(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated) . . . ." 29 U. S. C. § 203 (s).

the time before the 1966 amendments to the Act went into effect,[2] the District Court determined that the aggregate activities of the respondent at all nine locations were "related," performed under "common control," and for "a common business purpose," thereby constituting an "enterprise" within the meaning of § 3 (r), 29 U. S. C. § 203 (r). 324 F. Supp., at 994–995.

On cross appeals, the Court of Appeals for the Third Circuit affirmed the District Court's determination that the respondent is an "employer" of the building "employees," and also affirmed the use of gross rentals of the buildings as the proper measure of "gross sales." 444 F. 2d 609, 611–612. The Court of Appeals held that the District Court erred, however, in aggregating the gross rentals of the nine properties to determine the "gross sales" of the respondent's "enterprise." Recognizing that its decision conflicted with a substantially identical case in the Fourth Circuit, *Shultz* v. *Falk,* 439 F. 2d 340, the Court of Appeals held that before separate establishments could be deemed part of a single enter-

[2] Section 3 (s) (3) of the Act, as enacted in 1961, referred in its definition of "[e]nterprise engaged in commerce or in the production of goods for commerce," *inter alia,* to: "*any establishment* of any such enterprise . . . *which has employees engaged in commerce or in the production of goods for commerce* if the annual gross volume of sales of such enterprise is not less than $1,000,000 . . . ." Pub. L. 87–30, 75 Stat. 65, 66 (emphasis added). The District Court construed the statute to require that two or more employees in each building be engaged in commerce in order for that building to be covered under the Act. It found that in no building were there two such employees, and therefore held that there was no coverage under the Act prior to the 1966 amendments. 324 F. Supp. 987, 995–997. The 1966 amendments, see n. 1, *supra,* required only that the "enterprise" have "employees" engaged in commerce, and under this standard the District Court found that the respondent qualified. *Id.,* at 997. Though the Government appealed on this issue, the Court of Appeals did not reach it, 444 F. 2d 609, 614.

prise, a showing of common business purpose was required. 444 F. 2d, at 613.

> "If the record in this case revealed that the retention of the Company, as agent, were accompanied by a change in the independent business purposes of the owners—for example facts such as the pooling of profits from the various buildings demonstrating a common business purpose—the result might be different. Here, however, the record reveals that the owners share no common purpose except the decision to hire the Company as their rental or management agent. . . . Without more than here presented, we think the 'enterprise' requirement of the Act has not been satisfied." *Id.*, at 614.

Without reaching the issues regarding the respondent's engagement in commerce prior to 1967, the Court of Appeals reversed and remanded for proof of the individual gross rentals of the buildings. *Ibid.* In order to resolve the intercircuit conflict, we granted the Secretary's petition for certiorari, 409 U. S. 840, which raises the question whether the management activities of the respondent at all of the buildings served should be aggregated as part of a single "enterprise" within the meaning of § 3 (r) of the Act. Since no cross-petition for certiorari was filed by the respondent, the important issues of whether the respondent is in fact an "employer" of the building workers within the meaning of the Act, and whether gross rentals rather than gross commissions should serve as the measure of "gross sales," are not before us.[3]

The concept of "enterprise" under the Fair Labor Standards Act came into being with the 1961 amendments, which substantially broadened the coverage of

[3] *NLRB* v. *International Van Lines*, 409 U. S. 48, 52 n. 4, and cases there cited. But see n. 8, *infra*.

the Act. Rather than confining the protections of the Act to employees who were themselves "engaged in commerce or in the production of goods for commerce," 29 U. S. C. §§ 206 (a), 207 (a), the new amendments brought those "employed in an enterprise engaged in commerce" within the ambit of the minimum wage and maximum hours provisions.[4] The Congress defined "enterprise engaged in commerce" to include a dollar volume limitation. The standard in the original amendments included "any such enterprise which has one or more retail or service establishments if the annual gross volume of sales of such enterprise is not less than $1,000,000 . . . ," 75 Stat. 66, and has since been changed to include enterprises "whose annual gross volume of sales made or business done is not less than $500,000" for the period from February 1, 1967, to January 31, 1969, and those with annual gross sales of not less than $250,000 thereafter. 29 U. S. C. § 203 (s)(1). The presence of this dollar-volume cutoff for coverage under the Act, in turn, places importance on the Act's definition of "enterprise."

The term "enterprise" is defined by the statute as follows:

> " 'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities *whether performed in one or more establishments* or by one or more corporate or other organizational units . . . ." 29 U. S. C. § 203 (r) (emphasis added).

Specific exemptions are noted, making clear that exclusive-dealership arrangements, collective-purchasing pools, franchises, and leases of business premises from large

[4] Pub. L. 87–30, 75 Stat. 65, 67, 69.

commercial landlords do not create "enterprises" within the meaning of the Act. *Ibid.*

The District Court correctly identified the three main elements of the statutory definition of "enterprise": related activities, unified operation or common control, and common business purpose. We believe the Court of Appeals erred in holding that the aggregate management activities of the respondent failed to meet these statutory criteria. Once the respondent is recognized to be the employer of all of the building employees, it follows quite simply that it is a single enterprise under the Act. The respondent is, after all, but one company. Its activities in all of the buildings are virtually identical, and are plainly "related" in the sense that Congress intended. As the Senate report accompanying the 1961 amendments indicated: "Within the meaning of this term, activities are 'related' when they are the same or similar . . . ." S. Rep. No. 145, 87th Cong., 1st Sess., 41. The respondent's activities, similarly, are performed "either through unified operation or common control." The respondent is a fully integrated management company directing operations at all nine buildings from its central office. For purposes of determining whether it is an "enterprise" under the Act, it is irrelevant that the relationship between the respondent and the owners is one of agency; that separate bank accounts are maintained for each building; and that the risk of loss and the chance of gain on capital investment belong to the owners, not the respondent. All that is required under the statutory definition is that the respondent's *own* activities be related and under common control or unified operation, as they plainly are.

In its analysis of this problem, the Court of Appeals placed great weight on the fact that the building owners have no relationship with one another, and have no common business purpose. This is true, but beside the point,

for the owners are not defendants in this action and it is not *their* activities that are under examination. As Judge Winter wrote in the conflicting case from the Fourth Circuit, "It is *defendants'* activities at each building which must be held together by a common business purpose, not all the activities of all owners of apartment projects." *Shultz* v. *Falk*, 439 F. 2d, at 346. In the present case, the respondent's activities at the several locations are tied together by the common business purpose of managing commercial properties for profit. The fact that the buildings are separate establishments is specifically made irrelevant by § 3 (r).

The Court of Appeals also cited the portion of the Senate report explaining the exemptions to § 3 (r), noted above, for exclusive-dealing contracts, franchises, leasing space in shopping centers, and the like:

> "The bill also contains provisions which should insure that a small local independent business, not in itself large enough to come within the new coverage, will not become subject to the act by being considered a part of a large enterprise with which it has business dealings.
>
> "The definition of 'enterprise' expressly makes it clear that a local retail or service establishment which is under independent ownership shall not be considered to be so operated and controlled as to be other than a separate enterprise because of a franchise, or group purchasing, or group advertising arrangement with other establishments or because the establishment leases premises from a person who also happens to lease premises to other retail or service establishments." S. Rep. No. 145, 87th Cong., 1st Sess., 41.

The Court of Appeals went on to stress that the building owners should not be brought under the Act simply be-

cause they dealt with a large real estate management company. This is true, but also beside the point, since we deal here with that large management company as a party and, for purposes of this case, as an employer of the employees in question. We do not hold, nor could we in this case, that the individual building owners in *their* capacity as employers [5] are to be aggregated to create some abstract "enterprise" for purposes of the Fair Labor Standards Act.[6]

It is argued that such a straightforward application of the statutory criteria to the respondent's business ignores the significance of the dollar volume limitation included in the § 3 (s) definition of "[e]nterprise engaged in commerce or in the production of goods for commerce." The Court of Appeals cited evidence in the legislative history of the 1961 amendments that indicates a purpose to exempt small businesses from the obligations of the Act. 444 F. 2d, at 613; S. Rep. No. 145, 87th Cong., 1st Sess., 5. If the individual building owners are engaged in enterprises too small to come within the reach of the Fair Labor Standards Act, reasoned the Court of Appeals, it would be "anomalous" to treat them as a single enterprise subject to the Act "merely because they hire a rental agent who manages other buildings." 444

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[5] As both the District Court and the Court of Appeals noted, the statutory concept of "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ." 29 U. S. C. § 203 (d). This definition was held to be broad enough that there might be "several simultaneous 'employers.'" 444 F. 2d, at 611–612. See also 324 F. Supp. 987, 992; *Wirtz* v. *Hebert,* 368 F. 2d 139; *Mid-Continent Pipe Line Co.* v. *Hargrave,* 129 F. 2d 655.

[6] Contrary to the view taken by the dissent, we specifically do not hold that "the buildings and the management company collectively are an enterprise . . . ." We deal solely with the management company and *its* "related activities performed . . . for a common business purpose."

F. 2d, at 614. Once again, however, the response to this argument is that it is the respondent management company, not the individual building owners, that has been held in this case to be an "employer" of all the affected "employees." Furthermore, the proper measure of the respondent's size has been held to be the gross rentals produced by properties under its management. It is true that one purpose of the dollar-volume limitation in the statutory definition of "enterprise" is the exemption of small businesses, but this respondent is not such a business under these holdings of the Court of Appeals.[7] The argument to the contrary amounts to a collateral attack on the "employer" and "gross sales" determinations made below, and the respondent cannot make such an attack in the absence of a cross-petition for certiorari.[8]

We hold that the District Court was correct in aggregating all of the respondent's management activities as a single "enterprise." Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, dissenting.

It is undisputed that for the minimum wage and maximum hour requirements of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.*, to apply to all the employees involved in this case, they must be employed in an "enterprise engaged in com-

[7] It is stipulated that in all relevant years, the annual gross rental income collected by the respondent exceeded $1,000,000. 324 F. Supp., at 993.

[8] We have granted certiorari in No. 72–844, *Falk* v. *Brennan, sub nom. Falk* v. *Shultz, post,* p. 954, to consider whether the proper measure of "gross sales" in this context is gross rentals collected or gross commissions, and whether maintenance employees are "employees" of the management company within the meaning of the Act.

merce or in the production of goods for commerce." [1] 29 U. S. C. §§ 203 (s), 206, and 207. An "enterprise" for the purpose of the Act "means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose . . . ." *Id.*, § 203 (r). An enterprise, however, does not include the related activities performed for the enterprise by an independent contractor or other specified arrangements, including otherwise independent establishments occupying premises leased to them by the same person. *Ibid.*

But, for an "enterprise" to be "engaged in commerce or in the production of goods for commerce," the enterprise must have an "annual gross volume of sales made or business done" in an amount not less than the specified statutory minimum. *Id.*, § 203 (s)(1). Congress did not intend to cover all establishments by expanding the coverage of the Act through the enterprise approach. Instead, it drew an economic line. "It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage." S. Rep. No. 145, 87th Cong., 1st Sess., 5. Nor was the definition of enterprise intended to swallow up the exclusion of small businesses. Related activities conducted by separate businesses would be considered a part of an enterprise only "where they are joined either through unified opera-

[1] As discussed in the majority opinion, the Act as passed in 1938, 52 Stat. 1060, covered only employees "engaged in commerce or in the production of goods for commerce." The 1961 amendments, 75 Stat. 65–67, 69, greatly broadened the scope of the Act by adding the "enterprise" concept to cover those employees not directly engaged in commerce or in the production of goods for commerce but employed by an "enterprise" that was. Therefore, those employees in this case not engaged in commerce or in the production of goods for commerce, must belong to an "enterprise" so engaged, if they are to be covered.

tion or common control into a unified business system or economic unit to serve a common business purpose." *Id.*, at 41. And the express exemptions provided in § 203 (r) from the enterprise concept, the Senate Report said, would "insure that a small local independent business, not in itself large enough to come within the new coverage, will not become subject to the act by being considered a part of a large enterprise with which it has business dealings." *Ibid.*

In the case before us, nine separately and independently owned buildings leasing space to tenants employed the same management company as agent to recommend tenants, collect rents, hire, fire, and supervise employees, and maintain and operate the buildings. The Court holds that even if none of the individual building owners would itself generate gross rentals in sufficient amount to be covered by the Act, the buildings and the management company collectively are an enterprise with collective gross rentals in excess of the statutory minimums and hence covered by the Act.[2] Because it appears to me that the Court is applying the concept of enterprise in a way which ignores the economic limitations in the Act and the congressional intention they represent, I respectfully dissent.

There is no connection between these separately owned buildings other than the fact that they employ the same management company to represent them. They have a common managing agent, but that agent is separately accountable to, and must follow the perhaps diverse directions of, each of its principals. They have no unified operation, do not constitute a unified business system or an economic unit, and surely do not serve a common

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[2] If I agreed that the building owners and their common agent were an "enterprise," I would also agree that the cumulative gross rentals would be the proper measure of coverage.

business purpose. Hence there is no "enterprise" within the meaning of the Act which covers only those "related activities" performed through unified operation or common control "for a common business purpose."

As I have indicated, Congress was not unaware of the possibility of stretching the concept "enterprise" beyond its proper bounds and sought to guard against it. The Senate Committee said: "Thus the mere fact that a group of independently owned and operated stores join together to combine their purchasing activities or to run combined advertising will not for these reasons mean that their activities are performed through unified operation or common control and they will not for these reasons be considered a part of the same 'enterprise.'" S. Rep. No. 145, 87th Cong., 1st Sess., 42. Common agents, therefore, are not sufficient to convert otherwise independent entities into an enterprise.

The Committee also said: "There may be a number of different types of arrangements established in such cases. The key in each case may be found in the answer to the question, 'Who receives the profits, suffers the losses, sets the wages and working conditions of employees, or otherwise manages the business in those respects which are the common attributes of an independent businessman operating a business for profit?'" *Ibid.*

Under this standard, there can be no question that the buildings are separate economic units and should be treated as such. The manager receives merely a commission for his services. The managing agent manages, but is subject to direction by his principal. The income and expenses for each building are accounted for separately. The owner of each building receives the profits and suffers the losses, if any. Each owner sets the wages and working conditions for each building in the sense that, although the manager negotiates such matters, he negotiates under instructions, and it is each owner who

must approve them. Each building carries a separate employer identification number. Employees are hired with respect to each building, and supplies and other items necessary for the operation of the buildings are purchased separately for each building. Should a particular building terminate its relationship with the manager, the building employees remain with the building.

The Arnheim & Neely agency unquestionably was an "employer" insofar as its relationship to each of the buildings was concerned, for 29 U. S. C. § 203 (d) defines the term employer as including "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ." But this is a far cry from concluding that the separate buildings and their common agent constitute an enterprise engaged in commerce.[3]

Unquestionably, it is the individual owner who bears the burden of the Act and if any one of them, or each of them, individually has gross sales less than the jurisdictional minimums mentioned in the Act, construing the work "enterprise" concept as the majority does distorts clear congressional intent.

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[3] This is demonstrated by 29 CFR § 779.203, which provides that the "terms ['employer,' 'establishment,' and 'enterprise'] are not synonymous."

UNITED STATES *v.* FALSTAFF BREWING CORP. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

No. 71–873. Argued October 17, 1972—Decided February 28, 1973

Respondent Falstaff, the Nation's fourth largest beer producer, which was desirous of achieving national status, agreed to acquire the largest seller of beer in the New England market rather than enter *de novo*. The District Court dismissed the Government's resultant suit charging violation of § 7 of the Clayton Act, finding that entry by acquisition, which the court found was the only way that respondent intended to penetrate the New England market, would not result in a substantial lessening of competition. *Held:* The District Court erred in assuming that, because respondent would not have entered the market *de novo,* it could not be considered a potential competitor. The court should have considered whether respondent was a potential competitor in the sense that its position on the edge of the market exerted a beneficial influence on the market's competitive conditions. Pp. 531–538.

332 F. Supp. 970, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, J., joined, and in Part I of which DOUGLAS, J., joined. DOUGLAS, J., filed an opinion concurring in part, *post,* p. 538. MARSHALL, J., filed an opinion concurring in the result, *post,* p. 545. REHNQUIST, J., filed a dissenting opinion, in which STEWART, J., joined, *post,* p. 572. BRENNAN, J., took no part in the decision of the case. POWELL, J., took no part in the consideration or decision of the case.

Assistant Attorney General Kauper argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Acting Assistant Attorney General Comegys, William Bradford Reynolds,* and *Howard E. Shapiro.*

Matthew W. Goring argued the cause for appellees. With him on the brief were *James S. McClellan, Jerome M. McLaughlin,* and *Stephen J. Carlotti.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Alleging that Falstaff Brewing Corp.'s acquisition of the Narragansett Brewing Co. in 1965 violated § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 18,[1] the United States brought this antitrust suit under the theory that potential competition in the New England beer market may be substantially lessened by the acquisition. The District Court held to the contrary, 332 F. Supp. 970 (1971), and we noted probable jurisdiction[2] to determine whether the trial court applied an erroneous legal standard in so deciding, 405 U. S. 952 (1972). We remand to the District Court for a proper assessment of Falstaff as a potential competitor.

As stipulated by the parties, the relevant product market is the production and sale of beer, and the six New England States[3] compose the geographic market. While beer sales in New England increased approximately 9.5% in the four years preceding the acquisition, the eight largest sellers increased their share of these sales from approximately 74% to 81.2%. In 1960, approximately 50% of the sales were made by the four largest sellers; by 1964, their share of the market was 54%; and

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[1] Section 7 provides in relevant part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U. S. C. § 18.

For the legislative history of the amendment in 1950 that greatly expanded the section's scope, 64 Stat. 1125, see *Brown Shoe Co. v. United States*, 370 U. S. 294, 311–323 (1962).

[2] Jurisdiction lies under § 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29.

[3] Maine, New Hampshire, Vermont, Massachusetts, Connecticut, and Rhode Island.

by 1965, the year of acquisition, their share was 61.3%. The number of brewers operating plants in the geographic market decreased from 32 in 1935, to 11 in 1957, to six in 1964.[4]

Of the Nation's 10 largest brewers in 1964, only Falstaff and two others did not sell beer in New England; Falstaff was the largest of the three and had the closest brewery.[5] In relation to the New England market, Falstaff sold its product in western Ohio, to the west and in Washington, D. C., to the south.

The acquired firm, Narragansett, was the largest seller of beer in New England at the time of its acquisition, with approximately 20% of the market; had been the largest seller for the five preceding years; had constantly expanded its brewery capacity between 1960 and 1965; and had acquired either the assets or the trademarks of several smaller brewers in and around the geographic market.

The fourth largest producer of beer in the United States at the time of acquisition, Falstaff was a regional brewer[6] with 5.9% of the Nation's production in 1964, having grown steadily since its beginning as a brewer in 1933 through acquisition and expansion of other breweries. As of January 1965, Falstaff sold beer in 32 States, but did not sell in the Northeast, an area composed of New England and States such as New York and New Jersey; the area being the highest beer consumption region in the

[4] Nationally, the number of brewers decreased from 663 in 1935 to 140 in 1965.

[5] Of the three "top ten" brewers that were not selling in New England, Falstaff ranked fourth nationally, the other two ranking eighth and ninth. From Boston, Massachusetts, the distance to Falstaff's closest brewery was 844 miles, while the distance to the eighth and ninth largest sellers' breweries was 1,385 and 2,000 miles respectively.

[6] A "regional," as contrasted with a "national" brewer, is one that is not selling in all the significant national markets.

United States. Between 1955 and 1966, the company's net sales and net income almost doubled, and in 1964 it was planning a 10-year, $35 million program to expand its existing plants.

Falstaff met increasingly strong competition in the 1960's from four brewers who sold in all of the significant markets. National brewers possess competitive advantages since they are able to advertise on a nationwide basis, their beers have greater prestige than regional or local beers, and they are less affected by the weather or labor problems in a particular region. Thus Falstaff concluded that it must convert from "regional" to "national" status, if it was to compete effectively with the national producers.[7] For several years Falstaff publicly expressed its desire for national distribution[8] and after making several efforts in the early 1960's to enter the Northeast by acquisition, agreed to acquire Narragansett in 1965.

Before the acquisition was accomplished, the United States brought suit[9] alleging that the acquisition would violate § 7 because its effect may be to substantially lessen competition in the production and sale of beer in the New England market. This contention was based on two grounds: because Falstaff was a potential entrant

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[7] In 1958, Falstaff commissioned a study of actions it should take to maximize profits. The study recommended, *inter alia*, that Falstaff become a national brewer by entering those areas where it was not then marketing its product, especially the Northeast, and that Falstaff should build a brewery on the East Coast rather than buy.

[8] For example, Falstaff in several press releases and in the company publication expressed its desire for national distribution, and at a panel discussion in October 1964 the president of Falstaff, in response to a question as to Falstaff's reaction to industry trends in beer sales, stated: "For long range planning we are aiming for national distribution. Naturally this involves coming East." App. 82.

[9] Suit was filed against both Falstaff and Narragansett, but as to the latter, the complaint was dismissed shortly after it was filed.

and because the acquisition eliminated competition that would have existed had Falstaff entered the market *de novo* or by acquisition and expansion of a smaller firm, a so-called "toe-hold" acquisition.[10] The acquisition was completed after the Government's motions for injunctive relief were denied, and Falstaff agreed to operate Narragansett as a separate subsidiary until otherwise ordered by the court.

After a trial on the merits, the District Court found that the geographic market was highly competitive; that Falstaff was desirous of becoming a national brewer by entering the Northeast; that its management was committed against *de novo* entry; and that competition had not diminished since the acquisition.[11] The District Court then held:

> "The Government's contentions that Falstaff at the time of said acquisition was a potential entrant into said New England market, and that said acquisition deprived the New England market of additional competition are not supported by the evidence. On the contrary, the credible evidence establishes beyond a reasonable doubt that the executive management of Falstaff had consistently decided not to attempt to enter said market unless it could acquire a brewery with a strong and viable distribution system such as that possessed by Narragansett. Said executives had carefully considered such possible alternatives as (1) acquisition of a small brewery on the east coast, (2) the shipping of beer from its

[10] Hereinafter, reference to *de novo* entry includes "toe-hold" acquisition as well.

[11] Over the objections of the Government, the District Court allowed post-acquisition evidence and noted in the opinion that the market share of Narragansett dropped from 21.5% in 1964 to 15.5% in 1969, while the shares of the two leading national brewers increased from 16.5% to 35.8%.

existing breweries, the nearest of which was located in Ft. Wayne, Indiana, (3) the building of a new brewery on the east coast and other possible alternatives, but concluded that none of said alternatives would have effected a reasonable probability of a profitable entry for it in said New England market. In my considered opinion the plaintiff has failed to establish by a fair preponderance of the evidence that Falstaff was a potential competitor in said New England market at the time it acquired Narragansett. The credible evidence establishes that it was not a potential entrant into said market by any means or way other than by said acquisition. Consequently it cannot be said that its acquisition of Narragansett eliminated it as a potential competitor therein." 332 F. Supp., at 972.

Also finding that the Government had failed to establish that the acquisition would result in a substantial lessening of competition, the District Court entered judgment for Falstaff and dismissed the complaint.

I

Section 7 of the Clayton Act forbids mergers in any line of commerce where the effect may be substantially to lessen competition or tend to create a monopoly. The section proscribes many mergers between competitors in a market, *United States* v. *Continental Can Co.*, 378 U. S. 441 (1964); *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962); it also bars certain acquisitions of a market competitor by a noncompetitor, such as a merger by an entrant who threatens to dominate the market or otherwise upset market conditions to the detriment of competition, *FTC* v. *Procter & Gamble Co.*, 386 U. S. 568, 578–580 (1967). Suspect also is the acquisition by a company not competing in the market but so situated

as to be a potential competitor and likely to exercise substantial influence on market behavior. Entry through merger by such a company, although its competitive conduct in the market may be the mirror image of that of the acquired company, may nevertheless violate § 7 because the entry eliminates a potential competitor exercising present influence on the market. *Id.*, at 580–581; *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158, 173–174 (1964). As the Court stated in *United States* v. *Penn-Olin Chemical Co., supra,* at 174, "The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated."

In the case before us, Falstaff was not a competitor in the New England market, nor is it contended that its merger with Narragansett represented an entry by a dominant market force. It was urged, however, that Falstaff was a potential competitor so situated that its entry by merger rather than *de novo* violated § 7. The District Court, however, relying heavily on testimony of Falstaff officers, concluded that the company had no intent to enter the New England market except through acquisition and that it therefore could not be considered a potential competitor in that market. Having put aside Falstaff as a potential *de novo* competitor, it followed for the District Court that entry by a merger would not adversely affect competition in New England.

The District Court erred as a matter of law. The error lay in the assumption that because Falstaff, as a matter of fact, would never have entered the market *de novo,* it could in no sense be considered a potential competitor. More specifically, the District Court failed to give separate consideration to whether Falstaff was a potential competitor in the sense that it was so posi-

tioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market.

A similar error was committed by the Court of Appeals in *FTC* v. *Procter & Gamble Co., supra,* where one of the reasons for the Commission's finding the acquisition in violation of § 7 was that the merger eliminated Procter as a potential entrant, not because Procter would have entered independently, but because the acquisition eliminated the procompetitive effect Procter exerted from the fringe of the market. *Id.,* at 575. The Court of Appeals struck down this finding because there was no evidence that Procter ever intended *de novo* entry, but we held the Commission's finding was "amply supported by the evidence," *id.,* at 581, because the evidence "clearly show[ed] that Procter was the most likely entrant," *id.,* at 580, and it was "clear that the existence of Procter at the edge of the industry exerted considerable influence on the market," *id.,* at 581. Thus, the fact that Falstaff and its management had no intent to enter *de novo,* and would not have done so, does not *ipso facto* dispose of the potential-competition issue.

The specific question with respect to this phase of the case is not what Falstaff's internal company decisions were but whether, given its financial capabilities and conditions in the New England market, it would be reasonable to consider it a potential entrant into that market. Surely, it could not be said on this record that Falstaff's general interest in the New England market was unknown;[12] and if it would appear to rational beer merchants in New England that Falstaff might well build a new brewery to supply the northeastern market then its entry by merger becomes suspect under § 7. The District Court should therefore have appraised the economic facts about Falstaff and the New England market

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[12] See n. 8, *supra,* and accompanying text.

in order to determine whether in any realistic sense Falstaff could be said to be a potential competitor on the fringe of the market with likely influence on existing competition.[13] This does not mean that the testimony

[13] In *FTC* v. *Procter & Gamble Co.*, 386 U. S. 568, 581 (1967), we found the acquiring company at the edge of the market exerted "considerable influence" on the market because "market behavior . . . was influenced by each firm's predictions of the market behavior of its competitors, actual and potential"; because "barriers to entry . . . were not significant" as to the acquiring company; because "the number of potential entrants was not so large that the elimination of one would be insignificant"; and because the acquiring firm was the most likely entrant.

It is suggested that the District Court failed to consider whether Falstaff was an on-the-fringe potential competitor with influence on existing competition because the Government never alleged in its complaint that Falstaff was exerting a present procompetitive influence, never proceeded under this theory, and further failed to introduce any evidence to support this view. But this position merely ascribes an arbitrary meaning to the language of the complaint. The Government in its complaint alleged that the acquisition violated § 7 because it eliminated potential competition; since potential competition may stimulate a present procompetitive influence, the allegation certainly encompassed the "on-the-fringe influence" that the District Court failed to consider, and the Government was not required to be more specific in its allegation.

The Government did not produce direct evidence of how members of the New England market reacted to potential competition from Falstaff, but circumstantial evidence is the lifeblood of antitrust law, see *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100 (1969); *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 221 (1939); *Frey & Son, Inc.* v. *Cudahy Packing Co.*, 256 U. S. 208, 210 (1921), especially for § 7 which is concerned "with probabilities, not certainties," *Brown Shoe Co.* v. *United States*, 370 U. S., at 323. As was stated in *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158, 174 (1964), "[p]otential competition cannot be put to a subjective test. It is not 'susceptible of a ready and precise answer.'"

Nor was there any lack of circumstantial evidence of Falstaff's on-the-fringe competitive impact. As the record shows, Falstaff was in the relevant line of commerce, was admittedly interested in

of company officials about actual intentions of the company is irrelevant or is to be looked upon with suspicion; but it does mean that theirs is not necessarily the last

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entering the Northeast, and had, among other ways, see n. 8, *supra,* made its interest known by prior-acquisition discussions. Moreover, there were, as my Brother MARSHALL would put it, objective economic facts as to Falstaff's capability to enter the New England market; and the same facts which he would have the District Court look to in determining whether the particular theory of potential competition we do not reach has been violated, would be probative of violation of § 7 through loss of a procompetitive on-the-fringe influence. See *FTC* v. *Procter & Gamble Co., supra,* at 580–581; *United States* v. *Penn-Olin Chemical Co., supra,* at 173–177; *United States* v. *El Paso Natural Gas Co.,* 376 U. S. 651, 660 (1964).

And as for the contention that the Government did not proceed under this on-the-fringe influence view, the record is to the contrary. At one point in the trial, the Government informed the trial judge that a deposition was being introduced into evidence "to establish that Falstaff was a company that was on the wings or at the edge of the New England market. . . . What I mean by that is that Falstaff was capable and interested in entering the New England market and would be waiting for the opportunity to develop, but that Falstaff, over the long term, would eventually or could eventually or was a likely entrant into the New England market, to use the terminology in *FTC* v. *Procter & Gamble Company.*" App. 124. Further into its presentation of proof, the Government was introducing evidence of the trend toward concentration in the market, and stated: "It is this concentration, your Honor, which, as we attempted to point out in our pretrial brief, makes potential competition. . . . The concentration of sales within a small number of firms in New England. This is what makes the potential competition . . . so very, very important to this market. . . . In such a situation the potential entry of a fresh competitive factor is of extreme importance." App. 170.

That the on-the-fringe influence theory was one of the theories the Government was proceeding under was apparent to Falstaff. In its opening statement, Falstaff stated:

"Now, the Government has a theory which is, so far as the judicial determinations on the point are concerned, comparatively new. You were handed the other day a portion of the record in FTC against Bendix-Fram Corporation, and you were handed at the

word in arriving at a conclusion about how Falstaff should be considered in terms of its status as a potential entrant into the market in issue.

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same time a typed or otherwise reproduced copy of the opinion of Commissioner Elman of the FTC in that case.

"That opinion is not yet officially reported. The case is on its way to an appeal . . . . The Commissioner announced a theory upon which the Government relies and which they say lies within the ambit of this vague, undefined creature, potential competition. What that decision, on appeal as I say, what that decision announces is the doctrine which is called the toe-hold doctrine, and it goes like this:

"If a producer of Product A is standing in the wings, as the Commissioner says, outside the market, merely standing there, but in a position to move into the market if he chooses. He must remain there in the wings and forbear acquiring the producer of a like product within the market area.

"The Commissioner fancies that the mere presence of such a manufacturer or seller close to the market area had some effect which could fall within his ill-defined concept of potential competition. And he found in Bendix-Fram that Bendix was in such a position. He found that Bendix could have acquired a small company rather than Fram, a relatively larger one, beefed it up by expenditures of money which Bendix could afford, and develop it into a full-blown competitor within the market area. I do not know whether that notion will gain substantial acceptance in the theory of antitrust law. I do not know that it will have the approval of the Supreme Court if and when it ever reaches it. I do know, however, that that is an entirely different situation [than] we have here.

. . . . . .

"If there is any sense to this total theory at all it must be that the acquiring company was in fact so closely located to the market served by the acquired company that its entrance into the market unilaterally, under its own steam, without motivation was a distinct threat to those who were competing in the market." App. 182–183. (Emphasis added.)

Falstaff then proceeded to state why it felt that the on-the-fringe influence theory did not apply in this case.

During its proof, Falstaff had both its expert witness on economics, App. 257, and an officer of Narragansett, App. 376, testify as to whether Falstaff's presence had a procompetitive effect, both stating that it did not.

Since it appears that the District Court entertained too narrow a view of Falstaff as a potential competitor and since it appears that the District Court's conclusion that the merger posed no probable threat to competition followed automatically from the finding that Falstaff had no intent to enter *de novo,* we remand this case for the District Court to make the proper assessment of Falstaff as a potential competitor.

II

Because we remand for proper assessment of Falstaff as an on-the-fringe potential competitor, it is not necessary to reach the question of whether § 7 bars a market-extension merger by a company whose entry into the market would have no influence whatsoever on the present state of competition in the market—that is, the entrant will not be a dominant force in the market and has no current influence in the marketplace. We leave for another day the question of the applicability of § 7 to a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, and that is challengeable under § 7 only on grounds that the company could, but did not, enter *de novo* or through "toe-hold" acquisition and that there is less competition than there would have been had entry been in such a manner. There are traces of this view in our cases, see *Ford Motor Co.* v. *United States,* 405 U. S. 562, 567 (1972); *id.,* at 587 (BURGER, C. J., concurring in part and dissenting in part); *FTC* v. *Procter & Gamble Co.,* 386 U. S., at 580; *id.,* at 586 (Harlan, J., concurring); *United States* v. *Penn-Olin Chemical Co.,* 378 U. S., at 173, but the Court has not squarely faced the question,[14] if for no other reason than because there has

[14] It is suggested that certain language in the Court's opinion in *United States* v. *Continental Can Co.,* 378 U. S. 441, 464 (1964), is to the contrary. But there the merger was held proved prima facie

been no necessity to consider it. See *Ford Motor Co.* v. *United States, supra; FTC* v. *Procter & Gamble Co., supra; United States* v. *Penn-Olin Chemical Co., supra; United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651 (1964).

The judgment of the District Court dismissing the complaint against Falstaff is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

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

MR. JUSTICE DOUGLAS, concurring in part.

Although I join Part I of the Court's opinion and its judgment remanding the case to the District Court for further proceedings consistent with the opinion, I offer the following observations with respect to the question which the Court does not reach.

There can be no question that it would be sufficient for the Government to prove its case to show that Falstaff would have made a *de novo* entry but for the acquisition of Narragansett or that Falstaff was a potential competitor exercising present influence on the market. See *Ford Motor Co.* v. *United States,* 405 U. S. 562; *FTC* v. *Procter & Gamble Co.,* 386 U. S. 568; *United States* v. *Penn-Olin Chemical Co.,* 378 U. S. 158; *United States* v. *El Paso Natural Gas Co.,* 376 U. S. 651. But, I do not believe that it was a prerequisite to the Gov-

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anticompetitive because the acquiring and acquired companies were engaged in the same overall line of commerce in the same geographic market. This notwithstanding, it is again only arbitrary to assume that the quoted language was not referring to the acquired company's on-the-fringe influence as a potential competitor for certain end uses for containers.

ernment's case to prove that the acquisition had marked immediate, *i. e.*, present, anticompetitive effects.

Section 7 evidences a definite concern for protecting competitive markets. It does not require "merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future . . . ." *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 362. In *United States* v. *Penn-Olin Chemical Co., supra,* at 170–171, the Court said:

> "The grand design of the original § 7, as to stock acquisitions, as well as the Celler-Kefauver Amendment, as to the acquisition of assets, was to arrest incipient threats to competition which the Sherman Act did not ordinarily reach. It follows that actual restraints need not be proved. The requirements of the amendment are satisfied when a 'tendency' toward monopoly or the 'reasonable likelihood' of a substantial lessening of competition in the relevant market is shown."

Moreover, we are concerned with probabilities, not certainties. See *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 323.

Falstaff acquired Narragansett in 1965. Prior to that time, Falstaff was the largest brewer in the country that did not sell in the New England market. It had stated publicly that it wanted to become a national brewer to allow it to compete more effectively with the existing national brewers. Falstaff has conceded in its brief that "given an acceptable level of profit it had the financial capability and the interest to enter the New England beer market."

During the four years preceding 1965, beer sales in New England had increased approximately 9.5%. Nevertheless, the market had become more concentrated. In 1960, the eight largest sellers accounted for approximately

74% of the beer sales; by 1964, they accounted for 81.2%. From 1957 to 1964, the number of breweries decreased from 11 to 6. In addition, there is evidence that two of the remaining breweries were interested in being acquired. And, by Falstaff's own admission, "[a]t the time of the acquisition, the substantial growth in the market shares of the national brewers was just beginning to occur."

One of the principal purposes of § 7 was to stem the "'rising tide' of concentration in American business." *United States* v. *Pabst Brewing Co.*, 384 U. S. 546, 552. When an industry or a market evidences signs of decreasing competition, we cannot allow an acquisition which may "tend to accelerate concentration." *Ibid.; Brown Shoe Co.* v. *United States, supra,* at 346.

The implications of the Clayton Act, as amended by the Celler-Kefauver Act, 15 U. S. C. § 18, are much, much broader than the customary restraints of competition and the power of monopoly. Louis D. Brandeis testified in favor of the bill that became the Clayton Act in 1914. "You cannot have true American citizenship, you cannot preserve political liberty, you cannot secure American standards of living unless some degree of industrial liberty accompanies it."[1] He went on to say[2] in answer to George W. Perkins, who testified against the bill:

> "Mr. Perkins' argument in favor of the efficiency of monopoly proceeds upon the assumption, in the first place, and mainly upon the assumption, that with increase of size comes increase of efficiency. If any general proposition could be laid down on that subject, it would, in my opinion, be the opposite. It is, of course, true that a business unit may be too small to be efficient, but it is equally

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[1] Hearings on S. Res. 98 before the Senate Committee on Interstate Commerce, 62d Cong., Vol. 1, p. 1155.

[2] *Id.*, at 1147.

> true that a unit may be too large to be efficient. And the circumstances attending business to-day are such that the temptation is toward the creation of too large units of efficiency rather than too small. The tendency to create large units is great, not because larger units tend to greater efficiency, but because the owner of a business may make a great deal more money if he increases the volume of his business tenfold, even if the unit profit is in the process reduced one-half. It may, therefore, be for the interest of an owner of a business who has capital, or who can obtain capital at a reasonable cost, to forfeit efficiency to a certain degree, because the result to him, in profits, may be greater by reason of the volume of the business. Now, not only may that be so, but in very many cases it is so.
>
> "And the reason why . . . increasing the size of a business may tend to inefficiency is perfectly obvious when one stops to consider. Anyone who critically analyzes a business learns this: That success or failure of an enterprise depends usually upon one man; upon the quality of one man's judgment, and, above all things, his capacity to see what is needed and his capacity to direct others."

That is why the Celler Committee reporting in 1971 on conglomerates and other types of mergers [3] said that "Preservation of a competitive system was seen as essential to avoid the concentration of economic power that was thought to be a threat to the Nation's political and social system." [4] Control of American business is being transferred from local communities to distant cities

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[3] Investigation of Conglomerate Corporations, Report by the Staff of Antitrust Subcommittee of the House Committee on the Judiciary on H. Res. 161, 92d Cong., 1st Sess. (Comm. Print).

[4] *Id.*, at 18.

where men on the 54th floor with only balance sheets and profit and loss statements before them decide the fate of communities with which they have little or no relationship. As a result of mergers and other acquisitions, some States are losing major corporate headquarters and their local communities are becoming satellites of a distant corporate control.[5] The antitrust laws favored a wide diffusion of corporate control; and that aim has been largely defeated with serious consequences. Thus, a recent Wisconsin study shows that "[t]he growth of aggregate Wisconsin employment of companies acquired by out-of-state corporations declined substantially more than that of those acquired by in-state corporations."[6] In this connection, the Celler Report states:[7]

> "The Wisconsin study found, also, that 53 percent of acquired companies after the merger had a slower rate of payroll growth. Payroll growth, notably in large firms acquired by out-of-State corporations, was depressed by mergers. Inflation in recent years has markedly raised wages and salaries. It would be reasonable to expect that payrolls in acquired companies, because of the inflation, would have advanced more than employment. In this connection, the report states: 'The fact that this frequently did not happen in companies acquired by out-of-state firms would lead one to believe that their acquirers have transferred a portion of the higher salaried employees to a location outside Wisconsin. Such transfers mean a loss of talent, retail expenditures, and personal income taxes in the economies of Wisconsin's communities and the state.' "

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[5] *Id.*, at 52–53.

[6] *Id.*, at 53.

[7] *Id.*, at 54.

The adverse influence on local affairs of out-of-state acquisitions has not gone unnoticed in our opinions. Thus "the desirability of retaining 'local control' over industry and the protection of small businesses" was our comment in *Brown Shoe Co.* v. *United States,* 370 U. S., at 315–316, on one of the purposes of strengthening § 7 of the Clayton Act through passage of the Celler-Kefauver Act.

By reason of the antitrust laws, efficiency in terms of the accounting of dollar costs and profits is not the measure of the public interest nor is growth in size where no substantial competition is curtailed. The antitrust laws look with suspicion on the acquisition of local business units by out-of-state companies. For then local employment is apt to suffer, local payrolls are likely to drop off, and responsible entrepreneurs in counties and States are replaced by clerks.

A case in point is Goldendale in my State of Washington. It was a thriving community—an ideal place to raise a family—until the company that owned the sawmill was bought by an out-of-state giant. In a year or so, auditors in faraway New York City, who never knew the glories of Goldendale, decided to close the local mill and truck all the logs to Yakima. Goldendale became greatly crippled. It is Exhibit A to the Brandeis concern, which became part of the Clayton Act concern, with the effects that the impact of monopoly often has on a community, as contrasted with the beneficent effect of competition.

A nation of clerks is anathema to the American antitrust dream. So is the spawning of federal regulatory agencies to police the mounting economic power. For the path of those who want the concentration of power to develop unhindered leads predictably to socialism that is antagonistic to our system. See Blake & Jones, The Goals of Antitrust: A Dialogue on Policy—In Defense of Antitrust, 65 Col. L. Rev. 377 (1965).

It is against this background that we must assess the acquisition by Falstaff, the largest producer of beer in the United States that did not sell in the New England market, of the leading seller in that market.

In *United States* v. *El Paso Natural Gas Co.*, 376 U. S., at 660, we indicated that "[t]he effect on competition in a particular market through acquisition of another company is determined by the nature or extent of that market and by the nearness of the absorbed company to it, that company's eagerness to enter that market, its resourcefulness, and so on." Falstaff's president testified below that Falstaff for some time had wanted to enter the New England market as part of its interest in becoming a national brewer. And Falstaff has conceded in its brief before this Court that "given an acceptable level of profit it had the financial capability and the interest to enter the New England beer market." With both the interest and the capability to enter the market, Falstaff was "the most likely entrant." *FTC* v. *Procter & Gamble Co.*, 386 U. S., at 581. Thus, although Falstaff might not have made a *de novo* entry if it had not been allowed to acquire Narragansett,[8] we cannot say that it would be unwilling to make such an entry *in the future* when the New England market might be ripe for an infusion of new competition. At this point in time, it is the most likely new competitor. Moreover, there can be no question that replacing the leading seller in the market, a regional brewer, with a seller

[8] Falstaff contended below that a *de novo* entry would not be profitable. Management stated that an established distribution system was a prerequisite to entry. The District Judge concluded that "[t]he credible evidence establishes that [Falstaff] was not a potential entrant into said market by any means or way other than by said acquisition." 332 F. Supp. 970, 972.

with national capabilities increased the trend toward concentration.

I conclude that there is "reasonable likelihood" that the acquisition in question "may be substantially to lessen competition." Accordingly, I would be inclined to reverse and direct the District Judge to enter judgment for the Government and afford appropriate relief. Nevertheless, since the Court will not reach this question and I agree with the legal principles set forth in Part I of its opinion, I join the judgment remanding the case for further proceedings.

MR. JUSTICE MARSHALL, concurring in the result.

I share the majority's view that the District Judge erred as a matter of law and that the case must be remanded for further proceedings. I cannot agree, however, with the theory upon which the majority bases the remand.

The majority accuses the District Judge of neglecting to assess the present procompetitive effect which Falstaff exerted by remaining on the fringe of the market. The explanation for this failing is rather simple. The Government never alleged in its complaint that Falstaff was exerting a present procompetitive influence,[1] it introduced not a scrap of evidence to support this view,[2] and

[1] The Government's complaint alleged that the merger violated § 7 because "[*p*]*otential* competition in the production and sale of beer between Falstaff and Narragansett will be eliminated." (Emphasis added.) While it is true, as the majority asserts, that "potential competition may stimulate a present procompetitive influence," see *ante,* at 534 n. 13, the complaint nowhere alleges that such a procompetitive influence occurred in this case.

[2] Significantly, the majority cites no evidence at all from the record indicating that firms within the New England market were deterred from anticompetitive practices by Falstaff's presence at the market fringe. Indeed, my Brethren concede that "[t]he Govern-

even at this stage of the proceedings, it seemingly disclaims reliance on this theory.[3]

Thus, our remand leaves the hapless District Judge with the unenviable task of reassessing nonexistent evidence under a theory advanced by neither of the parties. I submit that civil antitrust litigation is complicated enough when the trial judge confines his attention to the legal arguments and evidence offered by the parties and avoids investigation of hypothetical lawsuits which might have been brought.

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ment did not produce direct evidence of how members of the New England market reacted to potential competition from Falstaff," *ibid.* While the majority contends that there was "circumstantial evidence" relevant to determining whether there was a loss of procompetitive influence, the evidence it points to suggests only that Falstaff might have been perceived as a potential entrant—not that this perception produced a present procompetitive effect. In fact, the little evidence on the question which does appear in the record strongly suggests that Falstaff was exerting no procompetitive influence. Thus, an economist testifying for the defense stated that, in his expert judgment, Falstaff's presence on the fringe of the market "had no effect" on the practices of firms within the market (App. 257). Similarly, the director of marketing for Narragansett testified that those within the market did not view Falstaff as a threat and that it never occurred to them that Falstaff would attempt a *de novo* entry (App. 376).

To be sure, this testimony may well have been biased and might properly have been discounted by the trier of fact. But it is harder to dismiss the documentary evidence showing continued vigorous competition after Falstaff's entry by acquisition. If Falstaff was exerting a substantial procompetitive influence by threatening entry, it would seem to follow that anticompetitive practices should have emerged when this threat was removed. The majority nowhere accounts for the continuing absence of such practices.

[3] In its brief before this Court, the Government characterizes its cause of action as follows:

"The theory of the suit was that *potential competition* in the New England beer market may be substantially lessened by the acquisition." Brief for United States 2–3.

The majority's departure from this self-evident proposition is all the more startling when one realizes that the Court eschews reliance on a well-established, plainly applicable body of law in order to reach questions not properly before it. As MR. JUSTICE DOUGLAS ably demonstrates, see *ante,* at 539–540, many decisions by this Court hold that § 7 is violated when a merger is reasonably likely to eliminate future or potential competition. See also *infra,* at 560–562. I know of no case suggesting that this principle is only applicable when the plaintiff can show that the merger will have present anticompetitive consequences, and the majority cites no authority for this proposition.

In the course of a nine-day trial, the Government introduced voluminous evidence to support its potential competition theory. But at the conclusion of the trial, the District Judge dismissed the Government's action in an opinion covering a scant two and one-half pages in the Federal Supplement [4] and without making any findings of fact or conclusions of law.[5] See *United States* v. *Falstaff Brewing Corp.,* 332 F. Supp. 970 (RI 1971).

The court held that Falstaff "was not a potential entrant into said market by any means or way other than by said acquisition. Consequently, it cannot be

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[4] Cf. *United States* v. *El Paso Natural Gas Co.,* 376 U. S. 651, 663 (1964) (opinion of Harlan, J.):

"Both as a practitioner and as a judge I have more than once felt that a closely contested government antitrust case, decided below in favor of the defendant, has foundered in this Court for lack of an illuminating opinion by the District Court. District Courts should not forget that such cases, the trials of which usually result in long and complex factual records, come here without the benefit of any sifting by the Courts of Appeals. The absence of an opinion by the District Court has been a handicap in this instance."

[5] See Fed. Rule Civ. Proc. 52 (a). Cf. *United States* v. *El Paso Natural Gas Co., supra,* at 656–657.

said that its acquisition of Narragansett eliminated it as a potential competitor therein." *Id.*, at 972. The District Judge based this conclusion on testimony by Falstaff executive personnel that "Falstaff had consistently decided not to attempt to enter said market unless it could acquire a brewery with a strong and viable distribution system such as that possessed by Narragansett." *Ibid.*

Inasmuch as the District Court grounded its dismissal on these conclusions, I think we have a responsibility to assess the validity of the legal standard from which they are derived. I would hold that where, as here, strong objective evidence indicates that a firm is a potential entrant into a market, it is error for the trial judge to rely solely on the firm's subjective prediction of its own future conduct. While such subjective evidence is probative on the issue of potential entry, it is inherently unreliable and must be used with great care. Ordinarily, the district court should presume that objectively measurable market forces will govern a firm's future conduct. Only when there is a compelling demonstration that a firm will not follow its economic self-interest may the district court consider subjective evidence in predicting that conduct. Even then, subjective evidence should be preferred only when the objective evidence is weak or contradictory. Because the District Court failed to apply these standards, I would remand the case for further consideration.

I

Although this case ultimately turns on a point of law, it cannot be satisfactorily understood without some appreciation of the factual context in which it arises. A somewhat more detailed description of the relevant line of commerce, the relevant geographic market, and the market structure than that provided by the majority is therefore in order.

A. The Product Market

The relevant product market is the production and sale of beer. The firms competing for this market can be divided into three categories: national, regional, and local. The national firms, Anheuser-Busch, Schlitz, Pabst, and Miller, sell their product throughout the country and advertise on a national basis. In contrast, the regional firms, the largest of which are Hamm's, Carling, Coors, Falstaff, and National Bohemian, market their beer in narrower geographical areas of varying size. Local brewers sell their product in a small area, sometimes no larger than a single State.

Originally, most of the market was held by a large number of small local and regional brewers. The high cost of transporting beer favored the local distributor in early years. But more recently, the national brewers have been able to overcome this difficulty to some extent by decentralizing their production facilities. Moreover, any remaining extra transportation costs associated with national distribution are now outweighed by the advantages of centralized management and, especially, national advertising. Thus, in recent years, while the beer market as a whole has expanded, the number of breweries has declined dramatically. See *United States* v. *Pabst Brewing Co.*, 384 U. S. 546, 550 (1966). Whereas in 1935 there were 684 brewing plants operating in the United States, by 1965 the number had been reduced to 178. Economies of scale, a relatively low profit margin, and significant barriers to market entry have all led to a concentration of beer production among the few national and large regional brewers.

B. The Geographic Market

These national trends are reflected in the six New England States, which constitute the relevant geographic market. In the four years preceding Falstaff's acquisi-

tion of Narragansett, New England beer sales increased 9.5%—a substantial gain, although somewhat below the increase in national sales for the same period. At the same time, however, the number of brewers operating plants in the region declined precipitately. Thus, in 1957, there were 11 breweries in the New England States, but by 1964 the number had declined to six, and of those six, two of the three smallest had publicly expressed an interest in merging with a larger competitor.

Not surprisingly, this decline in the number of breweries in New England was accompanied by an increase in the market shares of those selling in the region. In 1960, the eight largest participants in the New England market claimed 74% of all beer sales, and by 1964 this figure had risen to 81.2%. Examination of the four largest brewers shows that their share of the market rose from about 50% in 1960 to 54% in 1964, to 61.3% in 1965. In large part, these figures are probably explicable in terms of the nationwide trend in favor of the large national and regional brewers. Seven of the Nation's 10 largest breweries, including, of course, all the national breweries, sell beer in New England, and their share of the market has increased as the small, local brewers disappeared.

At the same time, however, the concentration of the market does not yet seem to have produced blatantly anticompetitive effects. In recent years, prices have remained fairly stable despite rising costs, and competition seems relatively intense among the few large firms which dominate the market. Still, there is no doubt that the seeds of anticompetitive conduct are present, since "[a]s [an oligopolistic] condition develops, the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge." *United States* v. *Aluminum Co. of America,* 377 U. S. 271, 280 (1964). One commentator's description of the national beer market aptly characterizes the situation in New England: "The

increasing concentration . . . and the unlikely entrance of new rivals poses a threat to the future level of competition in this industry. Thus far, there is no evidence of collusion in the beer industry. But as the industry becomes populated by fewer and fewer companies, the possibility and likelihood will be enhanced of their engaging in tacit or direct collusion—given the inelastic nature of demand—to establish a joint profit maximizing price and output. Similarly, the chances will become slimmer that individual firms in the industry will follow a truly independent price and production strategy, vigorously striving to take sales away from rival brewers. With only a few sellers will come the increasing awareness that parallel business behavior might be feasible." Elzinga, The Beer Industry, in W. Adams, The Structure of American Industry 189, 213 (4th ed. 1971).

C. Narragansett—The Acquired Firm

Narragansett is a regional brewery with only minuscule sales outside of New England. Within the New England market, however, the firm has been highly successful. Although only twenty-first in national sales and accounting for only 1.4% of the beer sales in the United States, Narragansett was the largest seller of beer in New England for the five years preceding its acquisition. In recent years, the firm has expanded steadily until, in 1964, the year before acquisition, it sold 1.275 million barrels, which was about 20% of the New England market. Net profits had increased from $417,284 in 1960 to a record level of $713,083 in 1964.

Notwithstanding this growth, Narragansett felt itself under some pressure from the national brewers.[6] The

[6] This pressure continued during the post-acquisition period. From 1964 to 1969, Narragansett's share of the market slipped from 21.5% to 15.5%, while Anheuser-Busch and Schlitz, two large national firms, increased their combined share from 16.5% to 35.8%.

corporation was closely held by the Haffenreffer family, and the stockholders apparently concluded that it was in their interest to diversify their personal holdings by selling Narragansett.

D. Falstaff—The Acquiring Firm

Like Narragansett, Falstaff has been highly successful in recent years. Beginning with a 100,000-barrel plant in St. Louis shortly after the repeal of Prohibition, the firm has steadily grown. By 1964, it was the Nation's fourth largest producer, marketing 5.8 million barrels, or 5.9% of the total national production.

Throughout its history, Falstaff has followed a pattern of acquiring weak breweries and expanding them so as to extend its influence to new markets. Although still a regional brewer, by 1965 the company had expanded its network of plants and distributorships over an area far larger than that in which Narragansett competed. In that year, Falstaff operated eight plants and sold its product in 32 States in the West, Midwest, and South. Sixteen of these States were added in the period after 1950. However, as of 1965, Falstaff sold virtually no beer in any of the Northeastern States, including the six composing the New England area. Falstaff marketed its product both through company-owned branches and through some 600 independent distributorships.[7]

[7] At trial, Falstaff argued that it was unlikely to make a *de novo* entry into the New England market since it had learned through experience that a strong, pre-existing organization of distributors was essential to success. It is true that Falstaff sold most of its beer through independent distributors. However, it should be noted that between 20% and 25% of its sales were made through company branches which Falstaff had established itself. As might be expected, Falstaff's profit margin was significantly higher in areas where it used its own distribution facilities. Moreover, Falstaff's assertion is belied by its own prior history. As noted above, for years Falstaff had successfully expanded by purchasing failing

In the years immediately prior to its acquisition of Narragansett, Falstaff's steady pattern of growth had continued. Between 1955 and 1964, its sales increased from $77 million to $139.5 million and its net profits grew from $4.3 million to $7 million. In the year before acquisition, the company announced a 10-year expansion program in which it was prepared to invest $35 million.

Yet, despite this encouraging trend, Falstaff, like Narragansett, was to some extent handicapped by the competitive advantages—in particular, national advertising—enjoyed by national distributors. For years, the company had publicly expressed the desire to become a national brewer, and the logical region for market extension was the Northeast. New England seemed a particularly appropriate area to initiate expansion. As indicated above, seven of the 10 largest manufacturers already sold beer in New England, and Falstaff was the largest of the three remaining outside the market. The New England market was expanding at a healthy rate, and it appeared to be a fertile area for growth.

In 1958, Falstaff commissioned a study from Arthur D. Little, Inc., to determine the feasibility of future expansion. The Little Report, two years in the making, concluded that Falstaff should enter the northeastern market sometime within the next five years. But although it was clear that Falstaff should move into the northeast market, the method of entry was less obvious. After a careful review of cost estimates and the ratio of earnings to net worth, the Little Report recommended *de novo* entry through the construction of a new plant to serve the Northeast. The report concluded that "[t]here appears to be ample reason . . . for building rather than buying . . . [and] that major new market entrances need

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breweries with weak distribution facilities and turning them into effective competitors.

not be predicated on the availability of a brewery Falstaff could purchase."

Despite this analysis, Falstaff's own management personnel apparently concluded that the profit return on a *de novo* entry would be inordinately low.[8] Falstaff argued at trial that it needed a strong, pre-existing distribution system to make a profitable entry. But cf. n. 7, *supra*. An independent economist, Dr. Ira Horowitz, testified on behalf of Falstaff that *de novo* entry would result in a 6.7% return which he characterized as "a very, very poor investment indeed." However, it should be noted that the 6.7% figure failed to account for the increment in Falstaff's profit margin which would result from its newly gained status as a national brewer with modern plants to serve the eastern part of the Nation—the very increment which provided the primary motivation for expansion in the first place. While Dr. Horowitz apparently recognized that such an increment might materialize, he stated that he was unable to estimate its size.[9] Moreover, even the 6.7% return rate compares favorably with Falstaff's actual rate of return on its Narragansett purchase, which was a mere 3.7%.

In any event, whatever the abstract merits of this dispute, it is clear that Falstaff's management personnel determined that entry by acquisition offered the preferable avenue for expansion. Beginning in 1962, the company held discussions with Liebmann, P. Ballantine

[8] At trial, Falstaff also argued that the other Little recommendations which Falstaff did follow led to disastrous consequences, that Little's estimate of construction costs were unrealistic, and that the Little Report was premised on Falstaff's penetration of the mid-Atlantic as well as the New England market.

[9] Dr. Horowitz' estimates were based on the assumption that Falstaff's profit margin would be $1.16 per barrel, which was the margin currently enjoyed by the company. However, Anheuser-Busch and Pabst, two of the larger national breweries, both earned more than $2.50 per barrel in their modern plants.

& Sons,[10] Piel Brothers, and Dawsons, all of which did a significant percentage of their business in the New England market. All of these possibilities were eventually rejected, and in 1965, Falstaff finally settled on Narragansett as the most promising available brewery.

II

With this factual background, it becomes possible to articulate the legal standards which should govern the resolution of this case.

A. The Purposes of § 7

As is clear from its face, § 7 was designed to deal with the anticompetitive effects of excessive industrial concentration caused by the corporate marriage of two competitors. "It is the basic premise of [§ 7] that competition will be most vital 'when there are many sellers, none of which has any significant market share.'" *United States* v. *Aluminum Co. of America,* 377 U. S., at 280.

But § 7 does more than prohibit mergers with immediate anticompetitive effects. The Act by its terms prohibits acquisitions which "may . . . substantially . . . lessen competition, or . . . tend to create a monopoly." The use of the subjunctive indicates that Congress was concerned with the *potential* effects of mergers even though, at the time they occur, they may cause no present anticompetitive consequences. See, *e. g., FTC* v. *Procter & Gamble Co.,* 386 U. S. 568, 577 (1967). To be sure, remote possibilities are not sufficient to satisfy the test set forth in § 7. Despite substantial concern with halting a trend toward concentration in its incipiency, Congress did not intend to prohibit all expansion and growth through acquisition

[10] Ultimately, on March 6, 1972, Falstaff announced plans to acquire Ballantine's trademarks and tradename.

and merger. The predictive judgment often required under § 7 involves a decision based upon a careful scrutiny and a reasonable assessment of the future consequences of a merger without unjustifiable, speculative interference with traditional market freedoms. As we stated in *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 323 (1962): "Congress used the words '*may be* substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act." See also *United States* v. *Pabst Brewing Co.,* 384 U. S., at 552; *United States* v. *Penn-Olin Chemical Co.,* 378 U. S. 158, 171 (1964).

The legislative history of § 7 makes plain that this was the intent of Congress. Before 1950, § 7 prohibited only those mergers which lessened competition "between the corporation whose stock is so acquired and the corporation making the acquisition." [11] The Celler-Kefauver Amendment, added in 1950, deleted these words and provided instead that all mergers which substantially lessened competition "in any line of commerce in any section of the country" were to be outlawed. See 64 Stat. 1126. Thus, whereas before 1950, § 7 proscribed only

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[11] The original § 7 provided in relevant part: "[N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." 38 Stat. 731.

those mergers which eliminated present, actual competition between the merging firms, the Celler-Kefauver Amendment reached cases where future or potential competition in the entire relevant market might be adversely affected by the merger.[12] "Section 7 of the Clayton Act was intended to arrest the anticompetitive effects of market power in their incipiency. The core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future. . . . The section can deal only with probabilities, not with certainties. . . . And there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive

[12] The legislative history of the 1950 amendment was traced in detail in our opinion in *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962). "The deletion of the 'acquiring-acquired' test was the direct result of an amendment offered by the Federal Trade Commission. In presenting the proposed change, Commission Counsel Kelley made the following points: this Court's decisions had implied that the effect on competition between the parties to the merger was not the only test of the illegality of a stock merger; the Court had applied Sherman Act tests to Clayton Act cases and thus judged the effect of a merger on the industry as a whole; this incorporation of Sherman Act tests, with the accompanying 'rule of reason,' was inadequate for reaching some mergers which the Commission felt were not in the public interest; and the new amendment proposed a middle ground between what appeared to be an overly restrictive test insofar as mergers between competitors were concerned, and what appeared to the Commission to be an overly lenient test insofar as all other mergers were concerned. Congressman Kefauver supported this amendment and the Commission's proposal was then incorporated into the bill which was eventually adopted by the Congress. See Hearings [before Subcommittee No. 2 of the House Committee on the Judiciary] on H. R. 515, [80th Cong., 1st Sess.] at 23, 117–119, 238–240, 259; Hearings before a Subcommittee of the Senate Judiciary Committee on H. R. 2734, 81st Cong., 1st Sess. . . . 147." 370 U. S., at 317 n. 30.

action before § 7 can be called into play. If the enforcement of § 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated." *FTC* v. *Procter & Gamble Co.*, 386 U. S., at 577.

B. Modes of Potential Competition

Since 1950, we have repeatedly applied § 7 to cases where the merging firms competed in the same line of commerce, and we have been willing to define the line of commerce liberally so as to reach anticompetitive practices in their "incipiency." See, *e. g.*, *United States* v. *Phillipsburg National Bank*, 399 U. S. 350 (1970); *United States* v. *Pabst Brewing Co.*, 384 U. S. 546 (1966); *United States* v. *Aluminum Co. of America*, 377 U. S. 271 (1964); *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963); *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962). But in keeping with the spirit of the Celler-Kefauver Amendment, we have also applied § 7 to cases where the acquiring firm is outside the market in which the acquired firm competes. These cases fall into three broad categories which, while frequently overlapping, can be dealt with separately for analytical purposes.

1. The Dominant Entrant.—In some situations, a firm outside the market may have overpowering resources which, if brought to bear within the market, could ultimately have a substantial anticompetitive effect. If such a firm were to acquire a company within the relevant market, it might drive other marginal companies out of business, thus creating an oligopoly, or it might raise entry barriers to such an extent that potential new entrants would be discouraged from entering the market. Cf. *Ford Motor Co.* v. *United States*, 405 U. S. 562, 567–568 (1972); *FTC* v. *Procter & Gamble Co.*, 386

U. S., at 575.[13] Such a danger is especially intense when the market is already highly concentrated or entry barriers are already unusually high before the dominant firm enters the market.

2. The Perceived Potential Entrant.—Even if the entry of a firm does not upset the competitive balance within the market, it may be that the removal of the firm from the fringe of the market has a present anticompetitive effect. In a concentrated oligopolistic market, the presence of a large potential competitor on the edge of the market, apparently ready to enter if entry barriers are lowered, may deter anticompetitive conduct within the market. As we pointed out in *United States* v. *Penn-Olin Chemical Co.,* 378 U. S., at 174: "The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market [is] a substantial incentive to competition which cannot be underestimated." From the perspective of the firms already in the market, the possibility of entry by such a lingering firm may be an important consideration in their pricing and marketing decisions. When the lingering firm enters the market by acquisition, the competitive influence exerted by the firm is lost with no offsetting gain through an increase in the number of companies seeking a share of the relevant market. The result is a net de-

[13] To be sure, in terms of anticompetitive effects, the dominant firm's acquisition of another firm within the market might be functionally indistinguishable from a *de novo* entry, which § 7 does not forbid. But "surely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition." *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 370 (1963). Moreover, entry by acquisition has the added evil of eliminating one firm in the market and thus increasing the burden on the remaining firms which must compete with the dominant entering firm.

crease in competitive pressure.[14] Cf. *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651, 659–660 (1964).

3. The Actual Potential Entrant.—Since the effect of a perceived potential entrant depends upon the perception of those already in the market, it may in some cases be difficult to prove. Moreover, in a market which is already competitive, the existence of a perceived potential entrant will have no present effect at all.[15] The entry by acquisition of such a firm may nonetheless have an anticompetitive effect by eliminating an actual potential competitor. When a firm enters the market by acquiring a strong company within the market, it merely assumes the position of that company without necessarily increasing competitive pressures. Had such a firm not entered by acquisition, it might at some point have entered *de*

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[14] Thus, whereas the practical difference between entry by acquisition and entry *de novo* may be marginal in the case of a dominant entrant, see n. 13, *supra*, it is crucial in the case of a perceived potential entrant. If the perceived potential entrant enters *de novo*, its deterrent effect on anticompetitive practices remains and the total number of firms competing for market shares increases. But when such a firm enters by acquisition, it merely steps into the shoes of the acquired firm. The result is no net increase in the actual competition for market shares and the removal of a threat exerting procompetitive influence from outside the market.

[15] Still, even if the market is presently competitive, it is possible that it might grow less competitive in the future. For example, a market might be so concentrated that even though it is presently competitive, there is a serious risk that parallel pricing policies might emerge sometime in the near future. In such a situation, an effective competitor lingering on the fringe of the market—what might be called a *potential* perceived potential entrant—could exert a deterrent force when anticompetitive conduct is about to emerge. As its very name suggests, however, such a firm would be still a further step removed from the exertion of actual, present competitive influence, and the problems of proof are compounded accordingly—particularly in light of the showing of reasonable probability required under § 7.

novo. An entry *de novo* would increase competitive pressures within the market, and an entry by acquisition eliminates the possibility that such an increase will take place in the future. Thus, even if a firm at the fringe of the market exerts no present procompetitive effect, its entry by acquisition may end for all time the promise of more effective competition at some future date.

Obviously, the anticompetitive effect of such an acquisition depends on the possibility that the firm would have entered *de novo* had it not entered by acquisition. If the company would have remained outside the market but for the possibility of entry by acquisition, and if it is exerting no influence as a perceived potential entrant, then there will normally be no competitive loss when it enters by acquisition. Indeed, there may even be a competitive gain to the extent that it strengthens the market position of the acquired firm.[16] Thus, mere entry by acquisition would not prima facie establish a firm's status as an actual potential entrant. For example, a firm, although able to enter the market by acquisition, might, because of inability to shoulder the *de novo* start-up costs, be unable to enter *de novo.* But where a powerful firm is engaging in a related line of commerce at the fringe of the relevant market, where it has a strong incentive to enter the market *de novo,* and where it has the financial capabilities to do so, we have not hesitated to ascribe to it the role of an actual potential entrant. In such cases, we have held that § 7 prohibits an entry by acquisition since such an entry eliminates the possibility of future actual competition which would occur if there were an entry *de novo.*

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[16] However, if the acquired firm is strengthened to such an extent that it upsets the market balance and drives its competitors out of the market, the acquiring firm takes on the characteristics of a dominant entrant, and the merger may therefore violate § 7 under that theory. See *supra,* at 558–560 and n. 14.

In light of the many decisions to this effect, the majority's assertion that "the Court has not squarely faced [this] question" is inexplicable. In *United States* v. *Continental Can Co.*, 378 U. S. 441 (1964), for example, the defendant argued that "the types of containers produced by Continental and Hazel-Atlas [the acquired firm] at the time of the merger were for the most part not in competition with each other and hence the merger could have no effect on competition." *Id.*, at 462. But MR. JUSTICE WHITE, writing for the Court, rejected that argument, holding that "[i]t is not at all self-evident that the lack of current competition between Continental and Hazel-Atlas for some important end uses of metal and glass containers significantly diminished the adverse effect of the merger on competition. Continental might have concluded that it could effectively insulate itself from competition by acquiring a major firm *not presently directing its market acquisition efforts toward the same end uses as Continental, but possessing the potential to do so.*" *Id.*, at 464 (emphasis added). The majority says it is "only arbitrary" to read this language as not referring to Hazel-Atlas' present procompetitive influence on the market. But the *Continental Can* Court said not a word about present procompetitive effects, and, indeed, made clear that it was relying on the future anticompetitive impact of the merger. The Court held, for example, that "the fact that Continental and Hazel-Atlas were not substantial competitors of each other for certain end uses at the time of the merger may actually enhance the *long-run tendency* of the merger to lessen competition." *Id.*, at 465 (emphasis added). See also *Ford Motor Co.* v. *United States*, 405 U. S. 562 (1972); *FTC* v. *Procter & Gamble Co.*, 386 U. S. 568 (1967); *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158 (1964); *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651 (1964).

C. Problems of Proof—The Role of Subjective Evidence

Although § 7 deals with probabilities, not ephemeral possibilities, all forms of potential competition involve future events and all of them are, therefore, to some extent speculative and uncertain. Whether future competition will be reduced by a present merger is clearly "not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'" *United States* v. *Philadelphia National Bank*, 374 U. S., at 362.

The unavoidable problems of proof are compounded in some cases by the relevance of subjective statements of future intent by the managers of the acquiring firm. Although not susceptible of precise analysis, the objective conditions of the market may at least be measured and quantified. But there exists no very good way of evaluating a subjective statement by the manager of a firm that the firm does or does not intend to enter a given market at some future date.

Fortunately, in two of the three forms of potential competition, such subjective evidence has no role to play. Clearly, in the case of a dominant entrant, the only issue is whether the firm's entry by acquisition will so upset objective market forces as to substantially reduce future competition. Since the firm will have already taken steps to enter the market by the time a § 7 action is filed, its statements of subjective intent are irrelevant.

Similarly, when the Government proceeds on the theory that the acquiring firm is a perceived potential entrant, testimony as to the subjective intent of the acquiring firm is not probative. The perceived potential entrant exerts a procompetitive effect because companies in the market *perceive* it as a potential entrant. The companies in the market may entertain this perception whether the perceived potential entrant is *in fact* a potential entrant or not. Thus, a firm on the fringe of the market may exert a procompetitive effect even if it has no intention of entering the market, so long as it seems to those within the market that it may have such an intention.[17] It follows that subjective testimony by the managers of the perceived potential entrant is irrelevant.[18]

However, subjective statements of management are probative in cases where the acquiring firm is alleged to be an actual potential entrant. First, management's statements that it does not intend to make a *de novo* market entry, together with its associated reasons, provide an expert judgment on the conclusions to be drawn

[17] Thus, in *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158 (1964), for example, management testified that the company had no intention of making a *de novo*, nonacquisitive entry, *id.*, at 166, and in part on the basis of this testimony, the District Court found that such an entry was unlikely, *id.*, at 173. But we rejected this finding as irrelevant to the company's status as a perceived potential entrant since "the corporation . . . might have remained at the edge of the market, continually threatening to enter," *ibid.*, and so affected competition within the market.

[18] Public statements by management that the firm does not intend to enter the market may be relevant. To the extent that such statements are believed by the firms within the market, they affect their perception of the firm outside the market as a potential entrant. But in that event, the statements of intent are admissible, not to show subjective state of mind, but, rather, as one of the objective factors controlling the perception of the firms within the market.

by the trier of fact from the objective market forces. Just as the Government may introduce expert testimony to inform and guide the trial court with respect to the appropriate business judgments to be derived from the objective data, so too the defendant is entitled to present the evaluation of its own "experts" who may include its management personnel. Although such evidence from management is obviously biased and self-serving, it is nonetheless admissible to prove that the objective market pressures do not favor a *de novo* entry.

More significantly, management's statement of subjective intent, if believed, affects the firm's status as an actual potential entrant. As indicated above, the actual potential entrant's entry by acquisition is anticompetitive only if it eliminates some future possibility that it might have entered *de novo*. An unequivocal statement by management that it has absolutely no intention of entering the market *de novo* at any time in the future is relevant to the issue of whether the possibility of such an entry exists. After all, the character of management is itself essentially an objective factor in determining whether the acquiring firm is an actual potential entrant.

But although subjective evidence is probative and admissible in actual potential-entry cases, its utility is sharply limited. We have certainly never suggested that subjective evidence of likely future entry is *required* to make out a § 7 case. On the contrary, in *United States* v. *Penn-Olin Chemical Co.*, 378 U. S., at 175, where the objective evidence of potential entry was strong, we said, *"Unless we are going to require subjective evidence,* this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. This we will not do." (Emphasis added.)

Nor do our prior cases hold that the district courts are bound by subjective statements of company officials that they have no intention of making a *de novo* entry. We have emphasized that the decision whether the acquiring firm is an actual potential entrant is, in the last analysis, an independent one to be made by the trial court on the basis of all relevant evidence properly weighted according to its credibility. Thus, in *FTC* v. *Procter & Gamble Co.*, for example, managers of Procter & Gamble testified that they had no intention of making a *de novo* entry, and the Court of Appeals thought itself bound by that testimony. See 386 U. S., at 580, and *id.*, at 585 (Harlan, J., concurring). We reversed, holding that "[t]he evidence . . . clearly shows that Procter was the most likely entrant." *Id.*, at 580.

As these cases indicate, subjective evidence has, at best, only a marginal role to play in actual potential-entry cases. In order to make out a prima facie case, the Government need only show that objectively measurable market data favor a *de novo* entry and that the alleged potential entrant has the economic capability to make such an entry. To be sure, the defendant may then introduce subjective testimony in rebuttal, and in the rare case where the objective evidence is evenly divided, it is conceivable that extremely credible subjective evidence might tip the balance. But where objectively measurable market forces make clear that it is in a firm's economic self-interest to make a *de novo* entry and that the firm has the economic capability to do so, I would hold that it is error for the District Court to conclude that the firm is not an actual potential entrant on the basis of testimony by company officials as to the firm's future intent.[19]

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[19] It might be argued that economic decisions are "inherently subjective" and that any attempt to derive objective conclusions from

The reasons for so limiting the role of subjective evidence are not difficult to discern. Such evidence should obviously be given no weight if it is not credible. But it is in the very nature of such evidence that in the

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economic data is futile. If this observation means that different people reach different conclusions from the same objective data, then the point must, of course, be conceded. Similarly, if the point is that economic predictions are difficult and fraught with uncertainty, it is well taken. As we recognized in *United States* v. *Philadelphia National Bank*, such questions are "not . . . susceptible of a ready and precise answer in most cases." 374 U. S., at 362. But although the factual controversies in § 7 cases may prove difficult to resolve, the statutory scheme clearly demands their resolution. As this Court held years ago, in response to a similar argument: "So far as the arguments proceed upon the conception that in view of the generality of the statute it is not susceptible of being enforced by the courts because it cannot be carried out without a judicial exertion of legislative power, they are clearly unsound. The statute certainly generically enumerates the character of acts which it prohibits and the wrong which it was intended to prevent. The propositions therefore but insist that . . . it never can be left to the judiciary to decide whether in a given case particular acts come within a generic statutory provision. But to reduce the propositions, however, to this their final meaning makes it clear that in substance they deny the existence of essential legislative authority and challenge the right of the judiciary to perform duties which that department of the government has exerted from the beginning." *Standard Oil Co.* v. *United States*, 221 U. S. 1, 69–70 (1911). Section 7 by its terms requires the trial judge to make a prediction, and it is entirely possible that others may reasonably disagree with the conclusion he reaches. But a holding that the fact of such disagreement requires the judge to delegate his decision-making authority to one of the parties would strike at the heart of the very notion of judicial conflict resolution. While it may be true that different people see economic facts in different light, § 7 gives federal judges and juries the responsibility to reach *their* conclusions as to the economic facts. And "[i]f justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try." O. Holmes, The Common Law 48.

usual case it is not worthy of credit.[20] First, any statement of future intent will be inherently self-serving. A defendant in a § 7 case such as this wishes to enter the market by acquisition and its managers know that its ability to do so depends upon whether it can convince a court that it would not have entered *de novo* if entry by acquisition were prevented. It is thus strongly in management's interest to represent that it has no intention of entering *de novo*—a representation which is not subject to external verification and which is so speculative in nature that it could virtually never serve as the predicate for a perjury charge.

Moreover, in a case where the objective evidence strongly favors entry *de novo,* a firm which asks us to believe that it does not intend to enter *de novo* by implication asks us to believe that it does not intend to act in its own economic self-interest. But corporations are, after all, profit-making institutions, and, absent special circumstances, they can be expected to follow courses of action most likely to maximize profits.[21] The

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[20] The Government directs our attention to a case which dramatically illustrates the unreliable character of such evidence. When the Government challenged Bethlehem Steel's acquisition of Youngstown Steel in a § 7 proceeding, Bethlehem vigorously argued that it would never enter the Midwestern steel market *de novo.* But when the merger was disallowed, see *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (SDNY 1958), Bethlehem nonetheless elected to make a *de novo* entry. See Moody's Industrial Manual 2861 (1966).

[21] It is possible to imagine a small, closely held corporation which is not solely concerned with profit maximization and which through excessive conservatism or inertia would not seize upon an opportunity to expand its profits. But such a corporation is exceedingly unlikely to become the defendant in a § 7 lawsuit. Section 7 suits of this type are triggered when a firm tries to expand its market by entering hitherto foreign territory by acquisition. A firm caught

trier of fact should, therefore, look with great suspicion upon a suggestion that a company with an opportunity to expand its market and the means to seize upon that opportunity will follow a deliberate policy of self-abnegation if the route of expansion first selected is legally foreclosed to it.

Thus, in most cases, subjective statements contrary to the objective evidence simply should not be believed. But even if the threshold credibility gap is breached, it still does not follow that subjective statements of future intent should outweigh strong objective evidence to the contrary. Even if it is true that management has no present intent of entering the market *de novo,* the possibility remains that it may change its mind as the objective factors favoring such entry are more clearly perceived. Of course, it is possible that management will adamantly continue to close its eyes to the company's own self-interest. But in that event, the chance remains that the stockholders will install new, more competent officers who will better serve their interests. All of these possibilities are abruptly and irrevocably aborted when the firm is allowed to enter the market by acquisition. And while it is conceivable that none of the possibilities will materialize if entry by acquisi-

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in the act of expanding by acquisition can hardly be heard to say that it is uninterested in expansion.

It is also possible that a firm might make a good-faith error as to the nature of objective market forces. Thus, even though the objective factors favor entry *de novo,* the firm's managers might *think* that the same factors are unfavorable. But as the objective evidence favoring entry becomes stronger, the possibility of good-faith error correspondingly decreases, so that if the objective forces favoring entry are clear, the chance of good-faith error becomes *de minimis.* Moreover, the mere fact that a firm is presently making a good-faith error does not demonstrate that it will continue to do so in the future. See *supra,* this page.

tion is prevented, it is absolutely certain that they will not materialize if such entry is permitted. All that is necessary to trigger a § 7 violation is a finding by the trial court of a reasonable chance of future competition. In most cases, strong objective evidence will be sufficient to create such a chance despite even credible subjective statements to the contrary.[22]

To summarize, then, I would not hold that subjective evidence may never be considered in the context of an actual potential-entry case. Such evidence should always be admissible as expert, although biased, commentary on the nature of the objective evidence. And in a rare case, the subjective evidence may serve as a counterweight to weak or inconclusive objective data. But when the district court can point to no compelling reason why the subjective testimony should be believed or when the objective evidence strongly points to the feasibility of entry *de novo,* I would hold that it is error for the court to rely in any way upon management's subjective statements as to its own future intent.

III

As indicated above, the Government failed to press the argument that Falstaff was a dominant or perceived potential entrant. Since there is virtually no evidence in the record to support either of these theories, I cannot

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[22] The distinction between subjective statements of intent and objectively verifiable facts is not unknown in other areas of the law. See, *e. g., Wright* v. *Council of City of Emporia,* 407 U. S. 451, 460–462 (1972); *NLRB* v. *Erie Resistor Corp.,* 373 U. S. 221, 227–228 (1963). Indeed, perhaps the oldest rule of evidence—that a man is presumed to intend the natural and probable consequences of his acts—is based on the common law's preference for objectively measurable data over subjective statements of opinion and intent. Nor have we hesitated to apply this principle to antitrust law. See, *e. g., Utah Pie Co.* v. *Continental Baking Co.,* 386 U. S. 685, 702–703 (1967); *United States* v. *Gypsum Co.,* 333 U. S. 364, 394 (1948).

say that the District Judge erred in rejecting them. It does appear, however, that he applied an erroneous standard in evaluating the subjective evidence relevant to Falstaff's position as an actual potential entrant and that this error infected the court's factual determinations. I would therefore remand the cause so that a proper fact-finding can be made.

The record shows that the New England market is highly concentrated with a few large firms gaining a greater and greater share of the market. Although this market structure has yet to produce overtly anticompetitive behavior, there is a real danger that parallel pricing and marketing policies will soon emerge if new competitors do not enter the field.

The objective evidence in the record strongly suggests that Falstaff had both the capability and the incentive to enter the New England market *de novo*. It is undisputed that it was in Falstaff's interest to gain the status of a national brewer in the near future and that New England was a logical area to begin its expansion. Indeed, Falstaff's own actions in entering the New England market support this conclusion. Nor can it be doubted that Falstaff had the economic capability to enter New England. Falstaff is the Nation's fourth largest brewer and the largest still outside of New England. It has been consistently profitable in recent years, has an excellent credit rating, and had, in 1964, enough excess capital to finance a 10-year, $35 million expansion project. The Little Report concluded that *de novo* entry into the Northeast was feasible and, although Falstaff attacks these findings, the trier of fact might well have accepted them had he relied upon the objective evidence.

To be sure, Falstaff introduced a great deal of evidence tending to show that entry *de novo* would have been less profitable for it than entry by acquisition.

I have no doubt that this is true. Indeed, if it can be assumed that Falstaff is a rational, profit-maximizing corporation, its own decision offers strong proof that entry by acquisition was the preferable alternative. But the test in § 7 cases is not whether anticompetitive conduct is profit maximizing. The very purpose of § 7 is to direct the profit incentive into channels which are procompetitive. Thus, the proper test is whether Falstaff would have entered the market *de novo* if the preferable alternative of entry by acquisition had been denied it. The objective evidence strongly suggests that such an entry would have occurred.

The District Court, however, chose to ignore this objective evidence almost totally. Instead, the trial judge seems to have considered himself bound by Falstaff's subjective representations that it had no intention of entering the market *de novo*. As noted above, even if these subjective statements are credible, they appear to be insufficient to outweigh the strong objective evidence to the contrary.

Findings of fact are, of course, for the trial judge in the first instance, and even in antitrust cases where the evidence is largely documentary, appellate courts should be reluctant to set them aside. But when the facts are found under a standard which is legally deficient, the situation is fundamentally different. It is the duty of appellate courts to establish the legal standards by which the facts are to be judged. The facts in this case were judged by a wrong standard, and the cause should therefore be remanded for a new, error-free determination.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART concurs, dissenting.

Civil litigation in our common-law system is conducted within the framework of the time-honored principle that the plaintiff must introduce sufficient evidence to con-

vince the trier of fact that his claim for relief is factually meritorious. However large the societal interest in the area of antitrust law, so long as Congress assigns the vindication of those interests to civil litigation in the federal courts, antitrust litigation is no exception to that rule. The plaintiff, whether public or private, must prove to the satisfaction of the judge or jury that the defendant violated the antitrust laws. *United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949). It is the exclusive responsibility of the trier of fact to weigh, as he sees fit, all admissible evidence in resolving disputed issues of fact, *ibid.*, and his findings of fact cannot be overturned on appeal unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *Gypsum Co.*, 333 U. S. 364, 395 (1948). Cf. *FTC* v. *Procter & Gamble Co.*, 386 U. S. 568 (1967). The Court today simply disregards these principles.

The Court remands this case to the District Court to consider "whether Falstaff was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market." *Ante*, at 532–533. The antitrust theory underlying the remand is that the competitors in the relative geographic market, aware of Falstaff's presence on the periphery, would not exercise their ostensible market power to raise prices because of the possibility that Falstaff, sufficiently tempted by the high prices in that market, would enter. A Government suit challenging a merger or acquisition can, of course, be premised on this theory, and, if sufficient evidence to convince the trier of fact is introduced, the determination that the merger or acquisition violated § 7 would not be reversed on appeal.

As my Brother MARSHALL convincingly demonstrates, however, in this case the Government neither proceeded on the theory advanced by the Court nor introduced *any*

evidence that would support that theory. The theory that the Government did advance, and upon which it offered its evidence, is concisely summarized in the Government's statement in opposition to Falstaff's motion to dismiss.

> "In our opening statement we attempted to show that the Government would prove—and I believe we have—that Falstaff, the fourth largest brewing corporation in the nation, had a continuous intensive interest in entering New England; that it carried on negotiations for five years with companies serving New England; that alternative methods of entry other than the acquisition of the largest New England brewer were available to Falstaff; and that it was in fact one of a few and the most likely entrant into this market; that its entrance into this market was especially important because the market is concentrated; that is, the sales of beer in New England are highly concentrated in the hands of the relatively few number of brewers.
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> "The entry by Falstaff by building a brewery, by shipping into this market, and opening it up, by the acquisition of a company less than number 1, thereby eliminating its most significant potential competitor, were all available to it. Because of the concentration in the market and because of Falstaff's being the most potential entrant, the acquisition by Falstaff of the leading firm in this market eliminated what we consider to be one of a few potential competitive effects that this market could expect for years." Transcript, Vol. 3, p. 7.

For this Court to reverse and to remand for consideration of a possible factual basis for a theory never advanced by the plaintiff is a drastic and unwarranted departure from the most basic principles of civil litigation

and appellate review. In this case, the Government originally advanced one theory, but failed to introduce sufficient evidence to convince the trier of fact. That failure is "a not uncommon form of litigation casualty, from which the Government is no more immune than others." *United States* v. *Yellow Cab Co.*, 338 U. S., at 341. The Court now resuscitates this "casualty" by use of a theory transplant, allowing the Government a second opportunity to vindicate its position by arguing a different theory not originally propounded before the District Court or on appeal. I cannot join in the Court's rescue operation for this "litigation casualty," an operation which succeeds only by flagrantly disregarding some of the axioms upon which our judicial system is founded.

Although agreeing with my Brother MARSHALL's criticism of the Court's reason for remanding this case, I cannot agree with his grounds for remanding to the District Court for reconsideration. That theory is based, erroneously I believe, on the notion that there is an identifiable difference between "objective" and "subjective" evidence in an antitrust case such as this. My Brother MARSHALL would have the District Court weigh "objective" evidence more heavily than "subjective" evidence. In the field of economic forecasting in general, and in the area of potential competition in particular, however, the distinction between "objective" and "subjective" evidence is largely illusory. It is, I believe, incorrect to state that a trier of fact can determine "objectively" what "is in a firm's economic self-interest." Such a determination is guesswork. The term "economic self-interest" is a convenient shorthand for describing the economic decision reached by an individual or firm, but does not connote some simple, mechanical formula which determines the input values, or their assigned weight, in the process of economic decisionmaking. The simple fact is that any economic decision is largely sub-

jective. In the instant case, Falstaff sought to prove why it was not in the "economic self-interest" of that firm to enter a new geographic market without an established distribution system. Its explanation is as "objective" as any of the evidence offered by the Government to show why a hypothetical Falstaff should enter the market. The question of who is an "actual potential competitor" is entirely factual. In deciding questions of fact, it is the province of the trier to weigh all of the evidence; but it is peculiarly his province to determine questions of credibility.

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. . . .
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> ". . . There is no exception [to the 'clearly erroneous' rule of appellate review] which permits [the Government], even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design." *United States* v. *Yellow Cab Co.*, 338 U. S., at 341–342.

I would not ignore our prior decisions or rewrite the rules of evidence simply to afford the Government a second chance, which is uniformly denied to other litigants, to convince the trier of fact.

UNITED STATES *v.* FIRST NATIONAL BANCORPORATION, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

No. 71–703. Argued October 16–17, 1972—
Decided February 28, 1973

329 F. Supp. 1003, affirmed by an equally divided Court.

Deputy Solicitor General Friedman argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Kauper, Acting Assistant Attorney General Comegys, Donald I. Baker, Howard E. Shapiro, William Bradford Reynolds,* and *Lee A. Rau.*

Eugene J. Metzger argued the cause for appellees. With him on the briefs were *Edward B. Close, Jr., Carl W. Schwarz,* and *Mark W. Haase.**

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

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*Briefs of *amici curiae* were filed by *Robert Bloom, C. Westbrook Murphy,* and *Charles H. McEnerney, Jr.,* for the Comptroller of the Currency; by *William E. Murane* and *J. William Via, Jr.,* for the Federal Deposit Insurance Corporation; by *Andrew P. Miller,* Attorney General, and *Henry M. Massie, Jr.,* Assistant Attorney General, for the Commonwealth of Virginia; and by *Michael Iovenko* for the New York State Banking Department.

HURTADO ET AL. *v.* UNITED STATES

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

No. 71–6742. Argued January 17, 1973—Decided March 5, 1973

1. A material witness who is incarcerated because unable to give bail is entitled under 28 U. S. C. § 1821 to the same $20 per diem compensation as is allowed a nonincarcerated witness during the trial or other proceeding at which he is in "attendance," *i. e.*, has been summoned and is available to testify in a court in session, regardless of whether he is physically present in the courtroom. Pp. 582–587.
2. The $1 statutory per diem plus subsistence in kind for incarcerated witnesses before trial does not violate the Just Compensation Clause, as detention of a material witness is not a "taking" under the Fifth Amendment; and the distinction between compensation for pretrial detention and for trial attendance is not so unreasonable as to violate the Due Process Clause of the Fifth Amendment, since Congress could determine that in view of the length of pretrial confinement and the costs necessarily borne by the Government, only minimal compensation for pretrial detention is justified, particularly since the witness has a public duty to testify. Pp. 588–591.

452 F. 2d 951, vacated and remanded to District Court.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 591. DOUGLAS, J., filed a dissenting opinion, *post*, p. 600.

Albert Armendariz, Sr., argued the cause and filed a brief for petitioners.

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Petersen, Deputy Solicitor General Lacovara, Harry R. Sachse,* and *Jerome M. Feit.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioners, citizens of Mexico, entered the United States illegally. To assure their presence as material witnesses at the federal criminal trials of those accused of illegally bringing them into this country, they were required to post bond pursuant to former Rule 46 (b) of the Federal Rules of Criminal Procedure. Unable to make bail, they were incarcerated.[1]

The petitioners instituted the present class action in the United States District Court for the Western District of Texas on behalf of themselves and others similarly incarcerated as material witnesses. Their complaint alleged that they, and the other members of their class, had been paid only $1 for every day of their confinement; that the statute providing the compensation to be paid witnesses requires payment of a total of $21 per day to material witnesses in custody; and that, alternatively, if the statute be construed to require payment of only $1 per day to detained witnesses, it violates the Fifth Amendment guarantees of just compensation and due process. They did not attack the validity or length of their incarceration as such, but sought monetary damages under the Tucker Act, 28 U. S. C. § 1346 (a)(2), for the

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[1] Fed. Rule Crim. Proc. 46 (b), at the time this case arose, and before Rule 46 was amended to conform to the Bail Reform Act of 1966, provided:

"Bail for Witness.

"If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if

lost compensation claimed, and equivalent declaratory and injunctive relief.

The statute in question, 28 U. S. C. § 1821, provides that a "witness attending in any court of the United States . . . shall receive $20 for each day's attendance and for the time necessarily occupied in going to and returning from the same . . . ." A separate paragraph of the statute entitles "a witness . . . detained in prison for want of security for his appearance, . . . in addition to his subsistence, to a compensation of $1 per day." [2]

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he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail."

[2] The statute provides in full:

"§ 1821. Per diem and mileage generally; subsistence.

"A witness attending in any court of the United States, or before a United States commissioner, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive $20 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 10 cents per mile for going from and returning to his place of residence. Regardless of the mode of travel employed by the witness, computation of mileage under this section shall be made on the basis of a uniform table of distances adopted by the Attorney General. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an additional allowance of $16 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance: *Provided,* That in lieu of the mileage allowance provided for herein, witnesses who are required to travel between the Territories and possessions, or to and from the continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed: *Provided further,* That this section shall not apply to Alaska.

"When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day.

"Witnesses in the district courts for the districts of Canal Zone,

The petitioners' complaint was grounded upon the theory that they were "attending in . . . court" throughout the period of their incarceration, since they were prevented from engaging in their normal occupations in order to be ready to testify. They argued that the $20 fee is compensation for the inconvenience and private loss suffered when a witness comes to testify, and that all of these burdens are borne by the incarcerated witness throughout his confinement. Urging that the compensation provisions should be applied as broadly as the problem they were designed to ameliorate, the petitioners argued that they were entitled to the $20 compensation for every day of confinement, in addition to the $1 a day that they viewed as a token payment for small necessities while in jail.

While they pressed this broad definition of "attendance," the petitioners also pointed to a narrower and more acute problem in administering the statute. Their amended complaint alleged that nonincarcerated witnesses are paid $20 for each day after they have been summoned to testify—even for those days they are not needed in court and simply wait in the relative comfort of their hotel rooms to be called. By contrast, witnesses in jail are paid only $1 a day when they are waiting to testify—even when the trial for which they have been detained is in progress. In short, the amended complaint alleged that the Government has construed the statute to mean that incarcerated witnesses must be physically present in the courtroom before they are eligible for the $20 daily compensation, but that nonincarcerated witnesses need not be similarly present to receive that amount.[3]

Guam, and the Virgin Islands shall receive the same fees and allowances provided in this section for witnesses in other district courts of the United States."

[3] By way of illustration, the witness who sets out on Monday in order to be available to testify on Tuesday; but who is not actually

In its answer, the Government conceded that each witness detained in custody is paid only $1 for every day of incarceration, and that the witness fee of $20 is paid only when such a witness is actually in attendance in court. The Government defended this practice as required by the literal words of the statute, and argued that the statute, as so construed, is constitutional.

In an unreported order, the District Court granted the Government's motion for summary judgment, and the Court of Appeals for the Fifth Circuit affirmed. 452 F. 2d 951. The Court of Appeals concluded that the $20 witness fee is properly payable only to those witnesses who are "in attendance" or traveling to and from court, and not to those who are incarcerated to assure their attendance. So interpreted, the court upheld the statute as constitutional. We granted certiorari, 409 U. S. 841, to consider a question of seeming importance in the administration of justice in the federal courts.

I

Both the petitioners and the Government adhere to their own quite contrary interpretations of § 1821—the petitioners maintaining that they are entitled to a $20 witness fee for every day of incarceration and the Government seeking to limit such payment to those days on which a detained witness is physically "in attendance" in court. We find both interpretations of the statute incorrect—the petitioners' too expansive, the Government's too restricted.[4]

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called to the court for testimony until Friday; and who returns home on Saturday, will receive $20 for every day from Monday through Saturday. But the material witness who is incarcerated on Monday, held until Friday when he testifies, and then released, will receive one dollar for every day and an additional $20 only for Friday—the day he actually testifies.

[4] Both parties bolster their statutory interpretations with arguments based upon the statutory language. The petitioners point out

The statute provides to a "witness attending in any court of the United States" $20 "for each day's attendance." This perforce means that a witness can be eligible for the $20 fee only when two requirements are satisfied—when there is a court in session that he is to attend, and when he is in necessary attendance on that court.

The petitioners' interpretation of "attendance" as beginning with the first day of incarceration slights the statutory requirement that attendance be *in court*. A witness might be detained many days before the case in which he is to testify is called for trial. During that time, there is literally no court in session in which he could conceivably be considered to be in attendance. Over a century and a half ago Attorney General William Wirt rejected a similar construction of an almost identically worded law. He found that the then-current statute, which provided compensation to a witness "for each day he shall attend in court," [5] could not be construed

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that incarcerated witnesses are not specifically excluded from those entitled to receive the $20 fee for attending court, though they are excluded from those entitled to the $16-a-day subsistence allowance. Hence, they conclude that Congress intended that they be eligible for the $20-per-day fee. But that argument proves no more than that Congress intended a detained witness to be eligible for the $20 fee for every day he is "attending" court; it does not indicate that Congress intended that every day of incarceration is the equivalent of a day attending court and compensable at the rate of $20 per day.

The Government supports its position by pointing out that the statute allocates to a detained witness $1 per day "in addition to his subsistence," not $1 a day in addition both to subsistence *and* to a witness fee of $20. But it is difficult to give any weight to this argument, since the Government acknowledges that a detained witness is to be paid $20 a day at least for days of physical attendance in court. Therefore, according to the Government's own interpretation, the $1-a-day clause can hardly be exclusive.

[5] "*And be it further enacted,* That the compensation to jurors and witnesses, in the courts of the United States, shall be as follows, to

to provide payment to incarcerated witnesses for every day of their detention:

> "There is no court, except it be a court in session. There are judges; but they do not constitute a court, except when they assemble to administer the law. . . . Now I cannot conceive with what propriety a witness can be said to be *attending in court* when there is *no court,* and will be *no court* for several months.
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> "To consider a witness who has been committed to jail because he cannot give security to attend a future court, to be actually *attending the court* from the time of his commitment, and this for five months before there is any court in existence, would seem to me to be rather a forced and unnatural construction." 1 Op. Atty. Gen. 424, 427.

The Government, on the other hand, would place a restrictive gloss on the statute's requirement of necessary attendance; it maintains that the $20 compensation need be paid only for the days a witness is in actual physical attendance in court, and it concludes that a witness confined during the trial need only be paid for those days on which he is actually brought into the courtroom. But § 1821 does not speak in terms of "physical" or "actual" attendance, and we decline to engraft such a restriction upon the statute. Rather, the statute reaches those witnesses who have been summoned and are in necessary attendance on the court, in readiness to testify. There is nothing magic about the four walls of a courtroom.

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wit: to each grand and other juror, for each day he shall attend in court, one dollar and twenty-five cents; and for travelling, at the rate of five cents per mile, from their respective places of abode, to the place where the court is holden, and the like allowance for returning; to the witnesses summoned in any court of the United States, the same allowance as is above provided for jurors." Act of Feb. 28, 1799, c. 19, § 6, 1 Stat. 626.

Once a witness has been summoned to testify, whether he waits in a witness room, a prosecutor's office, a hotel room, or the jail, he is still available to testify, and it is that availability that the statute compensates. Non-incarcerated witnesses are compensated under the statute for days on which they have made themselves available to testify but on which their physical presence in the courtroom is not required—for example, where the trial is adjourned or where their testimony is only needed on a later day.[6] We cannot accept the anomalous conclusion that the same statutory language imposes a requirement of physical presence in the courtroom on witnesses who have been confined. Attorney General Wirt concluded that language similar to that at issue here, did not require any such physical presence:

> "But it was by no means my intention to authorize the inference . . . that, in order to entitle a witness to his *per diem* allowance under the act of Congress, it was necessary that he should be every day *corporeally present* within the walls of the court-room, and that the court must be every day in actual session. Such a puerility never entered my mind. My opinion simply was, and is, that before compensation could begin to run, the court must have commenced its session; the session must be legally subsisting, and the witness attending on the court—not necessarily in the court-room, but within its power, whenever it may require his attendance. . . . I consider

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[6] Cf., *e. g., Hunter* v. *Russell,* 59 F. 964, 967–968; *Whipple* v. *Cumberland Cotton Mfg. Co.,* 29 F. Cas. 933 (No. 17,515); *Hance* v. *McCormick,* 11 F. Cas. 401 (No. 6,009).

The Department of Justice regulations repeat the statutory directive that a witness is to be paid $20 for "each day's attendance." Department of Justice, United States Marshal's Manual 340.14 (1971). There is no explicit requirement of physical presence in the courtroom.

> a witness as attending on court to the purpose of earning his compensation, so long as he is in the power of the court whensoever it may become necessary to call for his evidence, although he may not have entered the court-room until such call shall have been made; and I consider the court in session from the moment of its commencement until its adjournment *sine die,* notwithstanding its intermediate adjournments *de die in diem.*" 1 Op. Atty. Gen., at 426–427.

We conclude that a material witness who has been incarcerated is entitled to the $20 compensation for every day of confinement during the trial or other proceeding for which he has been detained.[7] On each of those days,

[7] The legislative history of the compensation provision is unenlightening. Though Congress early provided compensation for witnesses attending in the courts of the United States, no specific provision was made for incarcerated witnesses. See, *e. g.*, Act of May 8, 1792, c. 36, § 3, 1 Stat. 277; Act of June 1, 1796, c. 48, § 2, 1 Stat. 492; Act of Feb. 28, 1799, c. 19, § 6, 1 Stat. 626. In 1853, Congress provided for payment to a witness of $1.50 a day while attending court, and specifically indicated that a detained witness was to be paid $1 a day over and above his subsistence. Act of Feb. 26, 1853, c. 80, § 3, 10 Stat. 167. In 1926, Congress eliminated the specific provision for compensation to detained witnesses and raised the per diem compensation for attendance in court. Act of Apr. 26, 1926, c. 183, §§ 1–3, 44 Stat. 323–324.

In the following two decades, Congress changed the levels of compensation but did not specifically provide for compensation to detained witnesses. See Act of June 30, 1932, c. 314, § 323, 47 Stat. 413; Act of Mar. 22, 1935, c. 39, § 3, 49 Stat. 105; Act of Dec. 24, 1942, c. 825, § 1, 56 Stat. 1088. When the Judicial Code was revised in 1948, the provision for per diem compensation to detained witnesses was again absent, Act of June 25, 1948, c. 646, § 1821, 62 Stat. 950, but was added the following year, Act of May 24, 1949, c. 139, § 94, 63 Stat. 103, with the explanation by the House Committee on the Judiciary that it had been "inadvertently omitted." H. R. Rep. No. 352, 81st Cong., 1st Sess., 16. By a separate measure, witness fees were increased. Act of May 10, 1949,

the two requirements of the statute are satisfied—there is a court in session and the witness is in necessary attendance. He is in the same position as a nonincarcerated witness who is summoned to appear on the first day of trial, but on arrival is told by the prosecutor that he is to hold himself ready to testify on a later day in the trial. The Government pays such a witness for every day he is in attendance on the court, and the statute requires it to pay the same per diem compensation to the incarcerated witness. Because the Court of Appeals upheld a construction of the statute that would allow the $20 to be paid to incarcerated witnesses only for those days they actually appear in the courtroom, its judgment must be set aside.[8]

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c. 96, 63 Stat. 65. While the per diem fee, the subsistence fee, and the travel allowance have all been increased, the $1 a day for incarcerated witnesses has remained constant. See Act of Aug. 1, 1956, c. 826, 70 Stat. 798; Act of Mar. 27, 1968, Pub. L. 90–274, § 102 (b), 82 Stat. 62.

The petitioners urge that this history of steadily increasing fees at least indicates a congressional intent to compensate witnesses fully for their lost time and income, and that since they suffer these losses throughout the period of incarceration they ought to receive the $20 for every day of confinement. But Congress recognized that witness fees could not fully compensate witnesses for their lost time or income. See, *e. g.*, S. Rep. No. 891, 90th Cong., 1st Sess., 36; S. Rep. No. 187, 81st Cong., 1st Sess., 2. The petitioners point to no hint in any of the reports on the various changes in compensation levels which could justify the conclusion that Congress intended to provide more than $1 a day to detained witnesses for the period of their pretrial confinement.

[8] It was also error to affirm the summary judgment for the Government because there was a genuine issue of material fact whether the petitioners had ever been paid for the days that they actually attended court. See Fed. Rule Civ. Proc. 56 (c); *Arenas* v. *United States* 322 U. S. 419, 432–434; *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 623–629. They alleged in their amended complaint that on many occasions they testified for the Government and were not paid $20 a day for such testimony. The Government

II

The petitioners argue that if § 1821 provides incarcerated witnesses only a dollar a day for the period before the trial begins, then the statute is unconstitutional. We cannot agree.

As noted at the outset, the petitioners do not attack the constitutionality of incarcerating material witnesses, or the length of such incarceration in any particular case.[9] Rather, they say that when the Government incarcerates material witnesses, it has "taken" their property, and that one dollar a day is not just compensation for this "taking" under the Fifth Amendment. Alternatively, they argue that payment of only one dollar a day before trial, when contrasted with the $20 a day paid to witnesses attending a trial, is a denial of due process of law.

But the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed. See *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177, 193 (modification of bridge

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agreed that they were entitled to that compensation, but contended in its answer that they had been so paid. No affidavits or other evidence was submitted to support that contention, and the Court of Appeals in affirming summary judgment for the Government did not comment on this clear factual dispute.

Since a remand is required, we also note that the District Court never explicitly ruled on the petitioners' motion to have this suit declared a class action under Fed. Rule Civ. Proc. 23, and the Court of Appeals did not discuss the issue. It will, of course, be appropriate on remand for the District Court to determine whether this suit was properly brought as a class action, and we accordingly express no view on that issue.

[9] See *Stein* v. *New York,* 346 U. S. 156, 184 ("The duty to disclose knowledge of crime . . . is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness"); *Barry* v. *United States ex rel. Cunningham,* 279 U. S. 597, 616–618.

obstructing river); *United States* v. *Hobbs,* 450 F. 2d 935 (Selective Service Act); *United States* v. *Dillon,* 346 F. 2d 633, 635 (representation of indigents by court-appointed attorney); *Roodenko* v. *United States,* 147 F. 2d 752, 754 (alternative service for conscientious objectors); cf. *Kunhardt & Co.* v. *United States,* 266 U. S. 537, 540. It is beyond dispute that there is in fact a public obligation to provide evidence, see *United States* v. *Bryan,* 339 U. S. 323, 331; *Blackmer* v. *United States,* 284 U. S. 421, 438, and that this obligation persists no matter how financially burdensome it may be.[10] The financial losses suffered during pretrial detention are an extension of the burdens borne by every witness who testifies. The detention of a material witness, in short, is simply not a "taking" under the Fifth Amendment, and the level of his compensation, therefore, does not, as such, present a constitutional question. "[I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." *Blair* v. *United States,* 250 U. S. 273, 281.[11]

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[10] "[I]t may be a sacrifice of time and labor, and thus of ease, of profits, of livelihood. This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-required favor. It is a duty not to be grudged or evaded. Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit. He who will live by society must let society live by him, when it requires to." 8 J. Wigmore, Evidence § 2192, p. 72 (J. McNaughton rev. 1961).

[11] There is likewise no substance to the petitioners' argument that the $1-a-day payment is so low as to impose involuntary servitude

Similarly, we are unpersuaded that the classifications drawn by § 1821 as we have construed it are so irrational as to violate the Due Process Clause of the Fifth Amendment. Cf. *Bolling* v. *Sharpe,* 347 U. S. 497, 499. The statute provides $20 per diem compensation to a witness who is in necessary attendance on a court, but that fee is payable to any witness, incarcerated or not. During the period that elapses before his attendance on a court, a witness who is *not* incarcerated gets no compensation whatever from the Government. An incarcerated witness, on the other hand, gets one dollar a day during that period, in addition to subsistence in kind.

We cannot say that there is no reasonable basis for distinguishing the compensation paid for pretrial detention from the fees paid for attendance at trial. Pretrial confinement will frequently be longer than the period of attendance on the court, and throughout that period of confinement the Government must bear the cost of food, lodging, and security for detained witnesses. Congress could thus reasonably determine that while some compensation should be provided during the pretrial detention period, a minimal amount was justified, particularly in view of the fact that the witness has a public obligation to testify. As the Court of Appeals correctly observed, "[G]overnmental recognition of its interest in having persons appear in court by paying them for that participation in judicial proceedings, does not require that it make payment of the same nature and extent to persons who are held available for participation in judicial proceedings should it prove to be necessary. That the government pays for one stage does not require that it pay in like manner for all stages." 452 F. 2d, at 955.

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prohibited by the Thirteenth Amendment. Cf. *Griffin* v. *Breckenridge,* 403 U. S. 88, 104–105; *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 437–444.

We do not pass upon the wisdom or ultimate fairness of the compensation Congress has provided for the pretrial detention of material witnesses. We do not decide "that a more just and humane system could not be devised." *Dandridge* v. *Williams,* 397 U. S. 471, 487. Indeed, even though it opposed granting the petition for certiorari in the present case, the Government found it "obvious" that "the situation is not a satisfactory one," and we were informed at oral argument that a legislative proposal to increase the per diem payment to detained witnesses will shortly be submitted by the Department of Justice to the Office of Management and Budget for review. But no matter how unwise or unsatisfactory the present rates might be, the Constitution provides no license to impose the levels of compensation we might think fair and just. That task belongs to Congress, not to us.

The judgment of the Court of Appeals is vacated, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

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

I am in full agreement with much of the majority's opinion. Construing 28 U. S. C. § 1821, which authorizes compensation at the rate of $20 per day to "[a] witness attending in any court of the United States . . . ," the Court holds today that a person held in jail as a material witness [1] is "attending in . . . court" each day that the

[1] Fed. Rule Crim. Proc. 46 (b), at the time this case arose, provided that where a witness' testimony was "material" in any criminal proceeding and where it might become impracticable to secure the presence of the witness by subpoena, the court might require the witness to give bail for his appearance. If the witness failed to give bail, the court might order his incarceration pending final disposition of the proceeding in which his testimony was needed.

pertinent judicial proceeding is underway, even if the witness is not physically present in the courtroom. But the majority also holds that a jailed witness is not "attending in" court prior to the inception of the judicial proceeding, even though he is held in custody for no other purpose than to insure his appearance to give testimony at trial. I reject that conclusion because, in my view, it works an obvious and severe hardship on an incarcerated witness, because it is compelled neither by the language nor the purposes of the statute, and because the statute so construed would be unconstitutional under the Due Process Clause of the Fifth Amendment.

I

In addition to providing compensation of $20 per day for "each day's attendance and for the time necessarily occupied in going to and returning from" the court where the witness is to testify, the statute also authorizes, in certain cases, an "additional allowance of $16 per day for expenses of subsistence." 28 U. S. C. § 1821. And the same statute states that "[w]hen a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day."

In construing these statutory provisions, petitioners (citizens of Mexico who entered the United States illegally), respondent, and the Court agree on two points: first, that a jailed material witness is entitled to compensation of $1 per day for each day that he spends in confinement; and second, that a jailed material witness is entitled to the additional compensation of $20 per day for each day that a trial is in progress and that the witness is physically present in the courtroom. The point in contention is whether or not the jailed witness should receive the additional compensation of $20 per day during the time after he is taken into custody, but

before he is physically present in court. Petitioners contend that he should. Respondent contends that he should not. The Court holds that he *should* receive the compensation for each day that the trial is in progress (whether or not he actually appears in court), but that he *should not* receive it for the days spent in custody before the trial is under way.

The Court predicates its conclusion on a superficially plausible reading of the literal terms of the statute:

> "The petitioners' interpretation of 'attendance' as beginning with the first day of incarceration slights the statutory requirement that attendance be *in court*. A witness might be detained many days before the case in which he is to testify is called for trial. During that time there is literally no court in session in which he could conceivably be considered to be in attendance." *Ante,* at 583.

The Court holds, in other words, that if the court is not in session, then a jailed material witness cannot be said to be "attending *in . . . court.*" (Emphasis added.) But the correct interpretation of the phrase, "in court," is not as obvious as it would at first appear. Read literally, the phrase would appear to require that the witness spend the day within the four walls of the courtroom, or, at the very least, the courthouse. Yet the Court recognizes, and the Government concedes, that a witness can be "in court" even if he is in a hotel room or a restaurant. I share the view that physical presence in the courtroom is not required to bring a witness within the reach of the statute. But I cannot accept the Court's conclusion that a witness is "in court" or not "in court," depending on whether or not the judicial proceeding is technically under way.

Unfortunately, the Government has not described its practice in compensating witnesses under § 1821 with

the kind of specificity that would simplify our analysis. It would seem plausible, however, to assume that the practice might be as follows: A witness subpoenaed to appear on Tuesday morning may spend all of Monday en route to the courthouse, only to learn on Tuesday that the case will not be called as early as expected. If the witness waits in the witness room all day each day until the case is finally called on Friday, it would seem reasonable to assume that he is entitled to compensation for his attendance on Tuesday, Wednesday, and Thursday, even though the proceeding did not begin until Friday. Whatever the Government's practice in such a case, I would hold that the payment of compensation for those three days would be permitted, if not required, by the terms of the statute. Yet under the Court's rigid analysis of the phrase, "in court," it would be unlawful for the Government to compensate the witness, except for the days spent traveling to and from the courthouse, for any day except Friday. The Court is apparently bound to hold that notwithstanding the physical presence of the witness in the courthouse, he was not "in court" because the court was not yet in session.

The obvious shortcoming of the Court's analysis is its disregard, in construing the critical statutory phrase, of the purposes of the statute. The statute is grounded on the view that a subpoena to appear and give testimony will often entail substantial disruption of one's affairs, a loss of income, and considerable inconvenience. These dislocations, for which Congress has authorized compensation,[2] will exist whether a witness is required to wait in a witness room, a prosecutor's office, a courtroom, or

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[2] The Government argues at length that Congress did not intend to provide full compensation to a witness or to insure the witness against all lost earnings. See Brief for United States 16–24. The Government does not dispute, however, that the congressional pur-

a hotel room. For that reason, the Court is correct in its conclusion that a witness may be "in court" for the purposes of the statute even though he is not, in fact, in the courthouse. But that same purposive analysis refutes the Court's suggestion that the pendency of a judicial proceeding is a precondition to the payment of witness fees. Surely the fact that the court is not yet in session is small comfort to the witness who is required to appear and wait for the calling of his case. His daily loss of income does not mysteriously increase as soon as the judge appears behind the bench. Nor, if he is unlucky enough to be held in custody for want of bail, does the infringement on his liberty become less burdensome or the assault on his dignity less severe. Whatever the status of the judicial proceeding, it remains clear that the witness is held in jail for a single purpose: to serve the interests of the court. And it is the unquestioned purpose of the statute to insure that witnesses who are inconvenienced to serve the interests of the court are compensated, at least in part, for the service they have given. I cannot ascribe to Congress the essentially irrational view that a day spent in attendance on a pending trial is inherently a day more worthy of compensation than a day spent in attendance on a trial that is not yet under way. Nothing should or was intended to turn on whether a trial is actually in progress.

II

My conclusion that the majority has misconstrued the statute is fortified by the conviction that the statute, as interpreted by the Court, would be invalid under the Due Process Clause of the Fifth Amendment. *Bolling*

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pose was to provide at least partial compensation for the expenses, dislocation, and income loss attributable to compelled attendance as a witness.

v. *Sharpe,* 347 U. S. 497 (1954). The majority discerns a

> "reasonable basis for distinguishing the compensation paid for pretrial detention from the fees paid for attendance at trial. Pretrial confinement will frequently be longer than the period of attendance on the court, and throughout that period of confinement the Government must bear the cost of food, lodging, and security for detained witnesses. Congress could thus reasonably determine that while some compensation should be provided during the pretrial detention period, a minimal amount was justified, particularly in view of the fact that the witness has a public obligation to testify." *Ante,* at 590.

In my view, that assertion is inadequate to the task of justifying this discriminatory classification scheme. First, as construed by the Court, the scheme clearly does not treat jailed material witnesses in a manner which is in any sense equivalent to the treatment of subpoenaed witnesses. Rather, the Court establishes two distinct classes of inconvenienced witnesses: those who are burdened by a subpoena to appear, and who receive compensation for each day of dislocation; and those who are burdened by a term in jail, but who are compensated only for the days of dislocation which follow the inception of trial. The Court apparently denies this inequality, asserting that "[d]uring the period that elapses before his attendance on a court, a witness who is *not* incarcerated gets no compensation whatever from the Government. An incarcerated witness, on the other hand, gets one dollar a day during that period, in addition to subsistence in kind." *Ante,* at 590. But the appropriate point of comparison is not the treatment of incarcerated witnesses before trial with the treatment of nonincarcerated wit-

nesses before trial. The statement that a subpoenaed witness receives no compensation for the period which precedes the onset of trial is true but irrelevant. Naturally the witness receives no compensation; he has sustained no injury. By hypothesis, the subpoena directs the witness to appear at a time when trial is at least scheduled to begin. In practical effect, therefore, the subpoenaed witness is compensated in full for each day of inconvenience, while the jailed witness may endure the "inconvenience" of a lengthy term in jail and receive significant compensation only for the days of confinement which happen to coincide with trial.

Moreover, this discrimination against jailed witnesses cannot be justified by reference to the fact—again, true but irrelevant—that the "witness has a public obligation to testify." *Ante,* at 590. The identical "public obligation" is imposed on the subpoenaed witness, and the existence of the obligation does not rationalize the heavier burden placed on the jailed witness in seeking compensation for his days of dislocation. And since the jailed witness carries the same obligation to testify both before and after trial has begun, its existence does not explain a scheme that provides significant compensation only for days of confinement during trial.

If the statutory scheme is to be upheld, it can only be on the theory that Congress has made a rational attempt to impose some limits on the amount of money which will be paid out to any given witness under the scheme. I can assume that the imposition of such a ceiling on expenditures is, in itself, a permissible goal. And since witness fees could, in some instances, reach staggering amounts, I can assume that Congress has the power to impose an across-the-board cutoff—*e. g.,* $1,000 per witness—on the fees allowable under the Act. But these assumptions do not relieve us of the obligation to determine whether the particular approach Congress

has used in imposing a cutoff is sufficiently rational to withstand constitutional attack. Cf. *Dandridge* v. *Williams*, 397 U. S. 471, 483–487 (1970). I conclude that it is not.

As the Court construes the statutory scheme, a material witness who is held in jail for four months in anticipation of a one-day trial will receive in compensation $141—$1 per day for each of 120 days, and $21 for the day of trial. By contrast, a witness who is subpoenaed to appear on the first day of trial but who, as a result of preliminary motions, adjournment, and miscellaneous delays, is not called to appear until two weeks have passed, will receive $280 in compensation, plus a subsistence allowance. However legitimate the governmental interest in imposing some limit on the expenditure of money to witnesses, the mere assertion of that interest cannot save a classification scheme that pays to a witness who spends two weeks in a hotel a sum of money greatly in excess of the amount made available to one who spends four months in the less congenial atmosphere of a courthouse jail. I can see no rational basis for this appalling difference in treatment.[3]

[3] Of course, where the Government detains a material witness pending trial, its total financial burden is not limited to the payment of $1 per day under 28 U. S. C. § 1821. The Government also assumes the expense of feeding and housing the incarcerated witness. Nevertheless, I cannot conclude that this added expense affords a rational basis for imposing an arbitrary ceiling on the payment of witness fees to a jailed witness. First, the Government makes no attempt to justify the statute on this ground, and we are not advised of the marginal cost to the Federal Government of holding a material witness in an existing penal facility. Second, the legislative history of the scheme evidences no particular congressional concern for the costs of incarceration, nor any effort to limit the payment of witness fees because of this added expense. Third, even if the marginal costs of incarceration are substantial, that fact cannot explain the absence of any limits whatsoever on the witness fees that can be paid to a nonincarcerated witness. And since a nonincarcerated wit-

The classification scheme we uphold today cannot be considered a rational attempt to preserve the Government's financial resources.[4] Regrettably, it seems to

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ness may be eligible for a subsistence allowance of $16 per day in addition to the $20 daily fee, the amount of money involved can be very large indeed. Finally, and most important, while the Government has an obvious interest in limiting its total expenditure on witnesses—including the payment of fees, subsistence allowances, and incarceration costs—that interest cannot explain the payment of higher per diem fees to nonincarcerated witnesses than to incarcerated witnesses. Even if the cost of keeping a witness in jail is $36 per day, which is the amount paid each day to a nonincarcerated witness, it does not follow that the payments are equivalent from the standpoint of the witnesses. The jailed witness is inconvenienced no less than the subpoenaed witness, yet his rate of compensation is dramatically, and inexplicably, less.

[4] Nor can the scheme be justified on the theory that one who is too poor to give bail deserves only minimal compensation because he is unlikely to incur any great financial loss during the period of incarceration. The fact that a witness is unable to give bail is hardly an indication that he is unemployed. In any case, the statute is designed to compensate the witness not only for the loss of income, but also for the inconvenience and disruption of his personal affairs. Inconvenience is not the exclusive property of the rich. Moreover, the witness who cannot give bail is likely to be the one most in need of compensation to pay the expenses his family will inevitably incur while he waits in jail for the beginning of trial. As enacted by Congress, the scheme was thought to provide compensation in an amount that is "more or less arbitrary, but considered to be reasonably fair to the average witness." S. Rep. No. 187, 81st Cong., 1st Sess., 2. There is no indication that Congress thought some witnesses were so poor that they could be deemed indifferent to compensation.

Thus, the Government's assertion that "payment of $21 per day would serve as a chance bonus" for persons like petitioners who presumably earn less than that amount per day, Brief for United States 31, misses the point of the statutory scheme. By that reasoning, the scheme would offer the same "chance bonus" to a witness who earns $50,000 per year, but who is not required to perform a daily service to earn that income. Wealth is not a guarantee that income loss is substantial, just as poverty is not a guarantee that the income loss is trivial.

me little more than an attempt to punish those who are unable to give bail as a guarantee of their appearance at trial, and who, almost by definition, lack the power and resources to remedy their unfortunate plight. As my Brother DOUGLAS points out, "[w]e cannot allow the Government's insistent reference to these Mexican citizens as 'deportable aliens' to obscure the fact that they come before us as innocent persons who have not been charged with a crime or incarcerated in anticipation of a criminal prosecution." *Post*, at 604. They have been held in custody only to insure their presence at trial. I would not impute to Congress an intent to penalize these petitioners by holding the injury they have suffered less worthy of compensation than the inconvenience to a witness who is subpoenaed to appear at trial. I would hold, consistently with a fair reading of the statute in light of its purposes, that petitioners are entitled to compensation at the rate of $21 per day for each day they spend in custody while awaiting the call to appear in court.

MR. JUSTICE DOUGLAS, dissenting.

In my view, petitioners, all indigents, have been subject to discrimination "so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U. S. 497, 499.

Petitioners, citizens of Mexico allegedly brought into the United States illegally, belong to that class of persons who as material witnesses can be subpoenaed to testify. Each must suffer at least limited invasion of his personal liberty to fulfill his public obligation to provide evidence. See *United States* v. *Bryan*, 339 U. S. 323, 331; *Blair* v. *United States*, 250 U. S. 273, 281. Petitioners, however, also belong to a discrete subclass—those whose presence it might be impractical to secure by subpoena and thus were subject to detention pursuant

to former Fed. Rule Crim. Proc. 46 (b) [1] if they could not post bail. The deprivation they suffer is longer and more extensive than that of the witness merely subject to a subpoena. They may spend months in jail awaiting the few minutes or hours they will spend testifying. Unlike other witnesses, they are not free to come or go while the trial is not actually in progress. Nevertheless, the justification for infringing their liberty remains the same. Former Rule 46 (b) was conceived as a tool [2] to insure

[1] Rule 46 (b), at the time this case arose and before Rule 46 was amended to conform it to the Bail Reform Act of 1966, read:

"Bail for Witness.

"If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail."

[2] Mr. Justice Black and Mr. Justice Frankfurter dissented from submission of the original Rules of Criminal Procedure. 323 U. S. 821.

Mr. Justice Black and I in 1966 opposed the submission of certain amendments to the Rules of Criminal Procedure to the Congress. Mr. Justice Black's statement is to be found at 383 U. S. 1032, mine at 383 U. S. 1089. We thought at the time that some of the amendments presented serious constitutional questions.

The fact that the Court approved the Rules without reading them or debating them or weighing their merits does not, of course, preclude a challenge to their constitutionality in a given case.

But the imprimatur of this Court is on the Rules, and that gives them mighty weight. It is possible to read former Rule 46 (b) as permitting release on personal recognizance. But experience has shown that judges have not so read it. The result, as I indicate in this opinion, is that former Rule 46 (b) has borne down heavily on indigents who would be good risks but could not put up the money to buy a bail bond. Former Rule 46 (b) as so construed—and as

that the witness is available to testify, and any time spent incarcerated is spent as a direct result of the obligation that burdens all material witnesses. The comparison we are concerned with, then, is between the compensation paid to the incarcerated witness during the entire period his freedom to come or go is curtailed and the compensation paid to a nonincarcerated witness during the entire period he is subject to restraint. Although it is true, as the majority notes, that the nonincarcerated witness is paid nothing at all while court is not in session, the two classes are hardly comparably situated at the time, for the nonincarcerated witness is not subject to any substantial restraint as a result of his subpoena.

Congress has seen fit to compensate all material witnesses at the per diem rate of $20 for each day's attendance "in any court" (as defined by the majority) and for the necessary travel time. 28 U. S. C. § 1821. Yet, Congress compensates those incarcerated pursuant to former Rule 46 (b) at the per diem rate of only $1. Thus, not only are petitioners subject to more extensive deprivation of personal freedom, they also are denied equivalent compensation while waiting to testify.[3] Because former

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applied in the present case—is therefore plainly unconstitutional. Filling of the jails of San Antonio with men whose only crime is the desire to find work and holding them there at the caprice of the prosecutor is shocking, to say the very least—and traceable to the easy, offhand way in which the Court has seemingly approved many Rules which touch not only matters of public security but individual liberties as well.

[3] The Solicitor General asserts that "it is certainly not unreasonable or irrational for Congress to authorize a minimal sum as payment to deportable aliens. There is no indication that illegal aliens, like petitioners, even if employed, would have earned wages averaging $20 or $21 per day for a period of 30 or 60 days or longer." This prompts two comments. In explaining a predecessor of the current statute, the Senate Report stated:

"The amounts arrived at in this bill are considered to be more fair than presently existing amounts, although it is recognized that

Rule 46 (b) provided that only witnesses who failed to post bail might be incarcerated, this discrimination in practice affected just the indigent and resulted, therefore, in a suspect classification based upon wealth. This invidious discrimination against the poverty-stricken cannot be supported by some speculative rational justification. *Ortwein* v. *Schwab, post,* p. 661 (DOUGLAS, J., dissenting); *United States* v. *Kras,* 409 U. S. 434, 457 (opinion of DOUGLAS and BRENNAN, JJ.); *Boddie* v. *Connecticut,* 401 U. S. 371, 383 (DOUGLAS, J., concurring in result). Surely, the Government's desire to avoid the costs of compensation in addition to the increased costs of food, lodging, and security does not rise above that level.[4] See *Boddie* v. *Connecticut, supra,* at 382; *Shapiro* v. *Thompson,* 394 U. S. 618, 633.

The majority "cannot say that there is no reasonable basis for distinguishing the compensation paid for pretrial detention from the fees paid for attendance at trial." I am not certain I can agree even with that position. The magic transition period under the statute [5]

certain witnesses will not, under the proposed rates, be adequately compensated. In order to fairly compensate everyone appearing as a witness it would be necessary to have either a graduated scale of fees, or, leave the amount of such fees in the discretion of the judge. Neither was considered feasible, and therefore the amounts arrived at herein are more or less arbitrary, but considered to be reasonably fair to the average witness." S. Rep. No. 187, 81st Cong., 1st Sess., 2.

Also, if the statute is to be measured as it applies to aliens, it surely creates a suspect classification. See *Takahashi* v. *Fish & Game Comm'n,* 334 U. S. 410.

[4] For each day the Government compensates a witness at the per diem rate of $20, it also pays the witness $16 to cover subsistence expenses. I cannot believe that it costs the Government more than $16 a day to feed an incarcerated witness. In any event, the witness should not be taxed when he is imprisoned for the convenience of the Government.

[5] The majority tracks the legislative history of § 1821 and concludes that it is "unenlightening." When compensation was first

as construed by the majority is the beginning of trial. I find the distinction wholly arbitrary. I do not see how it bears any relevance to the quality of confinement; petitioners sacrifice their time waiting to testify whether or not court is in session.

Griffin v. *Illinois,* 351 U. S. 12, held that an indigent defendant is denied equal protection of the laws if he is barred from appealing on equal terms with other defendants solely because of his indigence. In *Bandy* v. *United States,* 82 S. Ct. 11, 7 L. Ed. 2d 9 (DOUGLAS, J., in chambers), I concluded that "no man should be denied release [pending trial or judicial review] because of indigence." *Id.,* at 13, 7 L. Ed. 2d, at 11. This principle seems ever clearer and more forceful to me in circumstances where the imprisoned have not been charged with or convicted of a crime. We cannot allow the Government's insistent reference to these Mexican citizens as "deportable aliens" to obscure the fact that they come before us as innocent persons who have not been charged with a crime or incarcerated in anticipation of a criminal prosecution. It is true, of course, that petitioners do not challenge the constitutionality of confining a material witness. But, in their prayer for relief, they seek to enjoin the Government "from any further incarceration of any person under such rule under the present interpretation of 28 U. S. C. § 1821 at one dollar ($1.00) per day total payment." I conclude that petitioners are entitled to this relief unless they are released on their personal recognizance.

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paid to incarcerated witnesses in 1853, Act of Feb. 26, 1853, § 3, 10 Stat. 167, they were paid $1 per day, or 50¢ less than a witness merely attending court. No subsistence was paid, and we can assume that the differential related to this factor. Over the years, Congress has increased the compensation paid to material witnesses and added subsistence payments without increasing the compensation paid to incarcerated witnesses. Congress has not advanced any justification.

BRADLEY ET AL. *v.* UNITED STATES

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

No. 71–1304. Argued January 8, 1973—Decided March 5, 1973

On May 6, 1971, petitioners were convicted and sentenced for narcotics offenses committed in March 1971. They received the minimum five-year sentences under a provision that was mandatory and made the sentences not subject to suspension, probation, or parole. Effective May 1, 1971, that provision was repealed and liberalized by the Comprehensive Drug Abuse Prevention and Control Act of 1970. On petitioners' motion for vacation of their sentences and remand for resentencing, the Court of Appeals held that the new provisions were unavailable in view of the Act's saving clause, which made them inapplicable to "prosecutions" antedating the Act's effective date. *Held:*

1. The word "prosecutions" in the saving clause is to be accorded its normal legal sense, under which sentencing is a part of the concept of prosecution. Therefore, the saving clause barred the District Judge from suspending sentence or placing petitioners on probation. Pp. 607–610.

2. Under the saving clause, parole under 18 U. S. C. § 4208 (a) is likewise unavailable to petitioners, since by its terms that provision is inapplicable to offenses for which a mandatory penalty is provided; and, in any event, a decision to grant early parole under that provision must be made "[u]pon entering a judgment of conviction," which occurs before the end of the prosecution. Pp. 610–611.

455 F. 2d 1181, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and in Part I of which BRENNAN and WHITE, JJ., joined. BRENNAN and WHITE, JJ., filed a statement concurring in the judgment, *post*, p. 611. DOUGLAS, J., filed a dissenting opinion, *post*, p. 612.

William P. Homans, Jr., argued the cause and filed a brief for petitioners.

Deputy Solicitor General Lacovara argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Petersen, Harriet S. Shapiro,* and *Jerome M. Feit.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In this case we must decide whether a District Judge may impose a sentence of less than five years, suspend the sentence, place the offender on probation, or specify that he be eligible for parole, where the offender was convicted of a federal narcotics offense that was committed before May 1, 1971, but where he was sentenced after that date. Petitioners were convicted of conspiring to violate 26 U. S. C. § 4705 (a) (1964 ed.) by selling cocaine not in pursuance of a written order form, in violation of 26 U. S. C. § 7237 (b) (1964 ed.). The conspiracy occurred in March 1971. At that time, persons convicted of such violations were subject to a mandatory minimum sentence of five years. The sentence could not be suspended, nor could probation be granted, and parole pursuant to 18 U. S. C. § 4202 was unavailable. 26 U. S. C. § 7237 (d) (1964 ed. and Supp. V). These provisions were repealed by §§ 1101 (b)(3)(A) and (b)(4)(A) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1292. The effective date of that Act was May 1, 1971, five days before petitioners were convicted.

Each petitioner was sentenced to a five-year term.[1] On appeal to the Court of Appeals for the First Circuit,

*Briefs of *amici curiae* were filed by *Harvey A. Silverglate* for Ralph De Simone; by *Irwin Klein* for Gerson Nagelberg et al.; and by *Fred M. Vinson, Jr.,* and *Robert S. Erdahl* for seven women prisoners.

[1] Petitioners Bradley, Helliesen, and Odell were found guilty also of unlawfully carrying a firearm during the commission of a felony, in violation of 18 U. S. C. § 924 (c)(2). Each was sentenced to

various points, not here relevant, were raised. Following affirmance of their convictions, petitioners moved that their sentences be vacated and their cases be remanded to the District Court for resentencing pursuant to Fed. Rule Crim. Proc. 35. In their motion they contended that the District Court should have considered "certain sentencing alternatives, including probation, suspension of sentence and parole" which became available on May 1, 1971. The Court of Appeals considered this motion as an "appendage" to the appeal. It held that the specific saving clause of the 1970 Act, § 1103 (a), read against the background of the general saving provision, 1 U. S. C. § 109, required that "narcotics offenses committed prior to May 1, 1971, are to be punished according to the law in force at the time of the offense," and that "under the mandate of § 109 the repealed statute, § 7237 (d) is '[to] be treated as still remaining in force.'" 455 F. 2d 1181, 1190, 1191. Accordingly, the Court of Appeals held that the trial judge lacked power to impose a lesser sentence.

We granted the petition for writ of certiorari, 407 U. S. 908 (1972), in order to resolve the conflict between the First and Ninth Circuits, see *United States* v. *Stephens*, 449 F. 2d 103 (CA9 1971).[2]

I

At common law, the repeal of a criminal statute abated all prosecutions which had not reached final disposition in the highest court authorized to review them. See *Bell* v. *Maryland*, 378 U. S. 226, 230 (1964); *Norris* v. *Crocker*, 13 How. 429 (1852). Abatement by repeal included a statute's repeal and re-enactment with different

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one year in prison; the sentences were suspended, and each was placed on probation for three years on these counts.

[2] See also *United States* v. *McGarr*, 461 F. 2d 1 (CA7 1972); *United States* v. *Fiotto*, 454 F. 2d 252 (CA2 1972).

penalties. See 1 J. Sutherland, Statutes and Statutory Construction § 2031 n. 2 (3d ed. 1943). And the rule applied even when the penalty was reduced. See, *e. g.*, *The King* v. *M'Kenzie,* 168 Eng. Rep. 881 (Cr. Cas. 1820); *Beard* v. *State,* 74 Md. 130, 21 A. 700 (1891). To avoid such results, legislatures frequently indicated an intention not to abate pending prosecutions by including in the repealing statute a specific clause stating that prosecutions of offenses under the repealed statute were not to be abated. See generally Note, Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation, 121 U. Pa. L. Rev. 120, 121–130 (1972).

Section 1103 (a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 is such a saving clause. It provides:

> "Prosecutions for any violation of law occurring prior to the effective date of [the Act] shall not be affected by the repeals or amendments made by [it] . . . or abated by reason thereof."

Petitioners contend that the word "prosecutions" in § 1103 (a) must be given its everyday meaning. When people speak of prosecutions, they usually mean a proceeding that is under way in which guilt is to be determined. In ordinary usage, sentencing is not part of the prosecution, but occurs after the prosecution has concluded. In providing that "[p]rosecutions . . . shall not be affected," § 1103 (a) means only that a defendant may be found guilty of an offense which occurred before May 1, 1971. The repeal of the statute creating the offense does not, on this narrow interpretation of § 1103 (a), prevent a finding of guilt. But § 1103 (a) does nothing more, according to petitioners.

Although petitioners' argument has some force, we believe that their position is not consistent with Con-

gress' intent. Rather than using terms in their everyday sense, "[t]he law uses familiar legal expressions in their familiar legal sense." *Henry* v. *United States,* 251 U. S. 393, 395 (1920). The term "prosecution" clearly imports a beginning and an end. Cf. *Kirby* v. *Illinois,* 406 U. S. 682 (1972); *Mempa* v. *Rhay,* 389 U. S. 128 (1967).

In *Berman* v. *United States,* 302 U. S. 211 (1937), this Court said, "Final judgment in a criminal case means sentence. The sentence is the judgment. *Miller* v. *Aderhold,* 288 U. S. 206, 210; *Hill* v. *Wampler,* 298 U. S. 460, 464." *Id.,* at 212. In the legal sense, a prosecution terminates only when sentence is imposed. See also *Korematsu* v. *United States,* 319 U. S. 432 (1943); *United States* v. *Murray,* 275 U. S. 347 (1928); *Affronti* v. *United States,* 350 U. S. 79 (1955).[3] So long as sentence has not been imposed, then, § 1103 (a) is to leave the prosecution unaffected.[4]

We therefore conclude that the Court of Appeals properly rejected petitioners' motion to vacate sentence and remand for resentencing. The District Judge had no power to consider suspending petitioners' sentences or placing them on probation. Those decisions must ordinarily be made before the prosecution terminates,

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[3] These cases involve determining whether a judgment in a criminal case is final for the purpose of appeal and determining whether the function of the trial judge has been concluded so that he may not alter the sentence previously imposed to include probation. The precise issues are, of course, different from the issue in this case. But these cases do show the point at which a prosecution terminates, and that is the issue here.

[4] Petitioners also argue that imposition of sentence precedes the suspension of sentence and the grant of probation. But the actions of the District Judge in imposing sentence and then ordering that it be suspended are usually so close in time that it would be unrealistic to hold that Congress intended so to fragment what is essentially a single proceeding.

and § 1103 (a) preserves the limitations of § 7237 (d) on decisions made at that time.

II

The courts of appeals that have dealt with this problem have failed, however, to consider fully the special problem of the parole eligibility of offenders convicted before May 1, 1971. The Seventh and Ninth Circuits hold that such offenders are eligible for parole.[5] The First Circuit in this case stated that petitioners were "ineligible for suspended sentences, *parole*, or probation." 455 F. 2d, at 1191 (emphasis added).

In the federal system, offenders may be made eligible for parole in two ways. Any federal prisoner "whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of" his sentence. 18 U. S. C. § 4202. Alternatively, the District Judge, "[u]pon entering a judgment of conviction . . . may (1) designate in the sentence of imprisonment imposed a minimum term, at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served, in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine." 18 U. S. C. § 4208 (a).

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[5] See n. 2, *supra*. We were informed at oral argument that "the Board of Parole is now considering as eligible for parole only defendants who have been sentenced in the Seventh and Ninth Circuits for narcotics offenses." Tr. of Oral Arg. 23. Our disposition of this case has no bearing on the power of the Board of Parole to consider parole eligibility for petitioners under 18 U. S. C. § 4202. See *infra*, at 611.

Section 1103 (a) clearly makes parole unavailable under the latter provision. As we have said, sentencing is part of the prosecution. The mandatory minimum sentence of five years must therefore be imposed on offenders who violated the law before May 1, 1971. And Congress specifically provided that § 4208 (a) does not apply to any offense "for which there is provided a mandatory penalty." Pub. L. 85–752, § 7, 72 Stat. 847. In any event, the decision to make early parole available under § 4208 (a) must be made "[u]pon entering a judgment of conviction," which occurs before the prosecution has ended. Section 1103 (a) thus means that the District Judge cannot specify at the time of sentencing that the offender may be eligible for early parole.

That was the only question before the Court of Appeals, and it is therefore the only question before us. Petitioners' motion, on which the Court of Appeals ruled, requested a remand so that the District Judge could consider the sentencing alternatives available to him under the Comprehensive Drug Abuse Prevention and Control Act of 1970. That Act, however, did not expand the choices open to the District Judge in this case, and the Court of Appeals correctly denied the motion to remand. The availability of parole under the general parole statute, 18 U. S. C. § 4202, is a rather different matter,[6] on which we express no opinion.

Affirmed.

MR. JUSTICE BRENNAN and MR. JUSTICE WHITE join Part I of the Court's opinion and would affirm for the reasons there expressed. They are also of the view that

[6] The decision to grant parole under § 4202 lies with the Board of Parole, not with the District Judge, and must be made long after sentence has been entered and the prosecution terminated. Whether § 1103 (a) or the general saving statute, 1 U. S. C. § 109, limits that decision is a question we cannot consider in this case.

§ 1103 (a) forecloses the availability of parole under both 18 U. S. C. § 4202 and 18 U. S. C. § 4208 (a), and that even if this were debatable as to § 4202, the general saving statute, 1 U. S. C. § 109, clearly mandates that conclusion as to that section. They therefore do not join Part II of the Court's opinion.

MR. JUSTICE DOUGLAS, dissenting.

The correct interpretation of the word "prosecutions" as used in § 1103 (a) of the 1970 Act was, in my view, the one given by the Court of Appeals of the Ninth Circuit in *United States* v. *Stephens*, 449 F. 2d 103, 105:

> "Prosecution ends with judgment. The purpose of the section has been served when judgment under the old Act has been entered and abatement of proceedings has been avoided. At that point litigation has ended and appeal is available. Korematsu v. United States, 319 U. S. 432, 63 S. Ct. 1124, 87 L. Ed. 1497 (1943). What occurs thereafter—the manner in which judgment is carried out, executed or satisfied, and whether or not it is suspended—in no way affects the prosecution of the case."

The problem of ambiguities in statutory language is not peculiar to legislation dealing with criminal matters. And the question as to how those ambiguities should be resolved is not often rationalized. The most dramatic illustration, at least in modern times, is illustrated by *Rosenberg* v. *United States*, 346 U. S. 273, where a divided Court resolved an ambiguity in a statutory scheme against life, not in its favor. The instant case is not of that proportion, but it does entail the resolution of unspoken assumptions—those favoring the status quo of prison systems as opposed to those who see real rehabilitation as the only cure of the present prison crises. As Mr. Justice Holmes said, "judges do and must legislate, but they can do so only interstitially; they are confined from

molar to molecular motions." *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 221 (dissenting opinion).*

Judges do not make legislative policies. But in construing an ambiguous word in a criminal code, I would try to give it a meaning that would help reverse the long trend in this Nation not to consider a prisoner a "person" in the constitutional sense. Fay Stender, writing the introduction to Maximum Security, p. X, has described some of the "tremendously sophisticated defenses against the least increase in the enforceable human rights available to the prisoner." (E. Pell ed., Bantam Books 1973).

A less strict and rigid meaning of the present Act would be only a minor start in the other direction. But it is one I would take.

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*Mr. Justice Holmes also said:

"[I]n substance the growth of the law is legislative. And this in a deeper sense than that that which the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which the courts most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. We mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that when ancient rules maintain themselves in this way, new reasons more fitted to the time have been found for them, and that they gradually receive a new content and at last a new form from the grounds to which they have been transplanted. The importance of tracing the process lies in the fact that it is unconscious, and involves the attempt to follow precedents, as well as to give a good reason for them, and that hence, if it can be shown that one half of the effort has failed, we are at liberty to consider the question of policy with a freedom that was not possible before." Common Carriers and the Common Law, 13 Am. L. Rev. 609, 630–631 (1879).

LINDA R. S. *v.* RICHARD D. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 71-6078. Argued December 6, 1972—
Decided March 5, 1973

Appellant, the mother of an illegitimate child, brought a class action to enjoin the "discriminatory application" of Art. 602 of the Texas Penal Code providing that any "parent" who fails to support his "children" is subject to prosecution, but which by state judicial construction applies only to married parents. Appellant sought to enjoin the local district attorney from refraining to prosecute the father of her child. The three-judge District Court dismissed appellant's action for want of standing: *Held:* Although appellant has an interest in her child's support, application of Art. 602 would not result in support but only in the father's incarceration, and a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another. Pp. 616–619.

335 F. Supp. 804, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post*, p. 619. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 622.

Windle Turley argued the cause and filed a brief for appellant.

Robert W. Gauss, Assistant Attorney General of Texas, argued the cause for appellees. On the brief were *Crawford C. Martin*, Attorney General, *Nola White*, First Assistant Attorney General, *Alfred Walker*, Executive Assistant Attorney General, *J. C. Davis* and *Pat Bailey*, Assistant Attorneys General, and *Samuel D. McDaniel*.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellant, the mother of an illegitimate child, brought this action in United States District Court on behalf of herself, her child, and others similarly situated to enjoin

the "discriminatory application" of Art. 602 of the Texas Penal Code. A three-judge court was convened pursuant to 28 U. S. C. § 2281, but that court dismissed the action for want of standing.[1] 335 F. Supp. 804 (ND Tex. 1971). We postponed consideration of jurisdiction until argument on the merits, 405 U. S. 1064, and now affirm the judgment below.

Article 602, in relevant part, provides: "any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years." The Texas courts have consistently construed this statute to apply solely to the parents of legitimate children and to impose no duty of support on the parents of illegitimate children. See *Home of the Holy Infancy* v. *Kaska,* 397 S. W. 2d 208, 210 (Tex. 1966); *Beaver* v. *State,* 96 Tex. Cr. R. 179, 256 S. W. 929 (1923). In her complaint, appellant alleges that one Richard D. is the father of her child, that Richard D. has refused to provide support for the child, and that although appellant made application to the local district attorney for enforcement of Art. 602 against Richard D., the district attorney refused to take action for the express

[1] The District Court also considered an attack on Art. 4.02 of the Texas Family Code, which imposes civil liability upon "spouses" for the support of their minor children. Petitioner argued that the statute violated equal protection because it imposed no civil liability on the parents of illegitimate children. However, the three-judge court held that the challenge to this statute was not properly before it since appellant did not seek an injunction running against any state official as to it. See 28 U. S. C. § 2281. The Court, therefore, remanded this portion of the case to a single district judge. 335 F. Supp. 804, 807. The District Court's disposition of petitioner's Art. 4.02 claim is not presently before us. But see *Gomez* v. *Perez,* 409 U. S. 535 (1973).

reason that, in his view, the fathers of illegitimate children were not within the scope of Art. 602.[2]

Appellant argues that this interpretation of Art. 602 discriminates between legitimate and illegitimate children without rational foundation and therefore violates the Equal Protection Clause of the Fourteenth Amendment. Cf. *Gomez* v. *Perez,* 409 U. S. 535 (1973); *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164 (1972); *Glona* v. *American Guarantee & Liability Ins. Co.,* 391 U. S. 73 (1968); *Levy* v. *Louisiana,* 391 U. S. 68 (1968). But cf. *Labine* v. *Vincent,* 401 U. S. 532 (1971). Although her complaint is not entirely clear on this point, she apparently seeks an injunction running against the district attorney forbidding him from declining prosecution on the ground that the unsupported child is illegitimate.

Before we can consider the merits of appellant's claim or the propriety of the relief requested, however, appellant must first demonstrate that she is entitled to invoke the judicial process. She must, in other words, show that the facts alleged present the court with a "case or controversy" in the constitutional sense and that she is a proper plaintiff to raise the issues sought to be litigated. The threshold question which must be answered is whether the appellant has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr,* 369 U. S. 186, 204 (1962).

Recent decisions by this Court have greatly expanded the types of "personal stake[s]" which are capable of

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[2] Appellant attached to her complaint an affidavit, signed by an assistant district attorney, stating that the State was unable to institute prosecution "due to caselaw construing Art. 602 of the Penal Code to be inapplicable to fathers of illegitimate children."

conferring standing on a potential plaintiff. Compare *Tennessee Electric Power Co.* v. *TVA,* 306 U. S. 118 (1939), and *Alabama Power Co.* v. *Ickes,* 302 U. S. 464 (1938), with *Barlow* v. *Collins,* 397 U. S. 159 (1970), and *Association of Data Processing Service Organizations* v. *Camp,* 397 U. S. 150 (1970). But as we pointed out only last Term, "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." *Sierra Club* v. *Morton,* 405 U. S. 727, 738 (1972). Although the law of standing has been greatly changed in the last 10 years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing,[3] federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.[4] See, *e. g., Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163, 166–167 (1972); *Flast* v. *Cohen,* 392 U. S. 83, 101 (1968); *Baker* v. *Carr,* 369 U. S. 186, 204 (1962). Cf. *Laird* v. *Tatum,* 408 U. S. 1, 13 (1972).

Applying this test to the facts of this case, we hold that, in the unique context of a challenge to a criminal statute, appellant has failed to allege a sufficient nexus

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[3] It is, of course, true that "Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions," *Sierra Club* v. *Morton,* 405 U. S. 727, 732 n. 3 (1972). But Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute. See, *e. g., Trafficante* v. *Metropolitan Life Ins. Co.,* 409 U. S. 205, 212 (1972) (WHITE, J., concurring); *Hardin* v. *Kentucky Utilities Co.,* 390 U. S. 1, 6 (1968).

[4] One of the leading commentators on standing has written, "Even though the past law of standing is so cluttered and confused that almost every proposition has some exception, the federal courts have consistently adhered to one major proposition without exception: One who has no interest of his own at stake always lacks standing." K. Davis, Administrative Law Text 428–429 (3d ed. 1972).

between her injury and the government action which she attacks to justify judicial intervention. To be sure, appellant no doubt suffered an injury stemming from the failure of her child's father to contribute support payments. But the bare existence of an abstract injury meets only the first half of the standing requirement. "The party who invokes [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some *direct* injury *as the result of* [a statute's] enforcement." *Massachusetts* v. *Mellon,* 262 U. S. 447, 488 (1923) (emphasis added). See also *Ex parte Lévitt,* 302 U. S. 633, 634 (1937). As this Court made plain in *Flast* v. *Cohen, supra,* a plaintiff must show "a logical nexus between the status asserted and the claim sought to be adjudicated. . . . Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power." *Id.,* at 102.

Here, appellant has made no showing that her failure to secure support payments results from the nonenforcement, as to her child's father, of Art. 602. Although the Texas statute appears to create a continuing duty, it does not follow the civil contempt model whereby the defendant "keeps the keys to the jail in his own pocket" and may be released whenever he complies with his legal obligations. On the contrary, the statute creates a completed offense with a fixed penalty as soon as a parent fails to support his child. Thus, if appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative. Certainly the "direct" relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a prerequisite of standing, is absent in this case.

The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. See *Younger* v. *Harris,* 401 U. S. 37, 42 (1971); *Bailey* v. *Patterson,* 369 U. S. 31, 33 (1962); *Poe* v. *Ullman,* 367 U. S. 497, 501 (1961). Although these cases arose in a somewhat different context, they demonstrate that, in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another. Appellant does have an interest in the support of her child. But given the special status of criminal prosecutions in our system, we hold that appellant has made an insufficient showing of a direct nexus between the vindication of her interest and the enforcement of the State's criminal laws. The District Court was therefore correct in dismissing the action for want of standing,[5] and its judgment must be affirmed.[6]

So ordered.

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

Appellant Linda R. S. alleged that she is the mother of an illegitimate child and that she is suing "on behalf of

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[5] We noted last Term that "[t]he requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process." *Sierra Club* v. *Morton,* 405 U. S., at 740. That observation is fully applicable here. As the District Court stated, "the proper party to challenge the constitutionality of Article 602 would be a parent of a legitimate child who has been prosecuted under the statute. Such a challenge would allege that because the parents of illegitimate children may not be prosecuted, the statute unfairly discriminates against the parents of legitimate children." 335 F. Supp., at 806.

[6] Since we dispose of this case on the basis of lack of standing, we intimate no view as to the merits of appellant's claim. But cf. *Gomez* v. *Perez,* 409 U. S. 535 (1973).

herself, her minor daughter, and on behalf of all other women and minor children who have sought, are seeking, or in the future will seek to obtain support for so-called illegitimate children from said child's father." Appellant sought a declaratory judgment that Art. 602 is unconstitutional and an injunction against its continued enforcement against fathers of legitimate children only. Appellant further sought an order requiring Richard D., the putative father, "to pay a reasonable amount of money for the support of his child."

Obviously, there are serious difficulties with appellant's complaint insofar as it may be construed as seeking to require the official appellees to prosecute Richard D. or others, or to obtain what amounts to a federal child-support order. But those difficulties go to the question of what relief the court may ultimately grant appellant. They do not affect her right to bring this class action. The Court notes, as it must, that the father of a legitimate child, if prosecuted under Art. 602, could properly raise the statute's underinclusiveness as an affirmative defense. See *McLaughlin* v. *Florida,* 379 U. S. 184 (1964); *Railway Express Agency* v. *New York,* 336 U. S. 106 (1949). Presumably, that same father would have standing to affirmatively seek to enjoin enforcement of the statute against him. Cf. *Rinaldi* v. *Yeager,* 384 U. S. 305 (1966); see also *Epperson* v. *Arkansas,* 393 U. S. 97 (1968). The question then becomes simply: why should only an actual or potential criminal defendant have a recognizable interest in attacking this allegedly discriminatory statute and not appellant and her class? They are not, after all, in the position of members of the public at large who wish merely to force an enlargement of state criminal laws. Cf. *Sierra Club* v. *Morton,* 405 U. S. 727 (1972). Appellant, her daughter, and the children born out of wedlock whom

she is attempting to represent have all allegedly been excluded intentionally from the class of persons protected by a particular criminal law. They do not get the protection of the laws that other women and children get. Under Art. 602, they are rendered nonpersons; a father may ignore them with full knowledge that he will be subjected to no penal sanctions. The Court states that the actual coercive effect of those sanctions on Richard D. or others "can, at best, be termed only speculative." This is a very odd statement. I had always thought our civilization has assumed that the threat of penal sanctions had something more than a "speculative" effect on a person's conduct. This Court has long acted on that assumption in demanding that criminal laws be plainly and explicitly worded so that people will know what they mean and be in a position to conform their conduct to the mandates of law. Certainly Texas does not share the Court's surprisingly novel view. It assumes that criminal sanctions are useful in coercing fathers to fulfill their support obligations to their legitimate children.

Unquestionably, Texas prosecutes fathers of legitimate children on the complaint of the mother asserting nonsupport and refuses to entertain like complaints from a mother of an illegitimate child. I see no basis for saying that the latter mother has no standing to demand that the discrimination be ended, one way or the other.

If a State were to pass a law that made only the murder of a white person a crime, I would think that Negroes as a class would have sufficient interest to seek a declaration that that law invidiously discriminated against them. Appellant and her class have no less interest in challenging their exclusion from what their own State perceives as being the beneficial protections that flow from the existence and enforcement of a criminal child-support law.

I would hold that appellant has standing to maintain this suit and would, accordingly, reverse the judgment and remand the case for further proceedings.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, dissenting.

By her complaint, appellant challenged Texas' exemption of fathers of illegitimate children from both civil and criminal liability. Our decision in *Gomez* v. *Perez,* 409 U. S. 535 (1973), announced after oral argument in this case, has important implications for the Texas law governing a man's civil liability for the support of children he has fathered illegitimately. Although appellant's challenge to the civil statute, as the Court points out, is not procedurally before us, *ante,* at 615 n. 1, her brief makes it clear that her basic objection to the Texas system concerns the absence of a duty of paternal support for illegitimate children. The history of the case suggests that appellant sought to utilize the criminal statute as a tool to compel support payments for her child. The decision in *Gomez* may remove the need for appellant to rely on the criminal law if she continues her quest for paternal contribution.

The standing issue now decided by the Court is, in my opinion, a difficult one with constitutional overtones. I see no reason to decide that question in the absence of a live, ongoing controversy. See *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U. S. 70 (1955). *Gomez* now has beclouded the state precedents relied upon by both parties in the District Court. Thus "intervening circumstances may well have altered the views of the participants," and the necessity for resolving the particular dispute may no longer be present. *Protective Committee* v. *Anderson,* 390 U. S. 414, 453–454 (1968). Under these circumstances, I would remand the case to the District Court for clarification of the status of the litigation.

Syllabus

UNITED AIR LINES, INC. *v.* MAHIN, DIRECTOR OF DEPARTMENT OF REVENUE, ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 71–862. Argued November 8, 1972—Decided March 5, 1973

The Illinois use tax was applied to appellant's aviation fuel stored in the State and loaded aboard its aircraft there and consumed in interstate flights, the tax authorities having revised their previous "burn off" interpretation of a statutory exemption for temporary storage. Under the "burn off" interpretation only fuel consumed in flight over Illinois was used to measure the tax imposed for storage before loading, but under the reinterpretation all fuel loaded was deemed to measure the tax on the "use" of storage or withdrawal from storage. The Illinois Supreme Court upheld the statute against appellant's contention that the tax as reinterpreted impermissibly burdened interstate commerce. *Held:*

1. The statute as authoritatively construed by the State's highest court to tax storage and not consumption does not place an unconstitutional burden on interstate commerce. *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249; *Nashville, Chattanooga & St. Louis R. Co.* v. *Wallace*, 288 U. S. 249. Cases allowing the taxation of storage of fuel before loading have not outlived their usefulness. Pp. 626–630.

2. The "burn off" rule is not unconstitutional, being distinguishable from a tax imposed on consumption such as was invalidated in *Helson* v. *Kentucky*, 279 U. S. 245. Since some of the Illinois Supreme Court majority were under the mistaken impression that *Helson* precluded use of the "burn off" interpretation, the case is remanded to enable that court to construe the temporary-storage provision under state law free from any constraint that such interpretation would not be constitutionally permissible. Pp. 630–632.

49 Ill. 2d 45, 273 N. E. 2d 585, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which STEWART and WHITE, JJ., joined, *post*, p. 632. WHITE, J., filed a dissenting opinion, *post*, p. 639.

Mark H. Berens argued the cause for appellant. With him on the briefs were *H. Templeton Brown, Robert L. Stern* and *William Bruce Hoff, Jr.*

Robert J. O'Rourke argued the cause for appellees. With him on the brief were *William J. Scott,* Attorney General of Illinois, and *Warren K. Smoot* and *Calvin C. Campbell,* Assistant Attorneys General.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

United Air Lines, Inc., challenged the constitutionality of the Illinois general revenue use tax as applied to aviation fuel stored in Illinois and then loaded aboard aircraft there and consumed in interstate flights. The Supreme Court of Illinois upheld the state tax as currently applied, concluding that it did not impose an unconstitutional burden on interstate commerce. 49 Ill. 2d 45, 273 N. E. 2d 585 (1971). We noted probable jurisdiction. 405 U. S. 986 (1972). We now affirm that holding, but we vacate the judgment and remand the case for consideration of an issue under state law.

Since 1953, United has purchased aviation fuel from a supplier for delivery from the supplier's Indiana facilities. This fuel is utilized by United in its extensive operations out of O'Hare and Midway airports in the Chicago area of Illinois. Although the method of delivery varies for different types of fuel and for the two airports,[1] all fuel

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**James A. Velde* filed a brief for American Airlines, Inc., et al. as *amici curiae* urging reversal.

[1] Turbine (jet) fuel for use at O'Hare is shipped by common carrier pipeline from the supplier's Indiana terminals to a 15-million-gallon storage facility at Des Plaines, Illinois. App. 168–169. Normally, three deliveries are made each month to this facility. App. 129. Smaller quantities of fuel are transferred by pipeline to facilities maintained by United at O'Hare.

Turbine fuel for use at Midway and aviation gasoline for both

is delivered by common carrier and is held for periods ranging from two to 12 days in ground storage facilities maintained in Illinois by United.[2] Fuel for both interstate and intrastate operations is delivered in the same manner.[3] United voluntarily has paid the tax on fuel consumed in purely intrastate operations. Only the tax as applied to fuel used in interstate flights is in issue.

In 1955, Illinois enacted a general tax on the "privilege of using" tangible personal property in the State. Ill. Rev. Stat., c. 120, § 439.3 (1971). "Use" was defined to include the "exercise . . . of any right or power over tangible personal property incident to the ownership of that property." § 439.2. Some exceptions from this inclusive definition were made. One of these exceptions, which the statute recites, § 439.3, is "[t]o prevent actual or likely multistate taxation," is the temporary-storage provision. This denies application of the tax to property brought from another State and stored temporarily in Illinois before use solely outside the State.[4]

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airports is transported from Indiana by common carrier tank truck to airport storage facilities. App. 159.

[2] The parties have stipulated that the period of storage ranges from two to 12 days. App. 38. The Des Plaines storage facilities are not owned by United; it and another airline jointly lease the facilities. United shares in the cost of repairs, the risk of loss, and the employment of a managing agent. App. 132, 168.

[3] App. 173–174. United uses fuel from the storage facilities for its intrastate training flights and for the intrastate leg of flights that stop at both Chicago and Moline, Illinois. 49 Ill. 2d 45, 47–48, 273 N. E. 2d 585, 586. United also engages in interstate charter flights. App. 37 n. 6.

[4] The temporary-storage provision excepts

"(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or physically attached to or incorporated into other tangible personal property that is used solely outside this State." § 439.3.

Since this general use tax, apart from its exceptions, reached all tangible personal property, it applied by its terms to fuel stored for use in vehicles. From 1955 to 1963, the Illinois Department of Revenue allowed interstate common carriers to benefit from the temporary-storage provision to the extent that fuel, although loaded aboard in Illinois, was not consumed by the vehicle in that State. The amount of aviation fuel used over Illinois could be calculated because scheduled airline routes are precise and the rate of consumption by each type of aircraft is known. This "burn off" interpretation was changed in 1963, however, when the Department announced by bulletin that it was reinterpreting the temporary-storage provision to mean that "temporary storage ends and a taxable use occurs when the fuel is taken out of storage facilities and is placed into the tank of the airplane, railroad engine or truck." Thus, as the Illinois court described it, "all fuel loaded on United's planes at the two airports was deemed to measure the tax." 49 Ill. 2d, at 49, 273 N. E. 2d, at 587.

United's suit attacked the new interpretation on both state and federal grounds. All justices of the Supreme Court of Illinois agreed that the new interpretation did not run afoul of the Federal Constitution, but the justices disagreed over the applicability and validity of the "burn off" alternative discussed in the several opinions. 49 Ill. 2d, at 50–53, 56, 57–59, 273 N. E. 2d, at 587–589, 591–592.

I

Two decisions of this Court were relied upon by the Illinois court in reaching its conclusion that the present application of the state tax was not offensive to the Federal Constitution. The cases are *Edelman* v. *Boeing Air Transport,* 289 U. S. 249 (1933), and *Nashville, Chattanooga & St. Louis R. Co.* v. *Wallace,* 288 U. S. 249 (1933). We agree that these cases support the

application of the Illinois tax to all fuel stored in Illinois and loaded aboard United's aircraft for in-flight consumption.

In *Edelman,* this Court upheld a state gasoline use tax, even when imposed on gasoline imported from outside the State, stored in tanks at an airport, and loaded aboard planes departing on interstate flights. The decision in *Edelman* followed the holding in *Nashville* that oil purchased by a railroad outside Tennessee but stored in Tennessee solely for the purpose of providing motive power for the railroad's interstate and intrastate operations could be subjected constitutionally to a Tennessee privilege tax. In *Nashville,* as in this case, none of the fuel stored was held as inventory for sale, and the tax was not one for the use of special services furnished by the State to the taxpayer railroad.

In *Edelman,* the Court accepted the State's determination that the taxable event was withdrawal from storage rather than consumption. 289 U. S., at 251. The airline in *Edelman* contended, *id.,* at 252, that the state tax was invalid under *Helson* v. *Kentucky,* 279 U. S. 245 (1929). In *Helson,* the Court held that a Kentucky tax on the use of gasoline within the State fell too directly on interstate commerce when it was imposed on fuel loaded in Illinois but consumed in the course of an interstate ferry's trip through Kentucky. In *Edelman,* the Court distinguished *Helson* because storage, rather than consumption, was the taxable event. See *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167 (1939).

The Supreme Court of Illinois characterized the taxable "use" under the Illinois statute as either storage or withdrawal from storage. United argued in the state court that the temporary-storage provision constituted a legislative waiver of the right to tax storage prior to loading. The Illinois court rejected this contention, noting that United stored fuel at the airport for general use.

On these facts, the Supreme Court of Illinois concluded that the Illinois use tax applied to storage by United before loading and that this application was constitutional:

> "Under the circumstances, the 'storage' becomes something more than a 'temporary storage' for safekeeping prior to its use solely outside of Illinois. Such storage, under the plain words of the statute, does not qualify under the temporary storage exemption and, as the authorities already discussed reveal, *either the storage itself or the withdrawal therefrom are uses which may be taxed without offending the commerce clause of the Federal constitution.*" 49 Ill. 2d, at 55–56, 273 N. E. 2d, at 590 (emphasis added).

The Illinois dissenters, too, treated the taxable event as storage or withdrawal. 49 Ill. 2d, at 57, 273 N. E. 2d, at 591.[5]

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[5] The Illinois court's interpretation of the temporary-storage provision makes it clear that loading into the tanks of the airplane is a relevant event but is not the taxable event. The court indicated that the temporary storage exemption suspended the effect of otherwise taxable events:

"To put it another way, the legislature has stated that the temporary storage and the withdrawal therefrom are not taxable uses, if the property in question is to be used solely outside the State. It is clear that if United was to withdraw its fuel from storage at Des Plaines and the airports and transport it outside the State for use elsewhere, as for example at an airport in nearby Wisconsin, the exemption would apply and neither the storage, nor the withdrawal, nor the transportation of the fuel outside the State would be uses subject to the tax." 49 Ill. 2d, at 55, 273 N. E. 2d, at 590.

Under this view, all the fuel is "used" and subject to Illinois tax when it is temporarily stored or withdrawn from storage. The taxable event is nullified, however, if the fuel is transported from the State for consumption elsewhere.

Although this use of a subsequent event to define the effect of a prior event may appear somewhat unusual, the result may be said

This Court usually has deferred to the interpretation placed on a state tax statute by the highest court of the State. *Scripto, Inc.* v. *Carson,* 362 U. S. 207, 210 (1960); *General Trading Co.* v. *State Tax Comm'n,* 322 U. S. 335, 337 (1944). See *Evco* v. *Jones,* 409 U. S. 91 (1972). As in *Edelman,* we see no reason to ignore, or to disagree with, the state court's determination that the taxable event is storage rather than consumption.

We hold that *Edelman* and *Nashville* support the conclusion of the Supreme Court of Illinois that this tax, as applied to all fuel withdrawn from storage for consumption in an interstate vehicle, does not place an unconstitutional burden on interstate commerce. Further, we decline to hold that *Edelman* has outlived its usefulness.[6] We must concede that for a long time this area of state tax law has been cloudy and complicated, primarily because the varied nature of interstate activities makes line drawing difficult. This Court has established some precedents, however, and *Edelman* and *Nashville* remain useful guidelines.

The line drawn between an impermissible tax on mere consumption of fuel, as in *Helson,* and a permissible tax on storage of fuel before loading, as in *Edelman* and *Nashville,* continues to serve rational purposes. Retaining the line at this point minimizes the danger of double taxation and yet provides a source of revenue having a

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to be compelled since fuel in transit may not be constitutionally taxed. See *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157 (1954). A similar exemption for gasoline "exported or sold for exportation from the State" was present in the Wyoming statute challenged in *Edelman* v. *Boeing Air Transport,* 289 U. S. 249, 250 (1933).

[6] *Amici* have urged reconsideration of *Edelman,* arguing that it represents "a high-water mark in the Court's search in the early thirties for formulas that would assist states in finding additional sources of revenue." Brief for American Airlines et al. 13.

relation to the event taxed. Double taxation is minimized because the fuel cannot be taxed by States through which it is transported, under *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157 (1954), nor by the State in which it is merely consumed, under *Helson.* A fair result is achieved because a State in which preloading storage facilities are maintained is likely to provide substantial services to those facilities, including police protection and the maintenance of public access roads.[7]

Since no persuasive reason has been advanced for changing the established rule, we reaffirm *Edelman* and *Nashville* as precedents.

II

United contended in state court that the Illinois temporary-storage exemption should be interpreted, as a matter of state law, to encompass the "burn off" rule which, as noted above, had received administrative sanction for eight years. 49 Ill. 2d, at 49, 273 N. E. 2d, at 587. Two justices of the Illinois court deemed themselves bound under *Helson* to regard the "burn off" rule as invalid under the Federal Constitution. 49 Ill. 2d, at 50, 273 N. E. 2d, at 587. This basis for construing a state statute creates a federal question. *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 120 (1924). The possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the

[7] Although this is a general state tax, rather than a toll on commerce, this Court has recognized that interstate commerce can be "required to pay a nondiscriminatory share of the tax burden." *Braniff Airways* v. *Nebraska State Board of Equalization,* 347 U. S. 590, 598 (1954). In *Helson* v. *Kentucky,* 279 U. S. 245 (1929), in contrast, the ferry boat was asked to bear more than its "nondiscriminatory share" when it was taxed only for passing through Kentucky waters.

necessity of considering the federal question. *Beecher* v. *Alabama,* 389 U. S. 35, 37 n. 3 (1967); see C. Wright, Federal Courts § 107, p. 488 (2d ed. 1970). Since the other justices of the Illinois court divided three to two on the state law issue, the votes of the two who felt bound by *Helson* could be determinative of the state issue. Under these circumstances, we proceed to consider the validity of the "burn off" rule in the light of *Helson,* as United has urged us to do. See *Perkins* v. *Benguet Mining Co.,* 342 U. S. 437, 441–443 (1952).

The facts in *Helson* are different from the facts here. In *Helson,* the operators of the interstate ferry boat purchased and took delivery of fuel in Illinois. The office, the place of business, and the situs of all the taxpayer's property were in Illinois. The boat crossed the Ohio River into Kentucky on regular runs, and Kentucky sought to impose a tax on the use of gasoline consumed in Kentucky. The Court invalidated the tax "computed and imposed upon the use of the gasoline thus consumed." 279 U. S., at 248.

In the present case, Illinois is the State of storage of United's fuel before loading. If Illinois imposed a tax on the basis of that storage but measured the tax only by the fuel consumed over Illinois, a lower tax would result. The dangers of multiple taxation and possible tax windfalls, already suggested as justifying the *Helson* decision, would not be present if the tax were imposed on storage prior to loading but were measured by consumption. Multiple taxation and tax windfalls are avoided because only one State—the State of storage before loading—has a local event upon which a tax is imposed. Under *Helson,* States over which the planes fly will be unable to impose a tax on mere consumption.[8]

[8] Those justices of the Illinois court who relied on *Helson* did not consider, apparently, any interpretation of *Helson* that would pre-

The use of a method of tax measurement that is intimately related to interstate commerce is not automatically unconstitutional. Tolls on the use of facilities that aid interstate commerce have been upheld even when measured by passengers or by mileage traveled on the highways of a State. *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines*, 405 U. S. 707 (1972); *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245 (1928). Upon the facts before us,[9] we see no constitutional barrier to the use of the "burn off" rule by Illinois to measure the tax imposed for storage before loading.

Since we now determine that the federal compulsion felt by two justices of the Illinois court is not warranted, we remand the case to avoid the risk of "an affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so." *Perkins* v. *Benguet Mining Co.*, 342 U. S., at 443. We, of course, express no opinion on the construction of the temporary-storage provision under state law.

The judgment of the Supreme Court of Illinois is vacated and the case is remanded to that court for further proceedings.

It is so ordered.

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

The Court today makes a break with the history of the Commerce Clause that has been largely responsible for creating in this Nation a great common market. One

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vent multistate taxation. They suggested that an adoption of the "burn off" rule would allow taxation by every State over which United's planes fly. 49 Ill. 2d, at 51, 273 N. E. 2d, at 588.

[9] United successfully calculated and paid the state tax under the "burn off" interpretation for eight years. App. 41. No suggestion has been made that the recordkeeping procedures were an intolerable burden on commerce or that special equipment must be installed to measure fuel consumption.

protective device this Court has used to keep the national channels of commerce open against hostile state legislation has been the constitutional ban on state taxation levied on interstate activities. In 1873, in *Case of State Freight Tax,* 15 Wall. 232, we held unconstitutional a state tax "so far as it applies to articles . . . taken up in the State and carried out of it . . . ." *Id.,* at 282. While there are ways in which interstate commerce can be required to pay its way, we have not until today abandoned the basic principle that a State may not tax interstate activities. That is what is done here, for the Illinois tax is levied on filling the fuel tanks of airplanes taking off for interstate or foreign journeys. If Illinois can tax that segment of the interstate activity, there is no reason why she may not tax the takeoff itself. The filling of fuel tanks to make an interstate or foreign journey is as indispensable a part and parcel of the interstate or foreign journey as using the runways for that purpose.

The Supreme Court of Illinois sustained the Illinois Use Tax [1] on all aviation fuel loaded aboard United's interstate and foreign flights departing from Chicago. United purchases fuel outside Illinois and stores it in Illinois temporarily for its interstate and foreign operations. The use tax exempts from the tax property purchased outside Illinois, temporarily stored in the State, and used solely outside the State.[2]

Until 1963 the temporary storage exception was construed by the Illinois Department of Revenue so as to subject to the use tax only that fuel loaded on departing flights that was actually burned over Illinois. In 1963 the Department changed its prior ruling and announced:

> "[T]emporary storage ends and a taxable use occurs when the fuel is taken out of storage facilities

[1] Ill. Rev. Stat., c. 120, § 439.1 *et seq.*

[2] *Id.,* § 439.3.

> and is placed into the tank of the airplane, railroad engine or truck. At this point, the fuel is converted into its ultimate use, and, therefore, a taxable use occurs in Illinois."

The Supreme Court of Illinois upheld that construction and application of the use tax against the claim that it violates the Commerce Clause, saying that United's storage becomes something more than temporary storage for safekeeping "prior to its use solely outside of Illinois." 49 Ill. 2d 45, 55, 273 N. E. 2d 585, 590.

The taxable event is the act of loading the fuel aboard United's aircraft in Illinois preparatory to their interstate or foreign journey. The majority states that the Supreme Court of Illinois concluded that either the storage of the gasoline itself or the withdrawal therefrom is a use which may be taxed without offending the Federal Constitution. But that statement of the Supreme Court of Illinois was made in its discussion of the exemption from the use tax which, as relevant here, provides: "[T]he temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State." Ill. Rev. Stat., c. 120, § 439.3 (1971). That means that the temporary-storage exemption would extend, not merely to storage on the ground, but also to its loading aboard the transportation vehicles, such as trucks or railroad cars, and to its transportation from the State. It is thus obvious that, unless the means of removing the property from the State is included in the scope of the temporary storage, it would be a nullity, as appellant maintains. Since in this case, there is no tax if fuel is withdrawn from storage and taken from the State by other means, it is clear that neither the storage nor the removal from storage is what makes the fuel taxable. The majority properly notes that, as a matter of state

law and the Illinois court's interpretation thereof, it is the "consumption" wholly without the State that makes the exception operable. Conversely, I read the Illinois opinion to mean that, as a matter of state law, it is at least partial consumption within the State that brings the tax on *all* the fuel into play. That is so even if only a small portion of the fuel is consumed within the State, while the remainder is consumed out of State during an interstate or foreign flight. The inescapable conclusion from the state court's interpretation of this state law is that the act of loading the fuel into the fuel tanks of the interstate aircraft solely for use as the motive power is the taxable event.

If that event were used to tax fuel used on an *intrastate* flight, no problem under the Commerce Clause would arise. But loading is part of the interstate activity when planes prepare for an interstate journey, just as loading is a part of the shipment of goods by rail or water interstate (*Puget Sound Stevedoring Co.* v. *Tax Comm'n,* 302 U. S. 90, 92–94; *Joseph* v. *Carter & Weekes Stevedoring Co.,* 330 U. S. 422, 427, 433–434) and just as local pickups of parcels and local delivery of parcels in interstate movement are not permissible grounds "for a state license, privilege or occupation tax." *Railway Express Agency* v. *Virginia,* 347 U. S. 359, 368.

In *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69, we held invalid a state sales tax levied on the delivery of fuel oil into a ship for overseas carriage. We said "[t]he incident which gave rise to the accrual of the tax was a step in the export process." *Id.,* at 84. A like result was reached in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157, where a State sought to impose a severance tax on the transfer of gas from a refinery pipeline to an interstate pipeline. We noted that the "taxable incidence" was the taking of gas from a local plant "for the purpose of immediate interstate transmission."

Id., at 161. We, therefore, held it unconstitutional, since it was a tax "on the exit of the gas from the State." *Id.*, at 167.

The present tax is analogous to the tax on the privilege of carrying on an exclusively interstate business which we struck down in *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 608. A tax upon an integral part of interstate commerce is a tax that no State by reason of the Commerce Clause is empowered to impose, unless authorized by Congress. *Id.*, at 608.

The fuel in United's planes propels the interstate flights; because it is the source of the motive power, it is essential to the interstate journey. It is, therefore, indisputably a part and parcel of the interstate movement. *McCarroll* v. *Dixie Greyhound Lines*, 309 U. S. 176, involved an Arkansas statute which prohibited any truck or automobile from entering the State with more than 20 gallons of gasoline in its tank unless an excise tax were paid on the gasoline. The Court held the tax unconstitutional because it imposed a tax on "gasoline to be immediately transported over the roads of Arkansas *for consumption beyond.*" *Id.*, at 180 (emphasis added). Similarly, Illinois imposes its tax on all of the fuel loaded into airplane tanks, whether or not that fuel is consumed out of State. In *Helson* v. *Kentucky*, 279 U. S. 245, on which the Illinois Supreme Court relied in disapproving the earlier construction of the statute, a ferry boat operated between Illinois and Kentucky, having its office in Illinois and buying all its fuel there. Kentucky sought to tax that portion of the fuel used in Kentucky. This Court invalidated the tax, saying it was "exacted as the price of the privilege of using an instrumentality of interstate commerce." *Id.*, at 252. If that tax is invalid, it follows *a fortiori* that Illinois may not tax the movement of airplanes from Illinois to California, from Illinois to Europe, or from Illinois to any other out-of-state point.

It is now well settled that interstate commerce can be required to pay its way, *Illinois Central R. Co.* v. *Minnesota,* 309 U. S. 157; *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250; *Greyhound Lines* v. *Mealey,* 334 U. S. 653; *Northwestern Cement Co.* v. *Minnesota,* 358 U. S. 450, a result commonly reached by formulae which allocate to the taxing State business derived from operations within the State. *Railway Express Agency* v. *Virginia,* 358 U. S. 434. Yet, when pieces or segments of an interstate business are taxed, our cases reveal discrimination in approving or disapproving taxes that may be imposed. A State may not exact a license tax for the privilege of carrying on interstate commerce. *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 56–58; *Murdock* v. *Pennsylvania,* 319 U. S. 105, 112–113. As stated in *Berwind-White,* taxes "which are aimed at or discriminate against [interstate] commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey" are within the ban, since they may "so readily be made the instrument of impeding or destroying interstate commerce." 309 U. S., at 48.

Sales within the State, however, are taxable, though the goods have reached the market by interstate channels. *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 43; *McGoldrick* v. *Berwind-White Co., supra,* at 58. The sales tax in *Berwind-White* was on the "transfer of title or possession, or both," *id.,* at 43. And we sustained the tax because of "a local activity" which we described as "delivery of goods within the state upon their purchase for consumption," *id.,* at 58. As a consequence, an out-of-state buyer who purchases goods in New York City and takes them with him pays the tax, while if he has them shipped to him, he pays no sales tax.

Although "delivery of goods" within the State may be taxed, "solicitation" within the State for out-of-state

confirmation and shipment into the State may not be. *Nippert* v. *Richmond,* 327 U. S. 416, 422; *West Point Grocery Co.* v. *Opelika,* 354 U. S. 390. In *Dunbar-Stanley Studios* v. *Alabama,* 393 U. S. 537, a tax was sustained on out-of-state photographers, since their activities were not soliciting orders for an out-of-state house but taking photographs within the State.

The use tax came into being to complement the sales tax, *i. e.,* to fill in gaps where the States could not constitutionally tax interstate arrivals or departures. See *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 581. Thus, goods may be taxed at the end of their interstate journey, where the tax does not discriminate against interstate commerce. *Id.,* at 582–583; *Felt & Tarrant Co.* v. *Gallagher,* 306 U. S. 62 (use tax on storage, use, or other consumption); *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167 (storage and use). Use taxes imposed on storage or withdrawal from storage have consistently been sustained. *Eastern Air Transport* v. *Tax Comm'n,* 285 U. S. 147; *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472; *Nashville, Chattanooga & St. Louis R. Co.* v. *Wallace,* 288 U. S. 249; *McGoldrick* v. *Berwind-White Co., supra,* at 49.

Nice distinctions are often necessary because, although all taxes on interstate carriers "in an ultimate sense, come out of interstate commerce" (*Freeman* v. *Hewit,* 329 U. S. 249, 256), the constitutional ban relates only to "a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause." *Id.,* at 256.

For Illinois to tax the storage of fuel within its borders is, of course, constitutionally permissible, even though in time the fuel may be used in interstate or foreign commerce. In *Edelman* v. *Boeing Air Transport,* 289 U. S. 249, 251, the use tax was "not levied upon the consumption of gasoline in furnishing motive power for re-

spondent's interstate planes." The tax was "applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes." *Ibid.* "It is at *the time of withdrawal alone* that 'use' is measured for the purposes of the tax." *Id.*, at 252. (Italics added.) At that time, the gasoline was not irrevocably committed to interstate commerce, for it might be diverted to planes on intrastate journeys.

By contrast, the taxable event on which Illinois levies her tax is not storage for future use, or withdrawal from storage, but only loading in the tanks of planes preparing for interstate or foreign journeys. It is, therefore, inescapably a tax on the actual motive power for an interstate or foreign journey. Taxing the fuel loaded in a plane destined for an interstate or foreign journey is, in other words, taxing the privilege of using a facility in commerce, because the motive power [3] represented by the fuel has become part and parcel of the facility. The decision today marks a break with our constitutional tradition, which, absent an Act of Congress, has led this Court consistently to hold that the free flow of interstate commerce is a ward of the Commerce Clause. Without that free flow of commerce we would not have the great common market we enjoy today.

I would reverse the judgment of the Supreme Court of Illinois.

MR. JUSTICE WHITE, dissenting.

The Illinois statute in question, Ill. Rev. Stat., c. 120, § 439.3 (1971), taxes the use of tangible personal property in Illinois, and "use" is defined as being the "exercise . . .

[3] *Edelman* was distinguished in *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, as involving a tax "upon events prior to the commerce," *id.*, at 176, the Court going on to say: "The principle illustrated by the *Helson* case forbids a tax upon commerce or consumption in commerce." *Ibid.*

of any right or power over tangible personal property incident to the ownership of that property . . . ." *Id.*, § 439.2. The Illinois Supreme Court held that as applied in this case the statute taxed either the storage or the withdrawal therefrom of aviation fuel. But the statute itself goes on to exempt from tax property temporarily stored in the State, withdrawn from storage, loaded on transportation facilities and transported for use solely outside the State. *Id.*, § 439.3 (d). For the tax to apply, the property must not only be stored and subsequently withdrawn, but must also be further used or consumed in the State. It is this actual use or consumption in the State after storage and withdrawal that triggers the tax. Thus it was enough here to invoke the tax that the fuel was temporarily stored, withdrawn, loaded on interstate aircraft, and then partially used within the State. But *Helson* v. *Kentucky*, 279 U. S. 245 (1929), forbids taxing the use of gasoline consumed within the State on an interstate trip. And as for that portion of the fuel withdrawn from storage, loaded on an aircraft and consumed in another State, the exemption in the statute would seemingly cover it; but if the exemption itself is not to apply, *Helson, a fortiori,* bars the tax. Moreover, under the Due Process Clause of the Fourteenth Amendment, Illinois has no jurisdiction to tax the use of property occurring in another State. *Norfolk & W. R. Co.* v. *Missouri State Tax Comm'n,* 390 U. S. 317, 324–325 (1968), and cases there cited.

Syllabus

OHIO *v.* KENTUCKY

ON MOTION FOR LEAVE TO FILE AMENDED BILL OF COMPLAINT

No. 27, Orig. Argued January 10, 1973—Decided March 5, 1973

Ohio sought leave to file an amended bill of complaint in an original action involving a boundary dispute with Kentucky. By the amendment Ohio claimed that the boundary between Ohio and Kentucky was located in the middle of the Ohio River. The motion was referred to the Special Master, who recommended that the motion be denied. *Held:*

1. In the exercise of its original jurisdiction, this Court is not invariably bound by common-law precedent or by current rules of civil procedure. The requirement of a motion for leave to file a complaint permits the Court to dispose of it at a preliminary stage in an appropriate case, such as where the claim is barred as a matter of law and a hearing on the issues presented "would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear." Pp. 644–645.

2. Ohio's long acquiescence in the location of the Ohio-Kentucky line at the northern edge of the Ohio River bars Ohio's present claim that the boundary is at the middle of the river. Pp. 648–652.

Motion for leave to file amended bill of complaint denied.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post,* p. 652.

Joseph M. Howard argued the cause for plaintiff on exceptions to the Report of the Special Master. With him on the brief was *William J. Brown,* Attorney General of Ohio.

John M. Famularo, Assistant Attorney General of Kentucky, argued the cause for defendant *pro hac vice* in answer to exceptions to the Report of the Special Master. With him on the brief were *Ed W. Hancock,*

Attorney General, and *James M. Ringo,* Assistant Attorney General.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Almost seven years ago, in March 1966, the State of Ohio instituted this original action against the Commonwealth of Kentucky. By its prayer for relief in its proposed bill of complaint, Ohio asked only that the Court declare and establish:

> "1. The boundary line between the State of Ohio and the State of Kentucky as being the low water mark on the northerly side of the Ohio River in the year 1792 . . . .
>
> "2. The State of Ohio and the State of Kentucky have equal and concurrent jurisdiction over and on all of the Ohio River from the northerly shore to the southerly shore, except jurisdiction incidental to the sovereignty of the soil under the river and structures permanently attached thereto."

In its complaint Ohio alleged:

> "4. The State of Ohio was established from the land ceded by legislative act of the Commonwealth of Virginia to the United States on the 1st day of March, 1784, which act is known as the Cession of Virginia.
>
> "5. The State of Kentucky was established by the separation of the District of Kentucky from the jurisdiction of the Commonwealth of Virginia pursuant to that certain act of the Virginia Legislature entitled 'An Act concerning the erection of the district of Kentucky into an independent state,' passed on the 18th day of December, 1789, which act is known as the Virginia-Kentucky Compact.

"6. The northern boundary line of the State of Kentucky was established from the Cession of Virginia and the Virginia-Kentucky Compact as the low water mark on the northerly side of the Ohio River as it existed in the year 1792." [1]

Ohio went on to allege: From 1910 to 1929, the United States erected dams in the Ohio River for navigational purposes. Since 1955, it has been replacing the earlier dams with higher ones. This has caused the waters of the river to rise and permanently inundate various areas of both Ohio and Kentucky. "As a result, the shores or banks of the Ohio River have been moved farther northerly and southerly as the water levels have increased by the damming of the river." The north low water mark of 1792 "has been obscured by the increased elevation of the water levels." Kentucky has claimed that the line between the two States is "along the present northerly shore line of the Ohio River rather than the 1792 northerly low water mark which is located to the south of the present north shore line." Ohio "does now and has always claimed . . . that the boundary between it and Kentucky is the 1792 northerly low water mark."

Leave to file the bill of complaint was granted. 384 U. S. 982 (1966). Kentucky by its answer admitted the allegations of the above-quoted numbered paragraphs of Ohio's complaint. The Court then appointed the Honorable Phillip Forman as Special Master in the case. 385 U. S. 803 (1966).

Five years later, in August 1971, Ohio moved for leave to file an amended complaint. By this amendment Ohio would assert that the boundary between it and Kentucky is the middle of the Ohio River, or, only alternatively, is the 1792 low water mark on the northerly

[1] 1792 is the year Kentucky became a State. 1 Stat. 189.

shore. We referred the motion to the Special Master. 404 U. S. 933 (1971). He held a hearing and in due course filed his report. 406 U. S. 915 (1972). The Master recommended that this Court enter its order denying Ohio's petition for leave to amend. His conclusion rested on the ground "that the proposed amendment, in any view of its factual allegations, fails as a matter of law to state a cause of action." Report 16. Upon the filing of Ohio's exceptions and Kentucky's reply, we set the matter for argument. 409 U. S. 974 (1972).

I

Accepted procedures for an ordinary case in this posture would probably lead us to conclude that the motion for leave to file should be granted, and the case would then proceed to trial or judgment on the pleadings. This, however, is not an ordinary case. It is one within the original and exclusive jurisdiction of the Court. Const., Art. III, § 2; 28 U. S. C. § 1251 (a). Procedures governing the exercise of our original jurisdiction are not invariably governed by common-law precedent or by current rules of civil procedure. See United States Supreme Court Rule 9; *Rhode Island* v. *Massachusetts,* 14 Pet. 210 (1840). Under our rules, the requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage. See, for example, *Alabama* v. *Texas,* 347 U. S. 272 (1954); *California* v. *Washington,* 358 U. S. 64 (1958); *Virginia* v. *West Virginia,* 234 U. S. 117, 121 (1914). Our object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented. To this end, where feasible, we dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear.

This case is peculiarly susceptible to treatment of that kind. The allegations in Ohio's proposed amendment are not as yet formally controverted by Kentucky. We, therefore, treat the new material as admitted. Kentucky asserts, however, that, even assuming the new allegations to be true, no cause of action is stated, for the subject matter of Ohio's proposed amendment is barred as a matter of law.

II

In *Handly's Lessee* v. *Anthony,* 5 Wheat. 374 (1820), this Court stated that the boundary between Indiana and Kentucky was the low water mark on the western or northwestern side of the Ohio River. *Handly* was an action for ejectment brought by a plaintiff claiming under a grant from Kentucky against defendants claiming under a grant "from the United States, as being part of Indiana." *Id.,* at 375. The disputed land was a neck south of a channel, or bayou, that had formed north of the main river. When the river was high, the channel filled and cut off the land to the north. When the river was low, the channel was dry in part and the separation did not exist. The resolution of the case turned on whether the land was in Indiana or in Kentucky. Indiana, like Ohio, received its territory from the United States. The Court in *Handly* observed that the question "depends chiefly on the land law of Virginia, and on the cession made by that State to the United States," *id.,* at 376, and concluded that the United States acquired title from Virginia when negotiations during the period from 1781–1784 resulted in Virginia's ceding its lands north and west of the Ohio River to the Federal Government.[2] Kentucky was received as a State of the

[2] Recommendation of the Continental Congress, September 6, 1780, 10 W. Hening, Laws of Virginia 562 (1822); Resolution of the General Assembly of Virginia, January 2, 1781, conditioned, among other

Union in 1792 out of territory Virginia purported to retain at the time of the 1784 cession. The Court concluded, on the basis of this history, that Kentucky, through Virginia, extended up to the low water mark on the northern, or far, side of the Ohio River. Mr. Chief Justice Marshall enunciated the following, now familiar, principle:

> "When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only. The river, however, is its boundary." 5 Wheat., at 379.

The rule of the *Handly* case, as well as its specific application to the Kentucky-Indiana border, has been

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things, upon ratification of the Articles of Confederation and upon like cessions by other States, *id.*, at 564, 567; Act of the Continental Congress, September 13, 1783, 25 J. of the Cont. Cong. 1774–1789, p. 559 (1922); Act of Confirmation, October 20, 1783, 11 W. Hening, Laws of Virginia 326 (1823); Act of the Continental Congress, March 1, 1784, 1 Laws of the United States 472 (B. & D. ed. 1815).

The 1781 Virginia resolution recited that the Commonwealth "will yield to the congress of the United States . . . all right, title, and claim that the said commonwealth hath to the lands northwest of the river Ohio." 10 W. Hening, Laws of Virginia 564 (1822). Among the proposed conditions was also a guarantee by the United States to Virginia of "all the remaining territory of Virginia included between the Atlantic Ocean and the south east side of the river Ohio." *Id.*, at 566. This latter condition was not agreed to by the Congress by its Act of 1783. 25 J. of the Cont. Cong. 1774–1789, p. 563 (1922).

The 1783 Act referred to territory "to the north-west of the river Ohio." 11 W. Hening, Laws of Virginia 327. So, too, did the deed of March 1, 1784, from Virginia to the United States accepted by Congress on the same day. 1 Laws of the United States, *supra*, at 474.

consistently adhered to in subsequent decisions of this Court. *Indiana* v. *Kentucky,* 136 U. S. 479 (1890) (despite Indiana's argument, *id.,* at 486–493, that its boundary was the middle of the river); *Henderson Bridge Co.* v. *Henderson City,* 173 U. S. 592 (1899);[3] *Nicoulin* v. *O'Brien,* 248 U. S. 113 (1918). It has been explicitly recognized by the Supreme Court of Ohio in *Booth* v. *Shepherd,* 8 Ohio St. 243, 247–248 (1858), where it was stated with far greater precision than the mere assumption the dissent suggests, *post,* at 654–655, that:

> "The construction given to the Virginia deed of cession by the supreme court of the United States, having been thus acquiesced in and acted on by the courts, both of Virginia and Ohio, may be regarded as decisive of the question."

See also *Lessee of McCullock* v. *Aten,* 2 Ohio 307, 310 (1826); *Lessee of Blanchard* v. *Porter,* 11 Ohio 138, 142 (1841).[4] See *Commonwealth* v. *Garner,* 3 Gratt. 655 (Gen. Court of Va. 1846).

In order to counter this history, Ohio argues that, as it was not a party to the *Handly* case, or to any of the later cases in this Court that reaffirmed *Handly,* it is not bound by the rule there established, which it characterizes as dictum. In particular, Ohio contends that it is free to challenge the conclusion that Virginia, prior to ceding

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[3] "Upon this question of boundary nothing can be added to what was said in the cases cited; and it must be assumed as indisputable that the boundary of Kentucky extends to low-water mark on the western and northwestern banks of the Ohio River." *Henderson Bridge Co.* v. *Henderson City,* 173 U. S. 592, 613 (1899).

[4] There is a possible intimation to the contrary in the bridge tax case of *Covington & Cincinnati Bridge Co.* v. *Mayer,* 31 Ohio St. 317, 327, 329 (1877). The case appears, however, to have been resolved on the content of the bridge company's Ohio charter granting permission for the erection of the bridge. See *Sebastian* v. *Covington & Cincinnati Bridge Co.,* 21 Ohio St. 451 (1871).

the land that now encompasses both Indiana and Ohio, held good title to that land.

Handly and the later decisions to which Ohio was not a party of course do not foreclose Ohio's claim in a *res judicata* sense. But proceedings under this Court's original jurisdiction are basically equitable in nature, *Rhode Island* v. *Massachusetts,* 14 Pet. 210 (1840), and a claim not technically precluded nonetheless may be foreclosed by acquiescence. *Indiana* v. *Kentucky,* 136 U. S., at 510, 518. We turn to that aspect of the present case.

III

By its amended complaint Ohio seeks to re-examine an accepted premise of the *Handly* decision and, in the process of doing so, to alter legal rights that, as a practical matter, have long been settled. By presently claiming ownership of half the Ohio River, Ohio does not assert that when Virginia ceded the lands northwest of the river, it intended to establish the river's center as the line between Ohio and Kentucky, but, at the same time and thus inconsistently, to establish its northern edge as the line between Indiana and Kentucky. Rather, Ohio challenges the very postulate underlying the *Handly* decision, which must be taken, in practical effect, as establishing the entire northern boundary of Kentucky including its contact with Ohio. Ohio's new theory is that Virginia did not have title to the lands north of the Ohio River in 1784 when Virginia surrendered its claim to the United States. Virginia's claim, it is said, was baseless. Indeed, Ohio argues that title to these lands was hotly contested, with Virginia, New York, Massachusetts, Connecticut, and the United States all laying claim to the territory north of the river. The Continental Congress, fearing the threat this controversy posed for the youthful Nation, refused to resolve the disputed claims, and, instead, prevailed upon each of

the claimants to forgo its claim in favor of the United States for the common good. Accordingly, Ohio contends, the premise of *Handly*—that Virginia had title to the northwest territory prior to ceding it to the United States, or, to say it another way, that it was the common proprietor of lands on both sides of the river—is historically invalid.

We need intimate no view on the merits of Ohio's historical analysis, for the State's long acquiescence in the location of its southern border at the northern edge of the Ohio River, and its persistent failure to assert a claim to the northern half of the river, convince us that it may not raise the middle-of-the-river issue at this very late date. The 1820 decision in *Handly* necessarily placed Ohio on notice that any claim it might assert to half the river would be precluded by the reasoning of that opinion. The Court in *Handly* concluded that the entire border between Indiana and Kentucky was the river's northern edge. Virginia's claim to the territory that is now Indiana arose from the same source as its claim to what is now Ohio. The lands to which Virginia purportedly surrendered title to the United States in 1784 encompassed both Ohio and Indiana.[5] Ohio could not reasonably have believed, after *Handly,* that its claim over the northern half of the Ohio River rested on a footing different from that of Indiana.

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[5] See *Indiana* v. *Kentucky,* 136 U. S. 479, 505 (1890). See also the deed of March 1, 1784, referred to in n. 2, *supra,* from Virginia to the United States. On August 7, 1789, Congress passed "An Act to provide for the Government of the Territory Northwest of the river Ohio." 1 Stat. 50. In 1800, this territory was divided into two separate governments. 2 Stat. 58. And on April 30, 1802, the enabling Act for the admission of Ohio was passed. 2 Stat. 173. The State was formed out of the eastern half of the theretofore divided territory and was "bounded . . . on the south by the Ohio river," *ibid.;* the land in the eastern division not included within the boundaries described for Ohio "is hereby attached to, and made a part of the Indiana territory." *Id.,* at 174.

Indeed, Ohio consistently has recognized that *Handly* and the cases that followed it foreclosed any claim that its border was located in the middle of the river. Even its original 1966 bill of complaint and supporting brief [6] in this case so state. The decisions of Ohio's highest court are to the same effect. And Ohio for over 150 years has failed to assert, through proceedings available in this Court, the claim it now would raise in the face of Kentucky's legislative [7] and judicial [8] assertions of sovereignty over the river.

Ohio does not say that its failure to assert its claim over the past century and a half is due to any excusable neglect. The implications of *Handly* and later decisions

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[6] "The State of Ohio does now, and has always claimed and maintained that the boundary between it and the State of Kentucky is the *northerly low water mark* of the Ohio River, as that mark existed *in the year 1792* when Kentucky became a state." Brief in support of motion for leave to file complaint 8. (Emphasis in original.)

[7] In 1810, a decade before the *Handly* decision, the Kentucky Legislature enacted the following statute:

"Sec. 1 *Be it enacted by the General Assembly,* That each county of this commonwealth, calling for the river Ohio, as the boundary line, shall be considered as bounded in that particular by the state line on the north west side of said river, and the bed of the river and the islands, therefore shall be within the respective counties, holding the main land opposite thereto, within this state, and the several county tribunals, shall hold jurisdiction accordingly." Acts of Kentucky, 1809, p. 100 (1810); 1 Statute Laws of Kentucky 268 (1834).

See also 2 Ky. Rev. Stat., Tit. 1, c. 1, p. 2 (1971).

[8] *Commonwealth* v. *Henderson County,* 371 S. W. 2d 27, 29–30 (1963); *Louisville Sand & Gravel Co.* v. *Ralston,* 266 S. W. 2d 119, 121–122 (1954); *Shannon* v. *Streckfus Steamers, Inc.,* 279 Ky. 649, 653, 131 S. W. 2d 833, 835 (1939); *McFarland* v. *McKnight,* 45 Ky. 500, 510 (1846); *Church* v. *Chambers,* 3 Dana 274, 278–279 (Ct. App. Ky. 1335); *Fleming* v. *Kenney,* 27 Ky. 155, 158 (1830); *McFall* v. *Commonwealth,* 2 Metc. 394, 396 (Ky. 1859).

of this Court are too clear to support that claim. Ohio recognized this in its initial brief here.[9] Nor, in the light of the longstanding and unequivocal claims of Kentucky over the river, and Ohio's failure to oppose those claims, may Ohio credibly suggest that it has not acquiesced. "The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority." *Michigan* v. *Wisconsin,* 270 U. S. 295, 308 (1926). To like effect are *Vermont* v. *New Hampshire,* 289 U. S. 593, 613 (1933); *Maryland* v. *West Virginia,* 217 U. S. 1, 42–44 (1910); *Louisiana* v. *Mississippi,* 202 U. S. 1, 53–54 (1906); *Virginia* v. *Tennessee,* 148 U. S. 503, 523 (1893); *Indiana* v. *Kentucky,* 136 U. S., at 509–510, 518; *Rhode Island* v. *Massachusetts,* 4 How. 591, 639 (1846).[10]

Here we have not only long acquiescence by Ohio in Kentucky's open claims over the river, but also lines of cases by this Court and the courts of both Ohio and Kentucky that, for more than 150 years, placed Ohio on consistent notice of the inadequacy of the claim it now asserts. We find ourselves in agreement with the Special Master that Ohio is foreclosed from claiming that its

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[9] "Like Ohio, the State of Indiana was formed from the land ceded by Virginia; therefore, it has for its southern boundary the Ohio River. See 3 Stat. 289 (1816), and 3 Stat. 399 (1816). Thus, a determination of the boundary between the states of Indiana and Kentucky would control the determination of the boundary between the states of Ohio and Kentucky." Brief in support of motion for leave to file complaint 10.

[10] The situation, of course, is otherwise when the States' boundary dispute has been open, continuous and of long standing. See, for example, *New Jersey* v. *Delaware,* 291 U. S. 361, 376–377 (1934); *Oklahoma* v. *Texas,* 272 U. S. 21, 46–47 (1926); *Arkansas* v. *Tennessee,* 246 U. S. 158, 172 (1918).

boundary with Kentucky lies in the middle of the Ohio River.

The Special Master's recommendation is adopted and Ohio's motion for leave to amend its bill of complaint is denied. The case is remanded to the Special Master for further proceedings.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

The State of Ohio instituted this original action to locate the boundary between it and the Commonwealth of Kentucky on the Ohio River. The initial complaint recognized Kentucky's northern boundary as following "the low water mark on the northerly side of the Ohio River as it existed in the year 1792," [1] but asserted that subsequent events had altered the location of the low-water mark. Today the Court denies Ohio's request that it be permitted to amend its complaint to plead an alternative boundary theory: that the true boundary between the States is in the middle of the Ohio River.[2]

Basic concepts of pleading preclude determination of factual issues in testing the sufficiency of a claim.[3] The appropriate question for the Court at this stage of the proceedings, therefore, is whether if the facts as stated by Ohio are true, a valid legal issue is tendered. Ohio asserts that Virginia, Kentucky's predecessor in title, never held ownership rights to both banks of the Ohio River and that, accordingly, Kentucky's current claim to land underlying the northern side of the Ohio River is invalid.[4] The question before us is equivalent to that

[1] Complaint ¶ 6.

[2] Amended complaint ¶¶ 1–3.

[3] F. James, Civil Procedure § 4.1, p. 127; *Conley* v. *Gibson*, 355 U. S. 41, 45–46.

[4] Virginia's claim of title rests upon the charter granted by King James I to the London Company in 1609. Ohio argues that later

posed by a demurrer. The majority's conclusion of insufficiency is, therefore, not sustainable.

The Court's decision is a determination upon the merits of Ohio's proffered allegations and should be made only after all the evidence is before it. The Master concludes, and the Court agrees, that Ohio has acquiesced to Kentucky's ownership of the northern half of the Ohio River as established by adjudications in this Court. Although I find such consideration of the merits to be premature, the Court's reasoning prompts me to review the case law upon which estoppel is urged.

The Ohio River serves as the boundary between the States of Kentucky and Indiana as well as the boundary between the parties to this suit, Kentucky and Ohio. During the 19th century, this Court dealt with the nature of the Kentucky-Indiana boundary in two cases. *Handly's Lessee* v. *Anthony,* 5 Wheat. 374 (1820), and *Indiana* v. *Kentucky,* 136 U. S. 479 (1890). Later cases dealt with issues that turned upon the boundary de-

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events, including the revocation of the charter in 1624 when Virginia became a Crown colony, 1 J. Marshall, The Life of George Washington 69; 2 W. Hening's Stat. at Large 525–526; 1 Laws of the United States 465 (B. & D. ed. 1815) (hereinafter Laws), and the ceding by the French to the British of the Eastern Mississippi Valley north of the Ohio River under the Treaty of Paris in 1763, 1 Laws 441–442; A. Shortt & A. Doughty, Documents Relating to the Constitutional History of Canada, 1759–1791, pp. 113, 116, sharply curtailed Virginia's reach and that the middle of the river was intended as the boundary between old and new States by the United States following the Revolution. It seeks to substantiate this final point by references to various laws that prescribe the boundaries of new States, 1 Laws 475, 480, provide for navigational rights, *id.,* at 479–480, and speak in general terms of Virginia, Kentucky, and Tennessee as the lands south, or south and east, of the Ohio River, and of Ohio, Indiana, and Illinois as the lands to the north, or the north and west, 2 Laws 14, 104, 138, 179, 311, 421, 533; 3 Laws 367, 385, 396, 596, 612.

termination of *Handly's Lessee*.[5] Based upon a historical analysis that Ohio here contests, the Court held in the *Handly* case that the Kentucky-Indiana boundary coincides with the northern low-water mark of the Ohio River.[6] Ohio, of course, was not involved in that litigation. Yet, the Master's recommendation that is now adopted would bind Ohio today to a determination made in 1820 in a case to which it was not a party. And, since the doctrine of *res judicata* does not reach so far, reliance is placed upon an estoppel theory. Simply stated, Kentucky contends that Ohio has lost whatever rights it may once have had to challenge the Kentucky claim to land underlying the northern half of the Ohio River by failing to object earlier and by recognizing the boundary rationale that was applied to Indiana in cases tried in Ohio courts since 1820. Ohio disputes the suggestion.

First, Ohio notes that the argument it wishes to present to substantiate a claim to the center of the river has not been considered by this Court. The early cases turned instead on the assumption that Virginia's prior title, upon which Kentucky's claims are predicated, was valid as to the land involved.[7] Ohio additionally points out that the three Ohio cases proffered as evidence of Ohio's recognition of Kentucky's claim to the northern half of the river [8] concerned private disputes that hinged upon location of the river's edge, rather than a determination as to the boundary between the States. That the further determination was not required is

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[5] *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592 (1899); *Wedding* v. *Meyler*, 192 U. S. 573 (1904); *Nicoulin* v. *O'Brien*, 248 U. S. 113 (1918).

[6] *Handly's Lessee* v. *Anthony*, 5 Wheat. 374, 377, 379.

[7] See *ibid.*; *Indiana* v. *Kentucky*, 136 U. S. 479, 503–504.

[8] *Lessee of McCullock* v. *Aten*, 2 Ohio 307 (1826); *Lessee of Blanchard* v. *Porter*, 11 Ohio 138 (1841); *Booth* v. *Shepherd*, 8 Ohio St. 243 (1858).

made clear by the language of those cases.[9] The most recent of the three, indeed, states quite explicitly:

> "It does not become necessary, in this case, to determine whether the middle of the Ohio River . . . does or does not constitute the boundary line between the states of Virginia and Ohio. For all the purposes of this case, it may be assumed that Virginia was the original, undisputed owner of the territory on both sides of the river, and still retains all that she did not part with by her deed of cession in 1784." [10]

Ohio now wishes to question precisely that assumption. In prematurely judging the issues and pretermitting briefing and argument of Ohio's attack on the validity of Virginia's title, the Court does disservice both to the adjudication of this dispute and to the procedural contours of original actions. I would allow Ohio to amend its complaint so that the merits might be reached in due course.

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[9] 2 Ohio, at 310 (discussing only ownership of the land above the water line but below the bank); 11 Ohio, at 139–140 ("The defendant's deed conveys the soil *to the top* of the river bank, and reserves the 'break and slope,' between that point and the river").

[10] 8 Ohio St., at 245–246 (noting that "In the case of *Handly's Lessee* v. *Anthony,* the supreme court of the United States, proceed[ed] on the *assumption* that Virginia was the original proprietor of both sides of the river . . ." (emphasis added)).

ORTWEIN ET AL. *v.* SCHWAB ET AL.

APPEAL FROM THE SUPREME COURT OF OREGON

No. 72–5431. Decided March 5, 1973

Appellants challenge the constitutionality of a $25 filing fee, which they were allegedly unable to pay, required to be paid in the state appellate court where they sought review of agency determinations resulting in their receiving reduced welfare payments. *Held:* Appellants were not deprived of due process, since the increase in welfare payments sought by them has less constitutional significance than the interest of appellants in *Boddie* v. *Connecticut,* 401 U. S. 371, and since evidentiary hearings provided a procedure, not conditioned on payment of any fee, through which appellants were able to seek redress. *United States* v. *Kras,* 409 U. S. 434. Nor is the filing-fee requirement violative of equal protection, since the applicable standard in the area of social and economic regulation when a suspect classification is not present is rational justification and here the requirement of rationality is met.

262 Ore. 375, 498 P. 2d 757, affirmed.

PER CURIAM.

Appellants contend that Oregon's $25 appellate court filing fee, as applied in this case, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and, also, the First Amendment as incorporated into the Fourteenth. The Supreme Court of Oregon decided otherwise. 262 Ore. 375, 498 P. 2d 757 (1972). We affirm that decision for reasons we found persuasive in *United States* v. *Kras,* 409 U. S. 434 (1973).

Appellant Ortwein (who also was receiving social security and an urban renewal allowance) sustained a reduction of approximately $39 per month in his Oregon old-age assistance when his county welfare agency determined that he shared shelter and expenses with another person in a manner that relieved him of some of the costs upon which his original award had been based.

Ortwein appealed to the Oregon Public Welfare Division. The Division conducted a hearing and upheld the county agency's decision.[1]

Appellant Faubion claimed that certain expenses related to work training under a federal program should have been deducted in calculating her income.[2] Most of these deductions were disallowed, after hearing, by the Public Welfare Division. The disallowance resulted in smaller welfare payments to Faubion over a five-month period.

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[1] The Division found that the county agency "acted within its discretion by determining that the claimant's living arrangement represented a living situation in which shelter and expenses are shared." The agency's order explained that that reduction in the room and board allowance was proper because "[t]he eligibility of recipients who share shelter with non-recipients, and do not pay for room and board, shall be determined on a share/fraction basis at [Public Welfare Division] standards." Record 9. In his petition for review, Ortwein contended that the order was not supported by "reliable, probative and substantial evidence in the whole record."

[2] Faubion received an incentive training allowance of $120 per month for approximately five months from a program under the Manpower Development and Training Act of 1962, as amended, 76 Stat. 23, 42 U. S. C. §§ 2571–2574. Record 12. Faubion also was receiving over $210 per month through a state-administered AFDC program. Jurisdictional Statement 4; Record 11. States, in making their income calculations under AFDC, deduct from gross income all expenses "reasonably attributable" to the earning of the income. 42 U. S. C. § 602 (a)(7); 45 CFR § 233.20 (a)(3)(iv) (Sept. 1972). Faubion claimed that she had work-training expenses of $20 per month for essential clothing and grooming, of $20 per month for lunches on the job, of $30 per month for convenience foods for family use made necessary because of her job, of $5 per month for oil, tune-ups and repairs, and of $5 per month for miscellaneous school supplies. Record 13. Although the Division allowed some deductions, it determined that the remaining expenses were not "reasonably attributable" to the training program. Record 12. On appeal, Faubion sought to challenge this finding.

Judicial review of these agency decisions is authorized under state law. Ore. Rev. Stat. § 183.480 (1971). In cases that are contested, as these were, jurisdiction for judicial review is conferred upon the Oregon Court of Appeals. § 183.480 (2). All appellants in civil cases in Oregon pay a $25 filing fee in appellate courts. §§ 21.010 and 21.040 (1971). Each of the present appellants alleged that he was an indigent unable to pay the filing fee; each moved to proceed *in forma pauperis* in the Oregon Court of Appeals. The motions were denied without opinions. Appellants then petitioned the Supreme Court of Oregon for an alternative writ of mandamus ordering the Court of Appeals to accept appellants' cases without payment of fees. The Supreme Court of Oregon requested supplemental briefs and then issued its opinion denying the petition for mandamus. 262 Ore. 375, 498 P. 2d 757 (1972). From this denial the present appeal is taken.

I

Relying on this Court's opinion in *Boddie* v. *Connecticut,* 401 U. S. 371 (1971), and on the remand-for-reconsideration order in *Frederick* v. *Schwartz,* 402 U. S. 937 (1971),[3] appellants contend that the Oregon appellate filing fee, when applied to indigents seeking to appeal an adverse welfare decision, violates the Due Process Clause of the Fourteenth Amendment. In *United States* v. *Kras,* 409 U. S. 434 (1973), this Court upheld statutorily imposed bankruptcy filing fees against a constitutional challenge based on *Boddie.* We emphasized the special nature of the marital relationship and its concomitant associational interests, and noted that they were not affected in that case and that the objective sought by appellant Kras could be obtained through alternative

[3] See also *Huffman* v. *Boersen,* 406 U. S. 337 (1972).

means that did not require a fee. *Boddie,* of course, was not concerned with post-hearing review. We now conclude that *Kras,* rather than *Boddie,* governs the present appeal, and we emphasize that *Frederick* was remanded, and not summarily reversed.

A. In *Kras,* we observed that one's interest in a bankruptcy discharge "does not rise to the same constitutional level" as one's inability to dissolve his marriage except through the courts. 409 U. S., at 445. In this case, appellants seek increased welfare payments. This interest, like that of Kras, has far less constitutional significance than the interest of the *Boddie* appellants. Compare *Dandridge* v. *Williams,* 397 U. S. 471 (1970), and *Richardson* v. *Belcher,* 404 U. S. 78 (1971), with *Loving* v. *Virginia,* 388 U. S. 1 (1967); *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), and *Eisenstadt* v. *Baird,* 405 U. S. 438 (1972). Each of the present appellants has received an agency hearing at which it was determined that the minimum level of payments authorized by law was being provided. As in *Kras,* we see "no fundamental interest that is gained or lost depending on the availability" of the relief sought by appellants. 409 U. S., at 445.

B. In *Kras,* the Court also stressed the existence of alternatives, not conditioned on the payment of the fees, to the judicial remedy. *Id.,* at 446. The Court has held that procedural due process requires that a welfare recipient be given a pretermination evidentiary hearing. *Goldberg* v. *Kelly,* 397 U. S. 254, 264, 266–271 (1970). These appellants have had hearings.[4] The

[4] These evidentiary hearings, of course, must meet the minimal requirements of due process. *Goldberg* v. *Kelly,* 397 U. S. 254, 266–271 (1970). Appellants have alleged that the hearings were deficient in several ways, Jurisdictional Statement 9–10, but neither the record nor the opinion of the Oregon court provides support for these contentions.

hearings provide a procedure, not conditioned on payment of any fee, through which appellants have been able to seek redress. This Court has long recognized that, even in criminal cases, due process does not require a State to provide an appellate system. *McKane* v. *Durston,* 153 U. S. 684, 687 (1894); see *Griffin* v. *Illinois,* 351 U. S. 12, 18 (1956); *District of Columbia* v. *Clawans,* 300 U. S. 617, 627 (1937); *Lindsey* v. *Normet,* 405 U. S. 56, 77 (1972). Under the facts of this case, appellants were not denied due process.[5]

II

Appellants urge that the filing fee violates the Equal Protection Clause by unconstitutionally discriminating against the poor. As in *Kras,* this litigation, which deals with welfare payments, "is in the area of economics and social welfare." 409 U. S., at 446; see *Dandridge* v. *Williams,* 397 U. S., at 485–486. No suspect classification, such as race, nationality, or alienage, is present. See *Graham* v. *Richardson,* 403 U. S. 365, 372 (1971). The applicable standard is that of rational justification. *United States* v. *Kras, supra.*

The purpose of the filing fee, as with the bankruptcy fees in *Kras,* is apparent. The Oregon court system incurs operating costs, and the fee produces some small revenue to assist in offsetting those expenses. Cf. Ore. Rev. Stat. § 21.590 (1971). Appellants do not contend that the fee is disproportionate or that it is not an effective means to accomplish the State's goal. The requirement of rationality is met.

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[5] Appellants also claim a violation of their First Amendment right to petition for redress. Our discussion of the Due Process Clause, however, demonstrates that appellants' rights under the First Amendment have been fully satisfied.

III

Relying on *Lindsey* v. *Normet, supra,* appellants contend that the fee is not required of certain classes of litigants, and that an appeal is thus "capriciously and arbitrarily denied" to other appellants, such as themselves, also in violation of the Equal Protection Clause. See 405 U. S., at 77. They assert that criminal appeals, habeas corpus petitions from state institutions or civil commitment proceedings, and appeals from terminations of parental rights may be filed *in forma pauperis* in the Oregon Court of Appeals. Jurisdictional Statement 23. We are not told just why these filings are permitted, but the opinion of the Supreme Court of Oregon makes it clear that *in forma pauperis* appeals are allowed only if supervening law requires a right to a free appeal. 262 Ore., at 384, 498 P. 2d, at 761–762.

If the Oregon courts have interpreted the applicable law to give special rights in the criminal area, in civil cases that result in loss of liberty, and in cases terminating parental rights, we cannot say that this categorization is capricious or arbitrary.

Affirmed.

MR. JUSTICE STEWART dissents, believing that the doctrine of *Boddie* v. *Connecticut,* 401 U. S. 371 (1971), requires reversal of this judgment. See *United States* v. *Kras,* 409 U. S. 434, 451 (1973) (dissenting opinion). He is convinced, however, that the Court is so resolutely firm in its contrary view that it would serve no useful purpose to set this case for oral argument.

MR. JUSTICE DOUGLAS, dissenting.

The majority today broadens and fortifies the "private preserve for the affluent." *Meltzer* v. *C. Buck Le Craw & Co.,* 402 U. S. 954, 961 (opinion of DOUGLAS, J.).

The Court upholds a scheme of judicial review whereby justice remains a luxury for the wealthy.

I

Appellants, welfare recipients whose benefits were reduced after adverse determinations by the Oregon Public Welfare Division, were denied access to the Oregon courts for review of those decisions solely on the grounds that they were unable to pay a $25 filing fee. Judicial review of administrative decisions is not otherwise available under Oregon law. I continue to believe that this invidious discrimination against the poverty-stricken—a classification based upon wealth—is proscribed by the Equal Protection Clause of the Fourteenth Amendment. *Meltzer, supra; Boddie* v. *Connecticut,* 401 U. S. 371, 383 (DOUGLAS, J., concurring in result); cf. *United States* v. *Kras,* 409 U. S. 434, 457 (opinion of DOUGLAS and BRENNAN, JJ.).

There is an additional consideration relevant here. The majority properly notes that "[t]his Court has long recognized that, even in criminal cases, due process does not require a State to provide an appellate system." We are concerned in this case not with appellate review of a judicial determination, but with *initial access* to the courts for review of an adverse administrative determination. By analogizing these two situations, the majority *sub silentio* answers a question this Court studiously has avoided—whether there is a due process right to judicial review. See 4 K. Davis, Administrative Law Treatise § 28.18. Access to the courts before a person is deprived of valuable interests, at least with respect to questions of law, seems to me to be the essence of due process. Cf. *Lindsey* v. *Normet,* 405 U. S. 56, 84 (DOUGLAS, J., dissenting in part). We have recognized that token access cannot satisfy the requirements

of due process. See, *e. g., Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306. Certainly, no access at all cannot stand in better stead. Appellant Ortwein contends that the order of the Public Welfare Division is not supported by substantial evidence; appellant Faubion contends that the order applicable to her conflicts with federal provisions. Moreover, each contends that the administrative hearing was deficient under *Goldberg* v. *Kelly,* 397 U. S. 254, because questions of law were not considered. The majority affirms the judgment without discussing its bearing on appellants' contention that the Oregon scheme of judicial review discriminates against the poor with respect to an exercise of a fundamental right.

Accordingly, I cannot agree that a "rational justification" will support the Oregon statute as it affects the poor. The primary justification by the State and fixed upon by the majority is the State's interest in offsetting the expenses of its court system. This interest falls far short of the "compelling interest" required to justify a suspect classification or discrimination which infringes on fundamental rights. *See Boddie* v. *Connecticut, supra,* at 382; *Shapiro* v. *Thompson,* 394 U. S. 618, 633.

II

The majority affirms the judgment below without the benefit of briefs or argument, relying on *United States* v. *Kras, supra.* Although I did not join the Court's opinion in *Boddie* v. *Connecticut, supra,* I am compelled to comment on the propriety of disposing of this case summarily in view of the decision in that case. However one views the merits of *Kras,* it seems to me that this case falls far closer to *Boddie* than *Kras.*

The majority distinguished *Kras* from *Boddie* on three

grounds. It is only proper that this case be compared on the same basis.

(1) The majority in *Kras* concluded that a debtor's desire to obtain a discharge in bankruptcy does not implicate a "fundamental interest." While it is true that our decisions attach less constitutional significance to welfare payments than the interests of the *Boddie* appellants, we have never decided that there is no constitutional right to judicial review of an adverse administrative determination. The majority also noted in *Kras* that "[g]aining or not gaining a discharge [in bankruptcy] will effect no change with respect to basic necessities." 409 U. S., at 445. It is clear in this case, however, that appellants suffered an inroad on their ability to subsist.

(2) Unlike Kras, who had a theoretical opportunity to seek relief from his creditors in a nonjudicial accommodation, appellants' only avenue of relief lies in the courts.

(3) Unlike Kras, who was afforded the opportunity to pay the bankruptcy filing fee in installments over six months, appellants must file their fee in a lump sum.

MR. JUSTICE BRENNAN, dissenting.

Although I am in substantial agreement with my Brothers DOUGLAS and MARSHALL that this case is distinguishable from our recent decision in *United States* v. *Kras,* 409 U. S. 434 (1973), I see no reason to set this case for argument in light of the majority's firmly held view that *Kras* is controlling. On the merits, I would reverse for the reasons stated in my separate opinion in *Boddie* v. *Connecticut,* 401 U. S. 371, 386 (1971) (concurring in part). See also *United States* v. *Kras, supra,* at 457 (opinion of DOUGLAS and BRENNAN, JJ.).

MR. JUSTICE MARSHALL, dissenting.

I adhere to my dissenting opinion in *United States* v. *Kras*, 409 U. S. 434, 458 (1973), and would reverse the judgment on that basis. But even were I to accept the majority position in *Kras*, there are still important differences between that case and this one which, in my judgment, require that this case be set for argument.

In *Kras*, the majority correctly noted that "[t]here is no constitutional right to obtain a discharge of one's debts in bankruptcy." *Id.*, at 446. Therefore, the only issue in the case was whether the Government could, on the basis of a *de facto* wealth classification, limit access to a remedy which it could concededly deny altogether.

The question here is quite different. Appellants seek a judicial remedy for the action of an administrative agency which deprived them of a pre-existing right. As my Brother DOUGLAS demonstrates, it is at very least doubtful that the Due Process Clause permits a State to shield an administrative agency from all judicial review when that agency acts to revoke a benefit previously granted.* I share the view of Mr. Justice Brandeis that "[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted

*The majority's statement that "[t]his Court has long recognized that, even in criminal cases, due process does not require a State to provide an appellate system," *ante*, at 660, is thus true, but irrelevant and misleading. The cases cited by the majority all involve efforts to secure appellate review of a decision by a lower court. Here, in contrast, no court has ever examined appellants' claims on the merits. Appellants assert only that they must have *some* access to *some* court to contest the legality of administrative action adversely affecting them.

regularly." *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 84 (1936) (concurring opinion). Cf. *Yakus* v. *United States,* 321 U. S. 414 (1944); *Crowell* v. *Benson,* 285 U. S. 22 (1932).

That opportunity was denied in this case, and important benefits were thereby taken from appellants without affording them a chance to contest the legality of the taking in a court of law. Cf. *Fuentes* v. *Shevin,* 407 U. S. 67 (1972).

The extent to which the State may commit to administrative agencies the unreviewable authority to restrict pre-existing rights is one of the great questions of constitutional law about which courts and commentators have debated for generations. See generally Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953); 4 K. Davis, Administrative Law Treatise § 28.18 (1958). Because I am not ready to decide that question summarily, *sub silentio,* and without the benefit of full briefing and oral argument, I must dissent from the Court's decision.

PAPISH *v.* BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI ET AL.

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

No. 72–794. Decided March 19, 1973

Expulsion of student for distributing on campus a publication assertedly containing "indecent speech" proscribed by a bylaw of a state university's Board of Curators *held* an impermissible violation of her First Amendment free speech rights since the mere dissemination of ideas on a state university campus cannot be proscribed in the name of "conventions of decency."

Certiorari granted; 464 F. 2d 136, reversed.

PER CURIAM.

Petitioner, a graduate student in the University of Missouri School of Journalism, was expelled for distributing on campus a newspaper "containing forms of indecent speech" [1] in violation of a bylaw of the Board of Curators. The newspaper, the Free Press Underground, had been sold on this state university campus for more than four years pursuant to an authorization obtained from the University Business Office. The particular newspaper issue in question was found to be unacceptable for two reasons. First, on the front cover the publishers had reproduced a political cartoon previously printed in another newspaper depicting policemen raping the Statue of Liberty and the Goddess of Justice. The caption under the cartoon read: ". . . With Liberty and Justice for All." Secondly, the issue contained an article entitled "M-----f----- Acquitted," which discussed the trial and acquittal on an assault

[1] This charge was contained in a letter from the University's Dean of Students, which is reprinted in the Court of Appeals' opinion. 464 F. 2d 136, 139 (CA8 1972).

charge of a New York City youth who was a member of an organization known as "Up Against the Wall, M-----f-----."

Following a hearing, the Student Conduct Committee found that petitioner had violated Par. B of Art. V of the General Standards of Student Conduct which requires students "to observe generally accepted standards of conduct" and specifically prohibits "indecent conduct or speech."[2] Her expulsion, after affirmance first by the Chancellor of the University and then by its Board of Curators, was made effective in the middle of the spring semester. Although she was then permitted to remain on campus until the end of the semester, she was not given credit for the one course in which she made a passing grade.[3]

After exhausting her administrative review alternatives within the University, petitioner brought an action

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[2] In pertinent part, the bylaw states:

"Students enrolling in the University assume an obligation and are expected by the University to conduct themselves in a manner compatible with the University's functions and missions as an educational institution. For that purpose students are required to observe generally accepted standards of conduct. . . . [I]ndecent conduct or speech . . . are examples of conduct which would contravene this standard. . . ." 464 F. 2d, at 138.

[3] Miss Papish, a 32-year-old graduate student, was admitted to the graduate school of the University in September 1963. Five and one-half years later, when the episode under consideration occurred, she was still pursuing her graduate degree. She was on "academic probation" because of "prolonged submarginal academic progress," and since November 1, 1967, she also had been on disciplinary probation for disseminating Students for a Democratic Society literature found at a university hearing to have contained "pornographic, indecent and obscene words." This dissemination had occurred at a time when the University was host to high school seniors and their parents. 464 F. 2d, at 139 nn. 3 and 4. But disenchantment with Miss Papish's performance, understandable as it may have been, is no justification for denial of constitutional rights.

for declaratory and injunctive relief pursuant to 42 U. S. C. § 1983 in the United States District Court for the Western District of Missouri. She claimed that her expulsion was improperly premised on activities protected by the First Amendment. The District Court denied relief, 331 F. Supp. 1321, and the Court of Appeals affirmed, one judge dissenting. 464 F. 2d 136. Rehearing *en banc* was denied by an equally divided vote of all the judges in the Eighth Circuit.

The District Court's opinion rests, in part,[4] on the conclusion that the banned issue of the newspaper was obscene. The Court of Appeals found it unnecessary to decide that question. Instead, assuming that the newspaper was not obscene and that its distribution in the community at large would be protected by the First Amendment, the court held that on a university campus "freedom of expression" could properly be "subordinated to other interests such as, for example, the conventions of decency in the use and display of language and pictures." *Id.*, at 145. The court concluded that "[t]he Constitution does not compel the University . . . [to allow] such publications as the one in litigation to be publicly sold or distributed on its open campus." *Ibid.*

This case was decided several days before we handed down *Healy* v. *James,* 408 U. S. 169 (1972), in which, while recognizing a state university's undoubted preroga-

[4] Prefatorily, the District Court held that petitioner, who was a nonresident of Missouri, was powerless to complain of her dismissal because she enjoyed no "federally protected or other right to attend a state university of a state of which she is not a domiciled resident." 331 F. Supp. 1321, 1326. The Court of Appeals, because it affirmed on a different ground, deemed it "unnecessary to comment" upon this rationale. 464 F. 2d, at 141 n. 9. The District Court's reasoning is directly inconsistent with a long line of controlling decisions of this Court. See *Perry* v. *Sindermann,* 408 U. S. 593, 596–598 (1972), and the cases cited therein.

tive to enforce reasonable rules governing student conduct, we reaffirmed that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Id.*, at 180. See *Tinker* v. *Des Moines Independent School District*, 393 U. S. 503 (1969). We think *Healy* makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of "conventions of decency." Other recent precedents of this Court make it equally clear that neither the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected. *E. g.*, *Kois* v. *Wisconsin*, 408 U. S. 229 (1972); *Gooding* v. *Wilson*, 405 U. S. 518 (1972); *Cohen* v. *California*, 403 U. S. 15 (1971).[5] There is language in the opinions below which suggests that the University's action here could be viewed as an exercise of its legitimate authority to enforce reasonable regulations as to the time, place, and manner of speech and its dissemination. While we have repeatedly approved such regulatory authority, *e. g.*, *Healy* v. *James*, 408 U. S., at 192–193, the facts set forth in the opinions below show clearly that petitioner was expelled because of the disapproved *content* of the newspaper rather than the time, place, or manner of its distribution.[6]

[5] Under the authority of *Gooding* and *Cohen*, we have reversed or vacated and remanded a number of cases involving the same expletive used in this newspaper headline. *Cason* v. *City of Columbus*, 409 U. S. 1053 (1972); *Rosenfeld* v. *New Jersey*, 408 U. S. 901 (1972); *Lewis* v. *City of New Orleans*, 408 U. S. 913 (1972); *Brown* v. *Oklahoma*, 408 U. S. 914 (1972). Cf. *Keefe* v. *Geanakos*, 418 F. 2d 359, 361 and n. 7 (CA1 1969).

[6] It is true, as MR. JUSTICE REHNQUIST's dissent indicates, that the District Court emphasized that the newspaper was distributed near the University's memorial tower and concluded that petitioner was engaged in "pandering." The opinion makes clear, however, that the reference to "pandering" was addressed to the content of the news-

Since the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech, and because the state University's action here cannot be justified as a nondiscriminatory application of reasonable rules governing conduct, the judgments of the courts below must be reversed. Accordingly the petition for a writ of certiorari is granted, the case is remanded to the District Court, and that court is instructed to order the University to restore to petitioner any course credits she earned for the semester in question and, unless she is barred from reinstatement for valid academic reasons, to reinstate her as a student in the graduate program.

Reversed and remanded.

MR. CHIEF JUSTICE BURGER, dissenting.

I join the dissent of JUSTICE REHNQUIST which follows and add a few observations.

The present case is clearly distinguishable from the Court's prior holdings in *Cohen, Gooding,* and *Rosenfeld,*

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paper and to the organization on the front page of the cartoon and the headline, rather than to the manner in which the newspaper was disseminated. 331 F. Supp., at 1325, 1328, 1329, 1330, 1332. As the Court of Appeals opinion states, "[t]he facts are not in dispute." 464 F. 2d, at 138. The charge against petitioner was quite unrelated to either the place or manner of distribution. The Dean's charge stated that the "forms of speech" contained in the newspaper were "improper on the University campus." *Id.,* at 139. Moreover, the majority below quoted without disapproval petitioner's verified affidavit stating that "no disruption of the University's functions occurred in connection with the distribution." *Id.,* at 139–140. Likewise, both the dissenting opinion in the Court of Appeals and the District Court opinion refer to this same uncontroverted fact. *Id.,* at 145; 331 F. Supp., at 1328. Thus, in the absence of any disruption of campus order or interference with the rights of others, the sole issue was whether a state university could proscribe this form of expression.

as erroneous as those holdings are.* *Cohen, Gooding,* and *Rosenfeld* dealt with prosecutions under criminal statutes which allowed the imposition of severe penalties. Unlike such traditional First Amendment cases, we deal here with rules which govern conduct on the campus of a state university.

In theory, at least, a university is not merely an arena for the discussion of ideas by students and faculty; it is also an institution where individuals learn to express themselves in acceptable, civil terms. We provide that environment to the end that students may learn the self-restraint necessary to the functioning of a civilized society and understand the need for those external restraints to which we must all submit if group existence is to be tolerable.

I find it a curious—even bizarre—extension of *Cohen, Gooding,* and *Rosenfeld* to say that a state university is impotent to deal with conduct such as that of the petitioner. Students are, of course, free to criticize the university, its faculty, or the Government in vigorous, or even harsh, terms. But it is not unreasonable or violative of the Constitution to subject to disciplinary action those individuals who distribute publications which are at the same time obscene and infantile. To preclude a state university or college from regulating the distribution of such obscene materials does not protect the values inherent in the First Amendment; rather, it demeans those values. The anomaly of the Court's holding today is

Cohen v. *California,* 403 U. S. 15, 27 (1971) (BLACKMUN, J., with whom BURGER, C. J., and Black, J., joined, dissenting); *Gooding* v. *Wilson,* 405 U. S. 518, 528 (1972) (BURGER, C. J., dissenting), 534 (BLACKMUN, J., dissenting); *Rosenfeld* v. *New Jersey,* 408 U. S. 901, 902 (1972) (BURGER, C. J., dissenting), 903 (POWELL, J., dissenting), 909 (REHNQUIST, J., dissenting).

suggested by its use of the now familiar "code" abbreviation for the petitioner's foul language.

The judgment of the Court of Appeals was eminently correct. It should be affirmed.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

We held in *Healy* v. *James,* 408 U. S. 169, 180 (1972), that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." But that general proposition does not decide the concrete case now before us. *Healy* held that the public university there involved had not afforded adequate notice and hearing of the action it proposed to take with respect to the students involved. Here the Court of Appeals found, and that finding is not questioned in this Court's opinion, that "the issue arises in the context of a student dismissal, after service of written charges and after a full and fair hearing, for violation of a University rule of conduct." 464 F. 2d 136, 138.

Both because I do not believe proper exercise of our jurisdiction warrants summary reversal in a case dependent in part on assessment of the record and not squarely governed by one of our decisions, and because I have serious reservations about the result reached by the Court, I dissent from the summary disposition of this case.

I

Petitioner Papish has for many years been a graduate student at the University of Missouri. Judge Stephenson, writing for the Court of Appeals in this case, summarized her record in these words:

> "Miss Papish's academic record reveals that she was in no rush to complete the requirements for her grad-

> uate degree in Journalism. She possesses a 1958 academic degree from the University of Connecticut; she was admitted to graduate school at the University of Missouri in September in 1963; and although she attended school through the fall, winter, and summer semesters, she was, after 6 years of work, making little, if any, significant progress toward the achievement of her stated academic objective. At the time of her dismissal, Miss Papish was enrolled in a one-hour course entitled 'Research Journalism' and in a three-hour course entitled 'Ceramics 4.' In the semester immediately preceding her dismissal, she was enrolled only in 'Ceramics 3.'" 464 F. 2d, at 138 n. 2.

Whatever may have been her lack of ability or motivation in the academic area, petitioner had been active on other fronts. In the words of the Court of Appeals:

> "3. On November 1, 1967, the Faculty Committee on Student Conduct, after notice of charges and a hearing, placed Miss Papish on disciplinary probation for the remainder of her student status at the University. The basis for her probation was her violation of the general standard of student conduct . . . . This action arose out of events which took place on October 14, 1967 at a time when the University was hosting high school seniors and their parents for the purpose of acquainting them with its educational programs and other aspects of campus life. She specifically was charged, *inter alia,* with openly distributing, on University grounds, without the permission of appropriate University personnel, two non-University publications of the Students for Democratic Society (SDS). It was alleged in the notice of charges, and apparently established at

> the ensuing hearing, that one of these publications, the *New Left Notes,* contained 'pornographic, indecent and obscene words, "f---," "bull s---," and "sh--s." ' The notice of charges also recites that the other publication, *The CIA at College: Into Twilight and Back,* contained 'a pornographic and indecent picture depicting two rats apparently fornicating on its cover . . . .'
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> "4. Some two weeks prior to the incident causing her dismissal, Miss Papish was placed on academic probation because of prolonged submarginal academic progress. It was a condition of this probation that she pursue satisfactory work on her thesis, and that such work be evidenced by the completion and presentation of several completed chapters to her thesis advisor by the end of the semester. By letter dated January 31, 1969, Miss Papish was notified that her failure to comply with this special condition within the time specified would result in the termination of her candidacy for a graduate degree." *Id.,* at 138–139, nn. 3, 4.

It was in the light of this background that respondents finally expelled petitioner for the incident described in the Court's opinion. The Court fails to note, however, two findings made by the District Court with respect to the circumstances under which petitioner hawked her newspaper near the memorial tower of the University:

> "The Memorial Tower is the central unit of integrated structures dedicated to the memory of those students who died in the Armed Services in World Wars I and II. Other adjacent units include the Student Union and a Non-Sectarian chapel for prayer and meditation. Through the Memorial Arch pass parents of students, guests of the University, stu-

dents, including many persons under 18 years of age and high school students." 331 F. Supp. 1321, 1325 n. 4.

"The plaintiff knowingly and intentionally participated in distributing the publication to provoke a confrontation with the authorities by pandering the publication with crude, puerile, vulgar obscenities." *Id.*, at 1325.

II

I continue to adhere to the dissenting views expressed in *Rosenfeld* v. *New Jersey*, 408 U. S. 901 (1972), that the public use of the word "M-----f-----" is "lewd and obscene" as those terms were used by the Court in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). There the Court said:

"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, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. 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." *Id.*, at 571–572.

But even were I convinced of the correctness of the Court's disposition of *Rosenfeld*, I would not think it should control the outcome of this case. It simply does not follow under any of our decisions or from the language of the First Amendment itself that because peti-

tioner could not be criminally prosecuted by the Missouri state courts for the conduct in question, she may not therefore be expelled from the University of Missouri for the same conduct. A state university is an establishment for the purpose of educating the State's young people, supported by the tax revenues of the State's citizens. The notion that the officials lawfully charged with the governance of the university have so little control over the environment for which they are responsible that they may not prevent the public distribution of a newspaper on campus which contained the language described in the Court's opinion is quite unacceptable to me, and I would suspect would have been equally unacceptable to the Framers of the First Amendment. This is indeed a case where the observation of a unanimous Court in *Chaplinsky* 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" applies with compelling force.

III

The Court cautions that "disenchantment with Miss Papish's performance, understandable as it may have been, is no justification for denial of constitutional rights." Quite so. But a wooden insistence on equating, for constitutional purposes, the authority of the State to criminally punish with its authority to exercise even a modicum of control over the university which it operates, serves neither the Constitution nor public education well. There is reason to think that the "disenchantment" of which the Court speaks may, after this decision, become widespread among taxpayers and legislators. The system of tax-supported public universities which has grown up

in this country is one of its truly great accomplishments; if they are to continue to grow and thrive to serve an expanding population, they must have something more than the grudging support of taxpayers and legislators. But one can scarcely blame the latter if, told by the Court that their only function is to supply tax money for the operation of the university, the "disenchantment" may reach such a point that they doubt the game is worth the candle.

MARSTON ET AL. *v.* LEWIS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. 72–899. Decided March 19, 1973

Arizona's 50-day durational voter residency and registration requirements as applied to other than presidential elections *held* constitutionally permissible, in light of Arizona's special problems arising from the State's legitimate needs to correct registrations accomplished by volunteer personnel and to interrupt registration work to take care of activities occasioned by its fall primaries.

Reversed.

PER CURIAM.

Fourteen county recorders and other public officials of Arizona appeal from a judgment of a three-judge district court holding the State's 50-day durational voter residency requirement and its 50-day voter registration requirement unconstitutional under the decision in *Dunn* v. *Blumstein,* 405 U. S. 330 (1972).[1] A permanent injunction was entered against enforcement of these or any other greater-than-30-day residency and registration requirements in any election held after November 1972. Appellants do not seek review of the District Court's judgment insofar as it enjoins application of the 50-day requirements in presidential elections. See Voting Rights Act Amendments of 1970, 84 Stat. 316, 42 U. S. C. § 1973aa–1.[2] Appellants assert, however, that the re-

[1] The requirements appear, respectively, at Ariz. Rev. Stat. Ann. §§ 16–101 (3) and 16–107. These provisions were enacted after our decision in *Dunn* v. *Blumstein.*

Appellees are a deputy registrar in Maricopa County and a resident of Maricopa County.

[2] Section 1973aa–1 withstood constitutional attack in *Oregon* v. *Mitchell,* 400 U. S. 112 (1970).

quirements, as applied to special, primary, or general elections involving state and local officials, are supported by sufficiently strong local interests to pass constitutional muster. We agree and reverse.

In *Dunn* v. *Blumstein,* we struck down Tennessee's durational voter residency requirement of one year in the State and three months in the county. We recognized that a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot. States have valid and sufficient interests in providing for *some* period of time—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible frauds. A year, or even three months, was found too long, particularly in the context of "the judgment of the Tennessee lawmakers," who had set "the cutoff point for registration [at] 30 days before an election . . . ." 405 U. S., at 349. The Arizona scheme, however, stands in a different light. The durational residency requirement is only 50 days, not a year or even three months. Moreover, unlike Tennessee's, the Arizona requirement is tied to the closing of the State's registration process at 50 days prior to elections and reflects a state legislative judgment that the period is necessary to achieve the State's legitimate goals.

We accept that judgment, particularly in light of the realities of Arizona's registration and voting procedures. Those procedures, apparently first adopted during the Populist Era, rely on a "massive" volunteer deputy registrar system. See Ariz. Rev. Stat. Ann. § 16–141. According to appellants' testimony, although these volunteers make registration convenient for voters, they average 1.13 mistakes per voter registration and the county recorder must correct those mistakes before certifying to

the "completeness and correctness" of each precinct register. Ariz. Rev. Stat. Ann. § 16–155. The District Court itself noted that there were estimates that "in Maricopa County alone, some 4,400 registered voters might be denied the right to vote if the county voter list is in error by only one percent."

An additional complicating factor in Arizona registration procedures is the State's fall primary system. The uncontradicted testimony demonstrates that in the weeks preceding the deadline for registration in general elections—a period marked by a curve toward the "peak" in terms of the registration affidavits received—county recorders and their staffs are unable to process the incoming affidavits because of their work in the fall primaries. It is only after the primaries are over that the officials can return to the accumulated backlog of registration affidavits and undertake to process them in accordance with applicable statutory requirements.

On the basis of the evidence before the District Court, it is clear that the State has demonstrated that the 50-day voter registration cutoff (for election of state and local officials) is necessary to permit preparation of accurate voter lists. We said in *Dunn* v. *Blumstein* that "[f]ixing a constitutionally acceptable period is surely a matter of degree. It is sufficient to note here that 30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud—and a year, or three months, too much." 405 U. S., at 348. In the present case, we are confronted with a recent and amply justifiable legislative judgment that 50 days rather than 30 is necessary to promote the State's important interest in accurate voter lists. The Constitution is not so rigid that that determination and others like it may not stand.

The judgment of the District Court, insofar as it has been appealed from, is

Reversed.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN concur, dissenting.

In *Dunn* v. *Blumstein*, 405 U. S. 330, 348 (1972), just last Term, we held that a 30-day residency requirement provided the State with "an ample period of time . . . to complete whatever administrative tasks are necessary to prevent fraud" in the process of voter registration. We made that judgment in light of the facts that Congress had made a similar judgment as to presidential and vice-presidential elections, 42 U. S. C. § 1973aa–1 (a)(6), that roughly half the States had periods of similar length, 1972–1973 Book of the States 36–37 (as of time of decision), and that the evidence needed to determine residency was relatively easy to find. The District Court, after hearing evidence about the administrative burdens in Arizona, found that appellants needed no longer than 30 days to complete the same tasks. I find nothing in the record that leads me to conclude that this judgment was erroneous.

The Court relies on two factors to justify the longer period. First, Arizona's volunteer registrar system is said to result in so many errors that their correction requires 45 days. But these errors occur only because the deputy registrars are inadequately trained and the central supervision of the data-control process is not well organized. The District Court found that "*under present conditions*, at least forty-five days are required to make a voter list as free from error as possible" (emphasis added). This justified its refusal to enjoin the operation of the statute as to the election held in November 1972. But appellant Marston's testimony was directed almost exclusively to what can only be considered readily

solvable problems caused by untrained personnel in a relatively small office. Appellants presented no evidence that improvements in the administration of the deputy registrar system, including earlier recruitment and better training of deputy registrars and of data-processing personnel in the central offices, could not be adopted before the next election. If, as we held in *Dunn,* the State "cannot choose means which unnecessarily burden or restrict constitutionally protected activity," and if the State must carry "a heavy burden of justification," 405 U. S., at 343, surely it must show that it cannot, by better administration, eliminate the errors that justified a 50-day period in 1972. The District Court, in my view, correctly concluded that "the State has presented no facts demonstrating a compelling interest" in its 50-day requirement.

The second "complicating factor" is said to be the burden on county recorders caused by the need to interrupt the processing of affidavits filed by new registrants in order for them to work on the fall primaries. Here too the appellants showed no need to use small staffs. It is by no means obvious that the recorders' staffs could not be increased temporarily to deal with this "complication." Certainly that is a method of processing affidavits which less seriously burdens the right to vote. "And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference." *Dunn* v. *Blumstein, supra,* at 343.

In addition, appellants have established a system to register voters for presidential and vice-presidential elections, in compliance with the requirement of 42 U. S. C. § 1973aa–1 (d), that no State may impose a residency requirement of greater than 30 days for such elections. In Arizona, those voters who qualify for presidential and vice-presidential elections, but not for state elections,

are given absentee ballots. This eliminates the necessity to prepare a separate list of registration lists. Any administrative problems caused by the inability to correct misspellings, to alphabetize the lists, and to determine in which precinct the voter lived—the only difficulties which appellants mentioned in their testimony*—could be eliminated by similar treatment of late registrants for all elections. And if these voters did not have to appear at the polls, the fears of deterring other voters by delays at the polling places would disappear.

Even if the evidence below established that the administrative burdens of a 30-day limitation on general registration could not possibly be removed, that would not itself justify the same limitation on registration of newly arrived voters. General registration requirements affect every voter in the State. Durational residency requirements affect a much smaller class of potential voters, and the burdens of registering the members of that class will therefore be significantly smaller. Further, general registration requirements, with which any otherwise eligible voter may comply if he acts with sufficient diligence, might be thought to impair less substan-

*Appellant Marston testified that there would be difficulty in locating the proper precincts and school districts for each registrant. Again, this pertains exclusively to the election in 1972, because of several nonrecurring facts: the State had recently "cleansed" its voting lists, dropping everyone from the rolls and requiring reregistration of every voter; the State had just been redistricted; and a statute rescheduling school board elections caused transitional problems. Difficulties in determining the proper precinct for each voter could be eliminated by a simple reprograming of the computer used by the registrars. Now the computer simply indicates an error if the address and the precinct entered on the registration form by the registrars are inconsistent; it would not be difficult for a programer to have the computer itself find the proper precinct. And, as appellant Marston testified, his task would not be difficult at all if he used an "on-line" system of processing the cards through the computer rather than the present "batch" system.

tially the right to vote than do durational residency requirements, which bar a newly arrived voter from any participation in the elections. Serious administrative problems might justify the less severe impairment, but a total bar to participation can be justified only by administrative problems of the highest order.

In short, the evidence produced below abundantly supports the District Court's conclusion that appellants had failed to carry the heavy burden of justifying the 50-day limitation period in light of reasonably available and less restrictive alternatives. If this Court has drawn a line beyond which reliance on administrative inconvenience is extremely questionable, as we did in *Dunn,* we can avoid an unprincipled numbers game only if we insist that any deviations from the line we have drawn, after mature consideration, be justified by far more substantial evidence than that produced in the District Court by appellants. I would therefore affirm the judgment of the District Court.

BURNS ET AL. *v.* FORTSON, SECRETARY OF STATE OF GEORGIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 72–901. Decided March 19, 1973

Closure of voter registration 50 days before November general elections for other than presidential elections, although approaching the outer constitutional limits, cf. *Dunn* v. *Blumstein,* 405 U. S. 330, is permissible to promote the important interest of Georgia in accurate voter lists. *Marston* v. *Lewis, ante,* p. 679.

Affirmed.

PER CURIAM.

By statute, Georgia registrars are required to close their voter registration books 50 days prior to November general elections, except for those persons who seek to register to vote for President or Vice President. Ga. Code Ann. §§ 34–611 and 34–602.* The District Court upheld the registration cutoff against appellants' constitutional attack based upon this Court's decision in *Dunn* v. *Blumstein,* 405 U. S. 330 (1972). This appeal followed.

The State offered extensive evidence to establish "the need for a 50-day registration cut-off point, given the vagaries and numerous requirements of the Georgia election laws." Plaintiffs introduced no evidence. On the basis of the record before it, the District Court concluded that the State had demonstrated "that the 50-day period is necessary to promote . . . the orderly, accurate, and efficient administration of state and local elections, free

*Section 34–611 was enacted in 1964. At present, Georgia has no independent durational residency requirement. The State's statutory requirement of one year in the State and six months in the county (see Ga. Code Ann. § 34–602) was held unconstitutional in *Abbott* v. *Carter* (No. 15689, ND Ga. 1972).

from fraud." (Footnote omitted.) Although the 50-day registration period approaches the outer constitutional limits in this area, we affirm the judgment of the District Court. What was said today in *Marston* v. *Lewis, ante,* p. 679, at 681, is applicable here:

> "In the present case, we are confronted with a recent and amply justifiable legislative judgment that 50 days rather than 30 is necessary to promote the State's important interest in accurate voter lists. The Constitution is not so rigid that that determination and others like it may not stand."

The judgment of the District Court is

Affirmed.

MR. JUSTICE BLACKMUN, concurring in the result.

I concur only in the result, for I hesitate to join what, for me, is the Court's unnecessary observation that "the 50-day registration period approaches the outer constitutional limits in this area." I also concurred in the result in *Dunn* v. *Blumstein,* 405 U. S. 330 (1972), and said,

> "It is, of course, a matter of line drawing, as the Court concedes, *ante,* at 348. But if 30 days pass constitutional muster, what of 35 or 45 or 75? The resolution of these longer measures, less than those today struck down, the Court leaves, I suspect, to the future." *Id.,* at 363.

I am not prepared to intimate at this point that a period of time in excess of 50 days cannot be sustained, no matter how supportive the record may be. In *Blumstein,* the Court struck down Tennessee's 90-day county durational residency requirement in part, I suppose, because it exceeded the State's 30-day registration period. Had the latter been 60 days, rather than 30, I suspect the Court would have indicated approval of a corresponding 60-day

durational residency requirement. See 405 U. S., at 345–349. I feel that each case in this area should be decided on its own record unrestricted by an arbitrary number-of-days figure.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN concur, dissenting.

For the same reasons that I gave in *Marston* v. *Lewis, ante,* p. 682, I dissent from the affirmance of the judgment of the District Court. Unlike Arizona, Georgia does not use volunteer deputy registrars, a system that the Court in *Marston* thought created special problems warranting special treatment. Indeed, the State's expert witness in this case testified that there was something dangerous about using deputy registrars. Nor does Georgia have as late a primary as Arizona. As in *Marston,* appellees here did not show that it was impossible to increase the size of the registrars' staffs or the efficiency of their operations. Moreover, there was evidence that final lists of registered voters are not prepared until 14 days before the election, which indicates that there is no serious administrative impediment to keeping registration open for a relatively long period.

The Court also relies on an ingenious bootstrap argument that I cannot let pass without comment. The statutes in question in *Marston* were enacted last year after our decision in *Dunn* v. *Blumstein,* 405 U. S. 330 (1972). The Arizona Legislature therefore knew that its limitations on registration could only be justified by the administrative burdens faced by registrars. It knew that insuring the purity of the ballot box and guaranteeing the knowledgeability of voters were not goals that could be permissibly served by time limitations on registration. *Id.,* at 353–357. The Court in *Marston* thus correctly noted that the Arizona statutes reflected a recent judg-

ment that 50 days were necessary to avoid administrative problems.

In this case, the Court quotes that statement from *Marston*. The difficulty is that the Georgia statutes here were adopted nearly a decade ago. The legislative judgment is hardly a recent one. Nor was it made knowing that only administrative difficulties were a justification for durational residency requirements. Even if we would be inclined to defer to a recent and informed legislative determination of necessity, when there is no reason to believe that the legislature made such a determination, deference in that regard is uncalled for.

Finally, I believe it important to indicate my view that the decisions today provide no basis for making it more difficult to register by making shorter any existing registration periods, in the absence of compelling evidence of extraordinary new circumstances. If 30 days were all that some state officials needed yesterday, that is all they need today.

LaVALLEE, CORRECTIONAL SUPERINTENDENT *v.* DELLE ROSE

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

No. 72–905. Decided March 19, 1973

Respondent's conviction for murder was based on his two confessions that, in subsequent New York court proceedings, were found to have been voluntary. In federal habeas corpus proceedings, the District Court, feeling unable to accord the state court the presumption of correctness because the state trial judge did not articulate to what extent he credited or rejected evidence and respondent's testimony, held its own hearing, found both confessions involuntary, and ordered respondent discharged from custody unless he was retried without the confessions. The Court of Appeals affirmed on the ground that the state court's factual determination on the voluntariness issue did not meet the 28 U. S. C. § 2254 (d) (1) requirement that it be accorded a presumption of correctness unless it appeared that the merits of the factual dispute were not resolved in the state court hearing. *Held:* The state trial judge's determination, on the totality of the circumstances, evidences that he applied correct voluntariness standards and, since the District Court could have been reasonably certain that he would have granted relief if he had believed respondent's testimony, the courts below erroneously concluded that the opinion of the trial court did not meet the requirements of § 2254 (d) (1).

Certiorari granted; 468 F. 2d 1288, reversed and remanded.

PER CURIAM.

The State of New York petitions for certiorari to review the adverse determination of the Court of Appeals in this federal habeas corpus proceeding directing the release* of respondent Pasquale Delle Rose. Delle Rose was serving a life sentence for the premeditated murder of his wife in 1963. At his trial, occurring before *Jackson*

*Respondent was ordered released unless retried within 60 days without the use of his confessions.

v. *Denno,* 378 U. S. 368 (1964), respondent was convicted by a jury which chose to credit his two confessions over his protestation of accidental involvement, and which presumably found them to be voluntary. On appeal, the New York appellate court directed the trial court to hold a special hearing to determine the voluntariness of his confessions in accordance with *People* v. *Huntley,* 15 N. Y. 2d 72, 204 N. E. 2d 179 (1965), the State's procedural response to this Court's decision in *Jackson* v. *Denno, supra.*

On remand to the trial court, the State rested on the trial record, and the respondent, in addition to relying on the record, testified in his own behalf. After extensively summarizing the trial evidence and respondent's explanations of certain of his confession statements, the court concluded:

> "On all evidence, both at the trial and at the hearing, and after considering the totality of the circumstances, including the omission to warn defendant of his right to counsel and his right against self-incrimination, I find and decide that the respective confessions to the police and district attorney were, in all respects, voluntary and legally admissible in evidence at the trial. . . ."

On this basis, respondent's conviction was affirmed by the New York appellate courts, 33 App. Div. 2d 657, 27 N. Y. 2d 882, 265 N. E. 2d 770 (1970), and this Court denied certiorari, 402 U. S. 913 (1971).

Respondent then petitioned the United States District Court for a writ of habeas corpus alleging his confessions were involuntary. That court held that since the state trial judge had "neglected to say how far he credited—and to what extent, if any, he discounted or rejected" respondent's testimony and the evidence before him, there was no "adequate" determination within the mean-

ing of 28 U. S. C. § 2254 (d), which would have entitled the state court's findings to a presumption of correctness and placed on respondent the burden of establishing by convincing evidence that the state court's conclusion was erroneous. The District Court therefore held its own hearing, found both confessions involuntary, and ordered respondent discharged from custody unless retried. A divided panel of the Second Circuit affirmed.

The Court of Appeals held that the state court's opinion did not meet the requisites of 28 U. S. C. § 2254 (d) which provides in relevant part:

> "[A] determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear . . . —
>
> "(1) that the merits of the factual dispute were not resolved in the State court hearing . . . ."

Although it is true that the state trial court did not specifically articulate its credibility findings, it can scarcely be doubted from its written opinion that respondent's factual contentions were resolved against him.

Respondent's wife was killed by a blast from a sawed-off shotgun device which had been set to shoot through the back of their front car seat. His confessions indicated that because of extreme jealousy, he rigged the device to go off when his wife pulled the car seat forward. For some reason it failed initially; so when he was seated with her in the car, he operated it by hand. At trial, he claimed his confessions were false and testified that he was seated in the car with his wife and he noticed a lump on the floor behind the front seat. When he reached down to investigate, it shot her.

At trial, in support of his theory of relentless questioning and police coercion, respondent presented evidence to the effect that, at the time of his confessions,

> "he had had a back injury, and therefore was in pain; that he was taken to the garage and asked to put his hand in the back seat where the blood of his wife was; that the police threatened to beat him up if he did not admit he killed her; that he was compelled to say by the police that he had killed his wife but that what he meant was that he had done so inadvertently, by placing his hand over the lump; and that, after telling the officer he wanted to see his wife, he did not remember what happened thereafter until 9:00 o'clock in the morning."

In addition, at his *"Huntley"* hearing, he testified that the officers told him they would beat him up if he did not talk to them; that one of the detectives told him to put his hands in the front seat hole where his wife's blood was and when he did not, the detective took his hands and put them there himself; and that he did not remember anything past the time when he asked to see his wife at the morgue, including the giving of the second statement. He also attempted to explain the reasons for his giving such detailed and factually accurate confession statements.

The trial court's summary of the State's evidence tended to show that although respondent had been taken to the station house about 5 p. m. on the day of the murder, he was not even a suspect as late as 9 p. m., and he was only giving information. He was taken to the morgue at his own request, a factor which triggered the first confession. Further, he had been allowed to sit with his family, was given coffee by his mother-in-law and police, and he admitted that his treatment by the police was good during the time of the questioning.

There was also testimony that he had been offered food, but as he admitted, he was not hungry. Again at the "*Huntley*" hearing, he acknowledged that the police had treated him "nice." It was "on this evidence" that the state trial court made its finding and conclusion that the confessions were voluntary.

The Court of Appeals stated that it could not tell whether the state courts "credited Delle Rose's story of the circumstances surrounding his confessions but still held these to have been voluntary, a conclusion to which we could not agree, or based their holding of voluntariness on a partial or complete rejection of his testimony, in which event the district judge would have been bound to deny the petition." 468 F. 2d 1288, 1290. In *Townsend* v. *Sain,* 372 U. S. 293, 314–315 (1963), the precursor of 28 U. S. C. § 2254 (d), this Court set forth general standards governing the holding of hearings on federal habeas petitions, stating:

> "[T]he possibility of legal error may be eliminated in many situations if the fact finder has articulated the constitutional standards which he has applied. Furthermore, the coequal responsibilities of state and federal judges in the administration of federal constitutional law are such that we think the district judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence . . . that there is reason to suspect that an incorrect standard was in fact applied. Thus, if third-degree methods of obtaining a confession are alleged and the state court refused to exclude the confession from evidence, the district judge may assume that the state trier found the facts against the petitioner, the law being, of course, that third-degree methods necessarily produce a coerced confession."

Here, not only is there no evidence that the state trier utilized the wrong standard, but there is every indication he applied the correct standards. His determination was made on the "totality of the circumstances" and, in this pre-*Escobedo* v. *Illinois,* 378 U. S. 478 (1964), pre-*Miranda* v. *Arizona,* 384 U. S. 436 (1966), situation, the court also considered the facts that respondent was not warned of his rights to the assistance of counsel and against self-incrimination before confessing. And we quite agree with the District Court's statement that it could not go along with the state trial court's conclusion of voluntariness if it "were to find the facts to have been as petitioner's [Delle Rose's] testimony portrayed them." See, *e. g., Spano* v. *New York,* 360 U. S. 315 (1959); *Watts* v. *Indiana,* 338 U. S. 49 (1949). Under these circumstances, we think the District Court could have been reasonably certain that the state court would have granted relief if it had believed respondent's allegations. See *Townsend* v. *Sain, supra,* at 315.

We, therefore, hold that the opinion of the state trial court met the requirements of 28 U. S. C. § 2254 (d)(1), and that the courts below incorrectly determined it did not. The burden was thus on respondent to establish in the District Court by convincing evidence that the state court's determination was erroneous. The motion of the respondent for leave to proceed *in forma pauperis* and the petition for certiorari are granted. The judgment of the Court of Appeals is reversed, and this cause is remanded for further proceedings consistent with this opinion.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART concur, dissenting.

Although I am in complete disagreement with this Court's *per curiam* decision herein, I see no reason to set

this case for oral argument in light of the majority's firmly held views.

I cannot accept the Court's holding that both the District Court and the Court of Appeals improperly concluded that the voluntariness of respondent's confessions was not adequately resolved by the state trial court, thereby relieving respondent of the obligation to establish "by convincing evidence that the factual determination by the State court was erroneous," 28 U. S. C. § 2254 (d). The Court does not deny that the state trial court judge, after summarizing the record evidence and respondent's testimony on the question of voluntariness, utterly failed to explain the basis for his conclusion that "considering the totality of circumstances . . . the respective confessions to the police and district attorney were, in all respects, voluntary and legally admissible in evidence at the trial . . . ." Despite this absence of any reasoned explanation for the state court's action, the Court now assures us that "it can scarcely be doubted from its written opinion that respondent's factual contentions were resolved against him." *Ante,* at 692. I could not disagree more, and therefore I must respectfully dissent.

Foremost, the Court's certainty as to the basis for the state court's action rests upon the fact that it is clear the state court "applied" the correct legal standard in evaluating the voluntariness of respondent's confession. Without question, the state court in this case ritualistically recited the standard of "totality of the circumstances" which governs the determination of voluntariness with respect to these 1963 confessions. See, *e. g., Clewis* v. *Texas,* 386 U. S. 707, 708 (1967). But this recitation in itself provided the courts below with no guarantee that the state court had not erroneously applied this standard to the facts of this case, perhaps accepting respondent's version of the circumstances sur-

rounding the confession, rather than rejecting respondent's version as incredible. Thus, the able District Judge noted that "[t]his court cannot be 'reasonably certain' what facts of possibly coercive or stressful impact the trial judge found from the disputed testimony" introduced before him. 342 F. Supp. 567, 570.

The Court, however, places heavy reliance upon our prior statement in *Townsend* v. *Sain,* 372 U. S. 293, 314–315 (1963), the source of the test set forth in § 2254 (d) (1), that "the district judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence . . . that there is reason to suspect that an incorrect standard was in fact applied. Thus, if third-degree methods of obtaining a confession are alleged and the state court refused to exclude the confession from evidence, the district judge may assume that the state trier of fact found the facts against the petitioner, the law being, of course, that third-degree methods necessarily produce a coerced confession." [1] But this is hardly the limit of the inquiry—contemplated by *Townsend* and § 2254 (d)—

[1] Insofar as the Court relies upon this language from *Townsend* in interpreting § 2254 (d) (1), the Court effectively ignores the discretionary character of the decision lodged with the district judge who is faced with a question as to the adequacy of unexplained state court findings. *Townsend* indicates that "the district judge *may,* in the ordinary case in which there has been no articulation, *properly assume*" that the state court reached a constitutionally permissible conclusion. (Emphasis added.) Today, however, the Court effectively indicates that the district court often *must assume* in such cases that the proper standard was applied. Such a rigid standard seems to me wholly improper and unworkable where the question whether the defendant's testimony was simply rejected and the proper standard applied is essentially one of judgment dependent upon the facts of each particular case. These matters are properly left largely to the discretion of the district judge. And here, certainly, it cannot be said such discretion was abused.

into whether a state court has adequately resolved the factual issues presented by the constitutional claim.

> "[E]ven if it is clear that the state trier of fact utilized the proper standard, a hearing is sometimes required if his decision presents a situation in which the 'so-called facts and their constitutional significance [are] . . . so blended that they cannot be severed in consideration.' . . . Unless the district judge can be reasonably certain that the state trier would have granted relief if he had believed petitioner's allegations, he cannot be sure that the state trier in denying relief disbelieved these allegations. *If any combination of the facts alleged would prove a violation of constitutional rights and the issue of law on those facts presents a difficult or novel problem for decision, any hypothesis as to the relevant factual determinations of the state trier involves the purest speculation.* The federal court cannot exclude the possibility that the trial judge believed facts which showed a deprivation of constitutional rights and yet (erroneously) concluded that relief should be denied. Under these circumstances it is impossible for the federal court to reconstruct the facts, and a hearing must be held." *Townsend* v. *Sain, supra,* at 315–316 (emphasis added).

The precise problem encountered by the courts below in evaluating the state court's conclusion—a problem which the Court now effectively ignores—is that the issue of voluntariness in this case presents just the sort of "difficult" mixed question of law and fact which *Townsend* recognized would make federal court speculation concerning the basis for unreasoned state court action wholly inappropriate. To be sure, where, for instance, a defendant alleges simply that a confession was extracted from him by means of a physical beating administered by the police,

it is obvious that if the defendant's story is believed, the confession would be involuntary. Thus, even if a state court holds the defendant's confession to be voluntary without articulating any reasons, a federal district court may safely assume that in such an uncomplicated situation the state court's determination resulted from a rejection of the defendant's factual allegations. But it can hardly be argued that this case involves allegations of the type of straightforward police "third-degree methods of obtaining a confession" which the *Townsend* Court suggested would entail little possibility of misapplication of the relevant legal standard so that a district court might, with reasonable confidence, assume that an unexplained state court finding of voluntariness rests upon a rejection of the defendant's version of the interrogation, not upon constitutional error. For a review of the state court's opinion following the *"Huntley"* hearing reveals that here the state court was confronted, not with an allegation of a single coercive incident which, if believed, would clearly have resulted in a finding of involuntariness, but rather with allegations of a series of coercive police actions applied to a particularly susceptible suspect.

Respondent claimed that he was held and interrogated, apparently without rest, from 5 p. m. on the day of the murder until sometime early the next morning. Throughout this time, respondent purportedly was suffering pain due to a serious back ailment and was undoubtedly handicapped by his lack of facility with the English language. Meanwhile, without any warnings as to his constitutional rights, he was questioned repeatedly by police officers, questioning which allegedly included physical threats if he refused to confess. During this process, respondent was compelled by the police to reenact the alleged murder of his wife complete with his hand being forced by a police officer into the torn seat

back which was wet with his wife's blood. Then the police offered to take respondent on what the District Court properly described as a "macabre" visit to the morgue to see his dead wife's body. There the police obtained the first confession. Subsequently, further questioning by an assistant district attorney produced a second confession at about 6 a. m. A defense psychiatrist testified at trial that respondent was, in his opinion, so exhausted from his long ordeal at the hands of the police that "he would say yes if you asked him if the moon were made of green cheese."

It is possible, of course, that the state court rejected all of respondent's testimony as incredible and therefore properly held the confessions voluntary. On the other hand, if the state court had believed all of respondent's contentions, it would undoubtedly have found the confessions involuntary. There remains, however, the third possibility that the state court believed some of respondent's contentions and rejected others. It is this last possibility that makes for substantial uncertainty in a factually complex case such as this as to whether the state court correctly applied the abstract legal standard and did not, instead, commit constitutional error. Due to the unrevealing nature of the state court's decision, it is impossible to say that that court may not have credited a sufficient portion of respondent's story to establish, under the controlling standard, the involuntariness of his confessions and nevertheless have reached an erroneous conclusion of voluntariness because the question may have been a close one on the facts that it accepted. It is this inherent uncertainty as to what the state court may have believed or disbelieved that justified the action of the District Court and the Court of Appeals in this case. To conclude otherwise, I believe, ignores the *full* import of this Court's reasoning in *Townsend* v. *Sain, supra,* concerning those limited situations in

which a federal district court on habeas corpus may reasonably assume that an unexplained state court determination rests merely upon a rejection of testimony rather than upon constitutional error.

Consequently, in my view, the courts below properly held the State not entitled in this case to the presumption of correctness and the special burden of proof set forth in § 2254 (d).[2] As for the merits, I see no basis for this Court to set aside the District Court's finding of involuntariness, a finding sustained by the Court of Appeals as not "clearly erroneous" under Fed. Rule Civ. Proc. 52 (a). Cf. *Neil* v. *Biggers*, 409 U. S. 188, 201 (1972) (opinion of BRENNAN, J.).

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[2] The Court, of course, does not hold that the District Court erred in holding a *de novo* evidentiary hearing on the voluntariness of respondent's confession. That is a question distinct from the presumption of validity and the special burden of proof established by 28 U. S. C. § 2254 (d). Section 2254 (d) says nothing concerning when a district judge may hold an evidentiary hearing—as opposed to acting simply on the state court record—in considering a state prisoner's petition for federal habeas corpus. So far as I understand, the question whether such a hearing is appropriate on federal habeas corpus continues to be controlled exclusively by our decision in *Townsend* v. *Sain* even after the enactment of § 2254 (d). See Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1141 (1970). And, *Townsend* explicitly recognizes that, apart from the six specific instances described in that opinion as mandating an evidentiary hearing, "[i]n all other cases where the material facts are in dispute, the holding of . . . a hearing is in the discretion of the district judge. . . . In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim." 372 U. S., at 318.

TEXAS *v.* LOUISIANA

ON BILL OF COMPLAINT

No. 36, Orig. Argued December 11, 1972—
Decided March 20, 1973

The Special Master's Report, to the extent that it recommends that the relevant boundary between Texas and Louisiana be the geographic middle of Sabine Pass, Lake, and River (collectively Sabine) and not the west bank or the middle of the main channel and that all islands in the east half of the Sabine when Louisiana was admitted as a State in 1812, or thereafter formed, should be awarded to Louisiana, is adopted; decision on the Report with respect to islands in the west half of the Sabine existing in 1812 or thereafter formed, is deferred pending further proceedings, in which the United States is invited to participate, and which the Special Master is to conduct. Pp. 704–714.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post,* p. 714.

Samuel D. McDaniel argued the cause for plaintiff in support of the Report of the Special Master. On the brief were *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, and *Houghton Brownlee, Jr., J. Arthur Sandlin,* and *James H. Quick,* Assistant Attorneys General.

Oliver P. Stockwell, Special Assistant Attorney General of Louisiana, argued the cause for defendant on exceptions to the Report of the Special Master. With him on the brief were *William J. Guste, Jr.,* Attorney General, *John L. Madden,* Assistant Attorney General, and *Sam H. Jones, Jacob H. Morrison,* and *Emmett C. Sole,* Special Assistant Attorneys General.

MR. JUSTICE WHITE delivered the opinion of the Court.

Texas brought this original action against Louisiana to establish its rights to the jurisdiction and ownership of the western half of Sabine Pass, Sabine Lake, and Sabine River (collectively Sabine) from the mouth of the Sabine in the Gulf of Mexico to the thirty-second degree of north latitude, and to obtain a decree confirming the boundary of the two States as the geographic middle of the Sabine. After the motion to file was granted, 397 U. S. 931 (1970), Louisiana filed motions, answer, and counterclaim asserting that its boundary was on the west bank of the Sabine; and the case was referred to a Special Master, 398 U. S. 934 (1970).

The Report of the Special Master and the parties' exceptions are now before us. The Special Master's recommendations are that the geographic middle, not the west bank or the middle of the main channel, is the boundary between the two States; that all islands in the Sabine when Louisiana was admitted as a State in 1812 should be awarded to Louisiana subject to prescriptive claims, if any, by Texas to such islands; that all islands formed in the east half of the Sabine after 1812 belong to Louisiana, and those in the west half to Texas. The Special Master contemplates further proceedings to determine what islands were in the Sabine in 1812 and what prescriptive claims Texas may have to such islands. Louisiana's exceptions maintain that its boundary is not the geographic middle but the west bank of the Sabine, or alternatively, the main channel of the stream as it existed in 1812 west of the most westerly islands. Louisiana also claims all islands in the Sabine, whether existing in 1812 or thereafter formed. The exception filed by Texas asserts its right to all islands in the west half of

the river but proposes that the question of ownership be deferred pending the outcome of the proposed additional proceedings with respect to islands that may have existed as of 1812.

Oral argument was heard on the exceptions. We now approve and adopt the report of the Special Master except his conclusions with respect to ownership of islands in the western half of the Sabine.

I

In an Enabling Act approved February 20, 1811, 2 Stat. 641, Congress authorized the inhabitants of a portion of the Louisiana Territory ceded under the Treaty between the United States and France on April 30, 1803, 8 Stat. 200, to seek statehood. The Sabine boundary for what was to become the State of Louisiana was described as "beginning at the mouth of the river Sabine, thence by a line to be drawn along the middle of the said river, including all islands to the thirty-second degree of latitude . . . ." 2 Stat. 641. The 1812 Louisiana Constitution described the State's western boundary in substantially the same manner,[1] and the Act of Admission of April 8, 1812, 2 Stat. 701, employed language identical to that of the Enabling Act.

Preceding this period, and for some time thereafter, the western boundary of the United States was in doubt. Negotiations between the United States and Spain from 1803 until 1819 culminated in the Treaty of Amity, Settlement, and Limits, 1819, 8 Stat. 252. Under this treaty, the boundary "between the two countries" was in relevant part established along the west bank of the Sabine, 8 Stat. 254; the United States relinquished all of Texas

[1] The preamble to the 1812 Louisiana Constitution described the boundary as along the middle of the Sabine, "including all *its* islands." (Emphasis added.)

west of that boundary in exchange for Florida and the Spanish claim to the Oregon Territory; and it was provided that all islands in the Sabine belonged to the United States.

The United States renewed its efforts to acquire Texas, and when Mexico declared its independence from Spain in 1821, the United States began negotiating anew for the purchase of Texas. In the Treaty of Limits, 1828, 8 Stat. 372, the United States and Mexico recognized the boundary "between the two countries," *id.*, at 374, on the west bank of the Sabine as established in the 1819 treaty with Spain.[2] Texas declared its independence from Mexico in 1836, 1 Laws, Republic of Texas, 3–7, in Gammel's Laws of Texas 1822–1897, was recognized as an independent nation by the United States in 1837, Cong. Globe, 24th Cong., 2d Sess., 83, 270, and in 1838 the Sabine boundary agreed upon with Spain in 1819, and with Mexico in 1828, was adopted by the United States and Texas, 8 Stat. 511.[3] The Sabine boundary remained unchanged when Texas was admitted as a State in 1845, 9 Stat. 108.

In 1848 the legislatures of Texas and Louisiana passed competing resolutions, each requesting consent of Congress to establish its jurisdiction over the Sabine between the middle and the western bank.[4] Congress passed an

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[2] Neither the 1819 Treaty nor the 1828 Treaty mentions Louisiana or its western boundary.

[3] Texas' relevant boundary along the Sabine thus began "on the gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north along the western bank of that river, to the 32d degree of latitude . . . ." 8 Stat. 374.

[4] The Louisiana Resolution, passed on March 16, 1848, and presented to Congress, provided in pertinent part:

"Whereas the constitution and the laws of the State of Louisiana, nor those of any other State or territory, extend over the waters of the Sabine river from the middle of said stream to the western bank thereof; and that it is of importance to the citizens living contiguous

Act in 1848 giving its consent to Texas to extend its eastern boundary from the west bank of the Sabine to the middle, 9 Stat. 245, the Act stating:

"[T]his Congress consents that the legislature of

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thereto, and to the people in general, that the jurisdiction of some State should be extended over said territory, in order that crimes and offences committed thereupon should be redressed in a speedy and convenient manner:

"*Therefore be it resolved by the Senate and House of Representatives of the State of Louisiana in General Assembly convened,* 1st. That the constitution and the jurisdiction of the State of Louisiana shall be extended over part of the United States, embraced in the following limits (whenever the consent of the Congress of the United States can be procured thereto,) viz:

"Between the middle of the Sabine river and the western bank thereof, to begin at the mouth of said river where it empties into the Gulf of Mexico, and thence to continue along the said western bank to the place where it intersects the thirty-second degree of north latitude, it being the boundary line between the said State of Louisiana and the States of—.

"2d. *Be it further resolved, etc.,* That our Senators be instructed, and our Representatives in Congress requested, to procure the passage of a law on the part of the United States, consenting to the extension of the constitution, and the jurisdiction of the laws of the State of Louisiana, over the territory in said river." S. Misc. Doc. No. 135, 30th Cong., 1st Sess.

The Resolution adopted by Texas on March 18, 1848, stated in relevant part:

"*Resolution of the Legislature of Texas, in favor of the passage of an act, extending the jurisdiction of that State over the Sabine pass, the Sabine lake, and the Sabine river, April 17, 1848.*

"*Joint Resolution instructing our Senators and requesting our Representatives in Congress to use their efforts to have a law passed to extend the jurisdiction of Texas over one half of Sabine pass, lake, and river.*

"SEC. 1. *Be it resolved by the Legislature of the State of Texas,* That our Senators be instructed, and our Representatives in Congress be requested, to use their efforts to have a law passed by Congress, extending the jurisdiction of Texas over one half of the waters of Sabine lake, Sabine pass, and Sabine river, up to the 32° of north latitude." S. Misc. Doc. No. 123, 30th Cong., 1st Sess.

the State of Texas may extend her eastern boundary so as to include within her limits *one half* of Sabine Pass, *one half* of Sabine Lake, also *one half* of Sabine River, from its mouth as far north as the thirty-second degree of north latitude." (Emphasis added.)

II

We agree with the Special Master that the western boundary of Louisiana is the geographical middle of the Sabine River, not its western bank or the middle of its main channel. Congress had the authority to admit Louisiana to the Union and to establish the boundaries of that State. U. S. Const., Art. IV, § 3; *United States* v. *Louisiana,* 363 U. S. 1, 30, 60–62, 67 (1960); *Washington* v. *Oregon,* 211 U. S. 127, 134–135 (1908). Hence, our task is to ascertain congressional will when it admitted Louisiana into the Union on April 8, 1812, and established her relevant western boundary as "beginning at the mouth of the river Sabine; thence, by a line to be drawn along the middle of said river, including all islands to the thirty-second degree of latitude . . . ." 2 Stat. 702. The statute in this respect was identical with the Enabling Act of the prior year and differed hardly at all from the Preamble to the Louisiana Constitution of January 22, 1812. The Louisiana Legislature resolved in 1848 that the State's jurisdiction should be "extended" to the western half of the river, reciting that neither it nor any other State had authority over that portion of the Sabine. See n. 4, *supra.* Texas made a similar request, see n. 4, *supra,* Congress acceding to the latter and consenting that Texas could "extend her eastern boundary so as to include within her limits one half of Sabine Pass, one half of the Sabine Lake, also one half of Sabine River, from its mouth . . . [to] the thirty-second degree of north latitude." 9 Stat. 245. On the floor of the Senate, Mr. Butler, speaking for the Judiciary

Committee, stated that the boundaries of the United States extended to the western shore of the Sabine, but that the boundary of the State of Louisiana extended only to the middle, the result being that "the half of the river and lake, to the western shore, belonged to the United States, and was not included in the State of Louisiana . . . ." Cong. Globe, 30th Cong., 1st Sess., 882. Hence the bill, which gave "the half of the river beyond the boundary of the State of Louisiana to the State of Texas . . . ." *Ibid.* The bill passed, both Senators from Louisiana expressing "their acquiescence in the arrangement." *Ibid.*[5]

There is not a whisper in these statutes and instruments that the western boundary of Louisiana was on the west bank of the Sabine. Clearly, the boundary was

[5] The full report of the action by the Senate, Cong. Globe, 30th Cong., 1st Sess., 882, is as follows:

"Mr. Butler, from the Committee on the Judiciary, reported an act giving the consent of the Government of the United States to the State of Texas to extend the eastern boundary *so as to include within her limits one-half of the Sabine Pass, Sabine Lake, and Sabine River* as far north as the 32° of north latitude.

"Mr. B. asked for the immediate consideration of the bill, and briefly explained its character. The boundary of the United States, it was known, embraced the Sabine River and lake to its western shore. The boundary of the State of Louisiana extended to the middle of the Sabine; *so that the half of the river and lake, to the western shore, belonged to the United States, and was not included in the State of Louisiana;* therefore, the boundary of the State and that of the United States, was not identical. The bill before the Senate gives the half of the river beyond the boundary of the State of Louisiana to the State of Texas, for the purpose of enabling the latter to extend her criminal jurisdiction to the Louisiana boundary. There could be no objection to the bill, and he hoped it would now be passed.

"Mr. Johnson, of La., and Mr. Downs in behalf of the State of Louisiana, expressed their acquiescence in the arrangement.

"The bill was then read a third time and passed." (Emphasis added.)

along the "middle" of the Sabine, not on the west bank. Louisiana argues, without substance we think, that the boundary was extended to the west bank by the Treaties of 1819 and 1828 with Spain and Mexico respectively, when the United States established and confirmed its own western boundary on the west bank of the Sabine. As the Special Master correctly noted, however, the United States was acting in its sovereign capacity throughout these events, and there is no indication that the United States was in any way representing Louisiana or intending to relocate the State's western border. Nor was there reason to do so. On the contrary, admission of States beyond the Sabine was some day contemplated, and it was more consistent with the policy of the United States to grant only the east half of the river to Louisiana and reserve the west half for a future State or States. See *United States* v. *Holt State Bank,* 270 U. S. 49, 55 (1926); *Shively* v. *Bowlby,* 152 U. S. 1, 26–28, 57–58 (1894).

The Special Master was also correct in ruling that the United States intended the geographic middle of the river, not of the main channel, or thalweg, to be the western boundary of the State. The argument that the middle of the main channel was intended rests on the line of cases in this Court beginning with *Iowa* v. *Illinois,* 147 U. S. 1 (1893), which hold that in normal circumstances it should be assumed Congress intends the word "middle" to mean "middle of the main channel" in order that each State would have equal access to the main navigable channel.[6] The doctrine was borrowed from international

[6] That the "middle" of a river was to be construed as the thalweg in establishing the boundary between the States newly admitted to the Union was not authoritative doctrine prior to 1892 when *Iowa* v. *Illinois,* 147 U. S. 1, was decided and certainly not when Louisiana was admitted to the Union in 1812. The opinion in *Iowa* v. *Illinois, supra,* referred to five treatises on international law in support of its holding but noted the sharp conflict on the thalweg

law and has often been adhered to in this Court, although it is plain that within the United States two States bordering on a navigable river would have equal access to it for the purposes of navigation whether the common state boundary was in the geographic middle or along the thalweg. *Id.*, at 7–8, 10; *New Jersey* v. *Delaware*, 291 U. S. 361, 380–385 (1934).

In *Iowa* v. *Illinois*, however, the Court recognized that the issue was the intent of Congress, 147 U. S., at 11, and that it was merely announcing a rule of construction with respect to statutes and other boundary instruments. Thus, it was acknowledged that the rule might be "changed by statute or usage of so great a length of time as to have acquired the force of law." *Id.*, at 10.

When Congress sufficiently indicates that it intends a different boundary in a navigable river, the thalweg rule will not apply.[7] In *Washington* v. *Oregon*, 211 U. S. 127 (1908), the usual rule of the thalweg was recognized, but the Court said that "there is no fixed rule making that the boundary between States bordering on a river." *Id.*, at 134. The Act admitting Oregon was construed by the Court as placing the northern boundary of the State in the northern channel of the Columbia River and as intending it to remain there even

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rule between the Illinois and Iowa courts. In *Dunlieth & Dubuque Bridge Co.* v. *County of Dubuque*, 55 Iowa 558, 8 N. W. 443 (1881), though the phrase in question was "middle of the main channel," certainly a phrase that would lend itself to a thalweg construction, the court instead ruled that the phrase meant the middle of the river bed, while in *Buttenuth* v. *St. Louis Bridge Co.*, 123 Ill. 535, 17 N. E. 439 (1888), the court construed the phrase "middle of the Mississippi River" as being under the thalweg doctrine. After reviewing both cases, this Court chose the latter rule of construction.

[7] A sufficiently expressed intent of Congress also overrides the usually applicable "equal-footing" rule, *United States* v. *Louisiana*, 363 U. S. 1, 76–77 (1960).

though that channel ceased to be the main navigable channel in the Columbia.

It was therefore imperative for the Special Master to look to congressional intent; and if it was sufficiently clear that Congress intended the Louisiana boundary to be the geographic middle of the Sabine rather than the thalweg, it was his duty to establish the border along the former line. His conclusion was surely consistent with the controlling instruments—"along the middle of the . . . river." It is also apparent that the parties to the Act of Admission, the United States and Louisiana, both evidenced their understanding of the 1811 Enabling Act, the 1812 Constitution of Louisiana, and the 1812 Act of Admission, when the Legislature of Louisiana and the Congress of the United States expressly recited in 1848 that the western boundary of Louisiana included only the east half of the Sabine, not the west half. Whatever may be the normal significance of a later congressional indication of the meaning of an earlier statute, see, *e. g., Glidden Co.* v. *Zdanok,* 370 U. S. 530, 541 (1962); *Great Northern R. Co.* v. *United States,* 315 U. S. 262, 273, 277 (1942); *Brewster* v. *Gage,* 280 U. S. 327, 337 (1930); *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 309 (1911), here the question concerns the 1812 boundary between the United States and Louisiana, and in light of Art. IV, § 3, cl. 2, of the Constitution empowering Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," we think the Act of 1848 and the events connected with its passage had special significance as a construction by the United States and Louisiana of the earlier act admitting Louisiana to the Union. Cf. *Washington* v. *Oregon,* 211 U. S., at 135. At least, the indications are clear enough to us that we shall not apply the rule of the thalweg in this case.

The Special Master also concluded that even if he was in error in rejecting Louisiana's claim with respect to the original location of her western boundary, Texas must still prevail by reason of prescription and acquiescence. Because we are satisfied with our conclusion, already reached, with respect to the boundary location, we need not pass upon this aspect of the Special Master's Report, although we note that the facts relied upon by him are consistent with and support the other ground for his conclusion as to Louisiana's Sabine boundary.

III

With respect to islands in the Sabine it is conceded that Louisiana owns all islands in the eastern half of the river, whether existing in 1812 or thereafter formed. As to islands in the west half, the Special Master concluded that by virtue of the 1812 Act of Admission Louisiana owns all islands that then existed in that portion of the river, but rejected her claims to islands thereafter formed in the western half. All later formed islands in that half of the river, he concluded, belonged to the State of Texas.

We shall withhold judgment with respect to the ownership of islands in the western half of the Sabine River. Further proceedings with respect to these islands are contemplated in any event, and it is our view that the United States should be requested to present any claims it may have to any of the islands in the western half of the Sabine south of 32 degrees north latitude and, if it so desires, to present evidence and argument with respect to the ownership of such islands. The Special Master should then determine whether his Report in this respect should be modified and complete the proceedings with respect to the ownership of the Sabine islands. Our reasons for so directing will be briefly stated.

It is the unquestioned rule that States entering the Union acquire title to the lands under navigable streams and other navigable waters within their borders. *Scott* v. *Lattig,* 227 U. S. 229, 242–243 (1913); *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 68 (1874); *Pollard's Lessee* v. *Hagan,* 3 How. 212, 228–230 (1845). But the rule does not reach islands or fast lands located within such waters. Title to islands remains in the United States, unless expressly granted along with the stream bed or otherwise. This was the express holding of *Scott* v. *Lattig, supra.*

In that case, a dispute arose over the ownership of an island located east of the thalweg of the Snake River, which was the western boundary of the State of Idaho. It appeared that after Idaho came into the Union, and thereby acquired title to the river bed on its side of the thalweg, the United States patented riparian lands opposite the island, and the patentees claimed the island under the laws of Idaho as against a settler seeking to homestead the property under the laws of the United States. The homesteader prevailed in this Court because title to the island remained in the United States:

> "But the island, which we have seen was in existence when Idaho became a State, was not part of the bed of the stream or land under the water, and therefore its ownership did not pass to the State or come within the disposing influence of its laws. On the contrary, although surrounded by the waters of the river and widely separated from the shore, it was fast dry land, and therefore remained the property of the United States and subject to disposal under its laws, as did the island which was in controversy in *Mission Rock Co.* v. *United States,* 109 Fed. Rep. 763, 769–770, and *United States* v.

Mission Rock Co., 189 U. S. 391." 227 U. S., at 244.

In the case before us, it is probably correct that once the eastern boundary of Texas was extended to the middle of the river in 1848 that State became entitled to any islands in the west half which formed after the date of that extension. But unless the 1848 Act conveyed to Texas the islands located in the western half of the river at that time, title to those islands remained in the United States, if the United States had not previously conveyed all or part of them to Louisiana. The 1848 Act, however, does not mention islands in the Sabine, and it would therefore appear, if *Lattig* is to be followed, that the United States has an interest in any proceedings to determine the ownership of islands in the west half of the Sabine and should be a party to, or at least have the opportunity to participate in, such proceedings. Texas claims any such islands existing prior to 1848 by prescription and acquiescence, but, plainly, a State may not acquire property from the United States in this manner. *United States* v. *California*, 332 U. S. 19, 39–40 (1947).

We shall accordingly await the result of further proceedings before the Special Master with respect to the ownership of islands in the western portion of the Sabine. In all other respects, the exceptions of the parties are overruled and the report of the Special Master is confirmed.

So ordered.

MR. JUSTICE DOUGLAS, dissenting.

Louisiana was admitted into the Union in 1812. 2 Stat. 701. The Constitution of Louisiana of 1812 described her western boundary as "beginning at the mouth of the river Sabine, thence by a line to be drawn along the middle of said river, including all its islands, to the

thirty-second degree of latitude . . . ." That was the description [1] that was recited in the 1812 Act in which Congress approved the Constitution of Louisiana. 2 Stat. 702. There remained a controversy between this Nation and Spain over this western boundary and the Treaty of 1819 settled the question by the only authority that could establish a boundary with a foreign government. *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 725.

That treaty provided that the boundary should start "at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river, to the 32d degree of latitude." 8 Stat. 252, 254, 256. When Texas was admitted to the Union in 1845, 9 Stat. 108, that same boundary was used to describe her eastern line. 8 Stat. 372, 374. The Treaty of 1828 recognized that as the boundary line between Louisiana and Texas for it was the boundary between the United States and Mexico, of which Texas was a part. 8 Stat. 372. Texas did not come into the Union until 1845. The Treaty of 1819 read in context means that Louisiana's western border, coinciding with that of the United States, was the western bank of the Sabine.

The 1819 Treaty does not mention Louisiana. But Louisiana along that segment of our western boundary was a buffer between this Nation and Spain. It is therefore dubious that the United States was bargaining for that narrow strip between the "middle" of the Sabine and the west bank of the Sabine as a detached, isolated piece of our public lands. Rather, it seems well-nigh conclusive that in 1819 this Nation was bargaining with Spain for a border that in part at least of its reach would be the western border of Louisiana.

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[1] It was also in the Enabling Act giving Louisiana authority to form a constitution and state government and gain admission to the Union. 2 Stat. 641.

Louisiana claims that much and alternatively only the "middle" of the Sabine which, according to the thalweg doctrine, when describing boundaries on navigable waters, means the middle of the channel, which is not necessarily the geographical "middle." The thalweg doctrine had that meaning both when Louisiana was admitted to the Union [2] and since that time.[3]

Why then does Louisiana lose? Why is her boundary restricted?

The Court relies on the Act of Congress of July 5, 1848, 9 Stat. 245, which gave Texas permission to extend her eastern boundary "so as to include within her limits one half of Sabine Pass, one half of Sabine Lake, [and] one half of Sabine River."

Washington v. *Oregon,* 211 U. S. 127 (1908), makes clear that the boundary originally established when Louisiana was admitted to the Union "is not within the power of the National Government to change . . . without [Louisiana's] consent . . . ." *Id.,* at 131.

Given that legislative restraint, Congress had no power to take the west bank from Louisiana or, alternatively, it must have used "one-half" in a general, rather than a mathematical, sense, thereby granting to Texas only those areas lying west of the thalweg.

The Sabine River, Sabine Lake, and Sabine Pass are one continuous body of navigable water. Heretofore when in controversies between States the "middle" of a navigable stream has been described as the boundary, the middle of the channel is intended. *Iowa* v. *Illinois,* 147 U. S. 1, 7–8; *Arkansas* v. *Tennessee,* 246 U. S. 158, 173; *Minnesota* v. *Wisconsin,* 252 U. S. 273; *Wisconsin* v. *Michigan,* 295 U. S. 455.

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[2] The earlier authorities are discussed at length in *Iowa* v. *Illinois,* 147 U. S. 1, 7–10 (1893).

[3] G. Thompson on Real Property § 3075 (1962 ed.); 3 American Law of Property § 12.27 n. 16 (A. Casner ed. 1952).

Mississippi, which was admitted to the Union five years after Louisiana, argued much as Texas does in this case to the effect that Congress had given her territory that Louisiana claimed under an earlier title. The Court held "[i]f it were true that . . . repugnancy between the two acts existed, it is enough to say that Congress, after the admission of Louisiana, could not take away any portion of that State and give it to the State of Mississippi." *Louisiana* v. *Mississippi*, 202 U. S. 1, 40. This reasoning is equally applicable to Louisiana's western border.

I conclude in the alternative that the thalweg doctrine—widely and generally accepted—has not been constitutionally displaced by statutory language in this case.

The question remains whether acts of acquiescence and prescription have since replaced the thalweg with some other boundary between Louisiana and Texas. Although the Special Master concluded that the maps and other evidence in question support both the conclusion that Louisiana has acquiesced in a mid-stream boundary, rather than the claimed west-bank boundary, and that the mid-stream boundary thus recognized is in the geographic center rather than the thalweg, I cannot agree. The vast majority of the maps in evidence do denominate a boundary between the banks of the waterways in issue. The quality of the boundary representation is, however, quite inadequate even to determine whether a geographic centerline designation was attempted. Moreover, the main channel is not depicted, so that any possible variance from the thread of the stream is incapable of determination.[4] Indeed, the language employed by the Master to describe these maps in the Appendix to his Report depicts this uncertainty; the terms "middle," "mid-Sabine," and "centerline" ap-

[4] See generally Texas Exs. A, F. But see Louisiana Ex. K.

pear to be used interchangeably, with only an occasional use of the more precise terminology "geographic middle." [5] Acquiescence on the part of one State or prescription on the part of another should not be predicated on such an inadequate showing.

The case should be returned to the Special Master for hearings that will thoroughly explore the factual issues concerning the alleged acquiescence or prescription.

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[5] Report of Special Master, App. B.

SALYER LAND CO. ET AL. *v.* TULARE LAKE BASIN WATER STORAGE DISTRICT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 71–1456. Argued January 8, 1973—Decided March 20, 1973

Appellee district exists for the purpose of acquiring, storing, and distributing water for farming in the Tulare Lake Basin. Only landowners are qualified to elect the district's board of directors, votes being apportioned according to the assessed valuation of the lands. A three-judge District Court, against challenge by appellants, held that the limitation of the franchise to landowners comported with equal protection requirements. *Held:*

1. Restricting the voters to landowners who may or may not be residents does not violate the principle enunciated in such cases as *Reynolds* v. *Sims,* 377 U. S. 533, and *Kramer* v. *Union School District,* 395 U. S. 621, that governing bodies should be selected in a popular election in which every person's vote is equal. Pp. 726–730.

(a) The activities of appellee district fall so disproportionately on landowners as a group that it is not unreasonable that the statutory framework focuses on the land benefited, rather than on people as such. Pp. 726–728.

(b) Although appellee district has some governmental powers, it provides none of the general public services ordinarily attributed to a governing body. Pp. 728–729.

2. Since assessments against landowners are the sole means by which expenses of appellee district are paid, it is not irrational to repose the franchise in landowners but not residents. Pp. 730–731.

3. The exclusion of lessees from voting does not violate the Equal Protection Clause since the short-term lessee's interest may be substantially less than that of a landowner and, the franchise being exercisable by proxy, other lessees may negotiate to have the franchise included in their leases. Pp. 731–733.

4. Weighting the vote according to assessed valuation of the land does not evade the principle that wealth has no relation to voter qualifications where, as here, the expense as well as the benefit is proportional to the land's assessed value. Pp. 733–735.

342 F. Supp. 144, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 735.

Thomas Keister Greer argued the cause for appellants. With him on the briefs was *C. Ray Robinson.*

Robert M. Newell argued the cause for appellee. With him on the brief was *Ernest M. Clark, Jr.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This is another in the line of cases in which the Court has had occasion to consider the limits imposed by the Equal Protection Clause of the Fourteenth Amendment on legislation apportioning representation in state and local governing bodies and establishing qualifications for voters in the election of such representatives. *Reynolds* v. *Sims*, 377 U. S. 533 (1964), enunciated the constitutional standard for apportionment of state legislatures. Later cases such as *Avery* v. *Midland County*, 390 U. S. 474 (1968), and *Hadley* v. *Junior College District*, 397 U. S. 50 (1970), extended the *Reynolds* rule to the governing bodies of a county and of a junior college district, respectively. We are here presented with the issue expressly reserved in *Avery, supra:*

> "Were the [county's governing body] a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents

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**Melvin L. Wulf, Sanford Jay Rosen, Joel M. Gora,* and *David Hall* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Denslow Green* for Irrigation Districts Association of California, and by *George Basye* for California Central Valleys Flood Control Association.

more than other constituents, we would have to confront the question whether such a body may be apportioned in ways which give greater influence to the citizens most affected by the organization's functions." 390 U. S., at 483–484.

The particular type of local government unit whose organization is challenged on constitutional grounds in this case is a water storage district, organized pursuant to the California Water Storage District Act, Calif. Water Code § 39000 *et seq.* The peculiar problems of adequate water supplies faced by most of the western third of the Nation have been described by Mr. Justice Sutherland, who was himself intimately familiar with them, in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, 156–157 (1935):

"These states and territories comprised the western third of the United States—a vast empire in extent, but still sparsely settled. From a line east of the Rocky Mountains almost to the Pacific Ocean, and from the Canadian border to the boundary of Mexico—an area greater than that of the original thirteen states—the lands capable of redemption, in the main, constituted a desert, impossible of agricultural use without artificial irrigation.

"In the beginning, the task of reclaiming this area was left to the unaided efforts of the people who found their way by painful effort to its inhospitable solitudes. These western pioneers, emulating the spirit of so many others who had gone before them in similar ventures, faced the difficult problem of wresting a living and creating homes from the raw elements about them, and threw down the gage of battle to the forces of nature. With imperfect tools, they built dams, excavated canals, constructed ditches, plowed and cultivated the soil, and trans-

formed dry and desolate lands into green fields and leafy orchards. . . ."

Californians, in common with other residents of the West, found the State's rivers and streams in their natural state to present the familiar paradox of feast or famine. With melting snow in the high mountains in the spring, small streams became roaring freshets, and the rivers they fed carried the potential for destructive floods. But with the end of the rainy season in the early spring, farmers depended entirely upon water from such streams and rivers until the rainy season again began in the fall. Long before that time, however, rivers which ran bank full in the spring had been reduced to a bare trickle of water.

It was not enough therefore, for individual farmers or groups of farmers to build irrigation canals and ditches which depended for their operation on the natural flow of these streams. Storage dams had to be constructed to impound in their reservoirs the flow of the rivers at flood stage for later release during the dry season regimen of these streams. For the construction of major dams to facilitate the storage of water for irrigation of large areas, the full resources of the State and frequently of the Federal Government were necessary.[1]

But for less costly projects which would benefit a more restricted geographic area, the State was frequently either unable or unwilling to pledge its credit or its resources. The California Legislature, therefore, has authorized a number of instrumentalities, including water storage districts such as the appellee here, to provide a local response to water problems.

Some history of the experience of California and the other Western States with the problems of water distri-

[1] The history of the vast Central Valley Project in California is recounted in *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725 (1950).

bution is contained in *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, 151–154 (1896), in which the constitutionality of California's Wright Act was sustained against claims of denial of due process under the Fourteenth Amendment to the United States Constitution. While the irrigation district was apparently the first local governmental unit authorized to deal with water distribution, it is by no means the only one. General legislation in California authorizes the creation, not only of irrigation districts, but of water conservation districts, water storage and conservation districts, flood control districts, and water storage districts such as appellee.[2]

Appellee district consists of 193,000 acres of intensively cultivated, highly fertile farm land located in the Tulare Lake Basin. Its population consists of 77 persons, including 18 children, most of whom are employees of one or another of the four corporations that farm 85% of the land in the district.

Such districts are authorized to plan projects and execute approved projects "for the acquisition, appropriation, diversion, storage, conservation, and distribution of water . . . ." Calif. Water Code § 42200 *et seq.*[3] Incidental to this general power, districts may "acquire, improve, and operate" any necessary works for the stor-

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[2] 4 Waters and Water Rights § 345.3 (R. Clark ed. 1970).

[3] The actual adoption of district projects is long and involved. After a district undertakes a project, it must be approved by the California Department of Water Resources. Calif. Water Code § 42200 *et seq.* A report and the estimated cost of the project must be submitted to the California State Treasurer, who undertakes an independent investigation before declaring the project abandoned or approving the report. *Id.,* § 42275 *et seq.* If the report is approved, a "special election" is called. *Id.,* § 42325 *et seq.* In order for the project to be finally adopted, a majority of the votes and a majority of the voters must approve it. *Id.,* §§ 42355–42550.

age and distribution of water as well as any drainage or reclamation works connected therewith, and the generation and distribution of hydroelectric power may be provided for.[4] *Id.*, §§ 43000, 43025. They may fix tolls and charges for the use of water and collect them from all persons receiving the benefit of the water or other services in proportion to the services rendered. *Id.*, § 43006. The costs of the projects are assessed against district land in accordance with the benefits accruing to each tract held in separate ownership. *Id.*, §§ 46175, 46176. And land that is not benefited may be withdrawn from the district on petition. *Id.*, § 48029.

Governance of the districts is undertaken by a board of directors. *Id.*, § 40658. Each director is elected from one of the divisions within the district, *id.*, § 39929, and each must take an official oath and execute a bond. *Id.*, § 40301. General elections for the directors are to be held in odd-numbered years. *Id.*, §§ 39027, 41300 *et seq.*

It is the voter qualification for such elections that appellants claim invidiously discriminates against them and persons similarly situated. Appellants are landowners, a landowner-lessee, and residents within the area included in the appellee's water storage district. They brought this action under 42 U. S. C. § 1983, seeking declaratory and injunctive relief in an effort to prevent appellee from giving effect to certain provisions of the California Water Code. They allege that §§ 41000 [5] and 41001 [6] unconstitutionally deny to them the equal pro-

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[4] There is no evidence that the appellee district engages in the generation, sale, or distribution of hydroelectric power.

[5] Calif. Water Code § 41000 provides:

"Only the holders of title to land are entitled to vote at a general election."

[6] Calif. Water Code § 41001 provides:

"Each voter may vote in each precinct in which any of the land owned by him is situated and may cast one vote for each one hundred

tection of the laws guaranteed by the Fourteenth Amendment, in that only landowners are permitted to vote in water storage district general elections, and votes in those elections are apportioned according to the assessed valuation of the land. A three-judge court was convened pursuant to 28 U. S. C. § 2284, and the case was submitted on factual statements of the parties and briefs, without testimony or oral argument. A majority of the District Court held that both statutes comported with the dictates of the Equal Protection Clause, and appellants have appealed that judgment directly to this Court under 28 U. S. C. § 1253.

In *Williams* v. *Rhodes*, 393 U. S. 23 (1968), a case in which the Ohio legislative scheme for regulating the electoral franchise was challenged, the Court said:

> "[T]his Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But we have also held many times that 'invidious' distinctions cannot be enacted without a violation of the Equal Protection Clause. In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Id.*, at 30.

We therefore turn now to the determination of whether the California statutory scheme establishing water storage districts violates the Equal Protection Clause of the Fourteenth Amendment.

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dollars ($100), or fraction thereof, worth of his land, exclusive of improvements, minerals, and mineral rights therein, in the precinct."

I

It is first argued that § 41000, limiting the vote to district landowners, is unconstitutional since nonlandowning residents have as much interest in the operations of a district as landowners who may or may not be residents. Particularly, it is pointed out that the homes of residents may be damaged by floods within the district's boundaries, and that floods may, as with appellant Ellison, cause them to lose their jobs. Support for this position is said to come from the recent decisions of this Court striking down various state laws that limited voting to landowners, *Phoenix* v. *Kolodziejski,* 399 U. S. 204 (1970), *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969), and *Kramer* v. *Union School District,* 395 U. S. 621 (1969).

In *Kramer,* the Court was confronted with a voter qualification statute for school district elections that limited the vote to otherwise qualified district residents who were either (1) the owners or lessees of taxable real property located within the district, (2) spouses of persons owning qualifying property, or (3) parents or guardians of children enrolled for a specified time during the preceding year in a local district school. Without reaching the issue of whether or not a State may in some circumstances limit the exercise of the franchise to those primarily interested or primarily affected by a given governmental unit, it was held that the above classifications did not meet that state-articulated goal since they excluded many persons who had distinct and direct interests in school meeting decisions and included many persons who had, at best, remote and indirect interests. *Id.,* at 632–633.

Similarly, in *Cipriano* v. *City of Houma, supra,* decided the same day, provisions of Louisiana law which gave only property taxpayers the right to vote in elec-

tions called to approve the issuance of revenue bonds by a municipal utility were declared violative of the Equal Protection Clause since the operation of the utility systems affected virtually every resident of the city, not just the 40% of the registered voters who were also property taxpayers, and since the bonds were not in any way financed by property tax revenue. 395 U. S., at 705. And the rationale of *Cipriano* was expanded to include general obligation bonds of municipalities in *Phoenix* v. *Kolodziejski, supra.* It was there noted that not only did those persons excluded from voting have a great interest in approving or disapproving municipal improvements, but they also contributed both directly through local taxes and indirectly through increased rents and costs to the servicing of the bonds. 399 U. S., at 210–211.

Cipriano and *Phoenix* involved application of the "one person, one vote" principle to residents of units of local governments exercising general governmental power, as that term was defined in *Avery* v. *Midland County,* 390 U. S. 474 (1968). *Kramer* and *Hadley* v. *Junior College District,* 397 U. S. 50 (1970), extended the "one person, one vote" principle to school districts exercising powers which,

> "while not fully as broad as those of the Midland County Commissioners, certainly show that the trustees perform important governmental functions within the districts, and we think these powers are general enough and have sufficient impact throughout the district to justify the conclusion that the principle which we applied in *Avery* should also be applied here." 397 U. S., at 53–54.

But the Court was also careful to state that:

> "It is of course possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal gov-

> ernmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds, supra,* might not be required, but certainly we see nothing in the present case that indicates that the activities of these trustees fit in that category. Education has traditionally been a vital governmental function, and these trustees, whose election the State has opened to all qualified voters, are governmental officials in every relevant sense of that term." *Id.,* at 56.

We conclude that the appellee water storage district, by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group, is the sort of exception to the rule laid down in *Reynolds* which the quoted language from *Hadley, supra,* and the decision in *Avery, supra,* contemplated.

The appellee district in this case, although vested with some typical governmental powers,[7] has relatively limited authority. Its primary purpose, indeed the reason for its existence, is to provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin.[8] It provides no other general public

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[7] The board has the power to employ and discharge persons on a regular staff and to contract for the construction of district projects. Calif. Water Code § 43152. It can condemn private property for use in such projects, *id.,* §§ 43530–43533, and may cooperate (including contract) with other agencies, state and federal. *Id.,* § 43151. Both general obligation bonds and interest-bearing warrants may be authorized. *Id.,* §§ 44900–45900.

[8] Appellants strongly urge that districts have the power to, and do, engage in flood control activities. The interest of such activities to residents is said to be obvious since houses may be destroyed and, as in the case of appellant Ellison, jobs may disappear. But Calif. Water Code § 43151 provides that any agreement entered into with the State or the United States must be "for a purpose appertaining to or beneficial to the project of the district. . . ." And the statute which assertedly gives support to the flood control activities, *id.,*

services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body. App. 86. There are no towns, shops, hospitals, or other facilities designed to improve the quality of life within the district boundaries, and it does not have a fire department, police, buses, or trains. *Ibid.*

Not only does the district not exercise what might be thought of as "normal governmental" authority, but its actions disproportionately affect landowners. All of the costs of district projects are assessed against land by assessors in proportion to the benefits received. Likewise, charges for services rendered are collectible from persons receiving their benefit in proportion to the services. When such persons are delinquent in payment, just as in the case of delinquency in payments of assessments, such charges become a lien on the land. Calif. Water Code §§ 47183, 46280. In short, there is no way that the economic burdens of district operations can fall on residents *qua* residents, and the operations of the districts primarily affect the land within their boundaries.[9]

Under these circumstances, it is quite understandable that the statutory framework for election of directors

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§ 44000, simply states that a district "may cooperate and contract with the state . . . or the United States" for the purpose of "flood control." *Id.*, § 44001. Thus, any flood control activities are incident to the exercise of the district's primary functions of water storage and distribution.

[9] Appellants point out that since the flood of 1969, the district has received about $250,000 in flood relief funds from the Federal Government and that the residents, like other American citizens, have paid their share of that money and are therefore entitled to vote. Cf. *Phoenix* v. *Kolodziejski*, 399 U. S. 204 (1970). But their status as district residents bears no more relation to the flood relief money than that of any other United States citizen and would seem to provide no more compelling reason for granting such residents the right to vote than the citizenry at large.

of the appellee focuses on the land benefited, rather than on people as such. California has not opened the franchise to all residents, as Missouri had in *Hadley, supra,* nor to all residents with some exceptions, as New York had in *Kramer, supra.* The franchise is extended to landowners, whether they reside in the district or out of it, and indeed whether or not they are natural persons who would be entitled to vote in a more traditional political election. Appellants do not challenge the enfranchisement of nonresident landowners or of corporate landowners for purposes of election of the directors of appellee. Thus, to sustain their contention that all residents of the district must be accorded a vote would not result merely in the striking down of an exclusion from what was otherwise a delineated class, but would instead engraft onto the statutory scheme a wholly new class of voters in addition to those enfranchised by the statute.

We hold, therefore, that the popular election requirements enunciated by *Reynolds, supra,* and succeeding cases are inapplicable to elections such as the general election of appellee Water Storage District.

II

Even though appellants derive no benefit from the *Reynolds* and *Kramer* lines of cases, they are, of course, entitled to have their equal protection claim assessed to determine whether the State's decision to deny the franchise to residents of the district while granting it to landowners was "wholly irrelevant to achievement of the regulation's objectives," *Kotch* v. *River Port Pilot Comm'rs,* 330 U. S. 552, 556 (1947). No doubt residents within the district may be affected by its activities. But this argument proves too much. Since assessments imposed by the district become a cost of doing business for those who farm within it, and that

cost must ultimately be passed along to the consumers of the produce, food shoppers in far away metropolitan areas are to some extent likewise "affected" by the activities of the district. Constitutional adjudication cannot rest on any such "house that Jack built" foundation, however. The California Legislature could quite reasonably have concluded that the number of landowners and owners of sufficient amounts of acreage whose consent was necessary to organize the district would not have subjected their land to the lien of its possibly very substantial assessments unless they had a dominant voice in its control. Since the subjection of the owners' lands to such liens was the basis by which the district was to obtain financing, the proposed district had as a practical matter to attract landowner support. Nor, since assessments against landowners were to be the sole means by which the expenses of the district were to be paid, could it be said to be unfair or inequitable to repose the franchise in landowners but not residents. Landowners as a class were to bear the entire burden of the district's costs, and the State could rationally conclude that they, to the exclusion of residents, should be charged with responsibility for its operation. We conclude, therefore, that nothing in the Equal Protection Clause precluded California from limiting the voting for directors of appellee district by totally excluding those who merely reside within the district.

III

Appellants assert that even if residents may be excluded from the vote, lessees who farm the land have interests that are indistinguishable from those of the landowners. Like landowners, they take an interest in increasing the available water for farming and, because the costs of district projects may be passed on to them

either by express agreement or by increased rentals, they have an equal interest in the costs.

Lessees undoubtedly do have an interest in the activities of appellee district analogous to that of landowners in many respects. But in the type of special district we now have before us, the question for our determination is not whether or not we would have lumped them together had we been enacting the statute in question, but instead whether "if any state of facts reasonably may be conceived to justify" California's decision to deny the franchise to lessees while granting it to landowners. *McGowan* v. *Maryland,* 366 U. S. 420, 426 (1961).

The term "lessees" may embrace the holders of a wide spectrum of leasehold interests in land, from the month-to-month tenant holding under an oral lease, on the one hand, to the long-term lessee holding under a carefully negotiated written lease, on the other. The system which permitted a lessee for a very short term to vote might easily lend itself to manipulation on the part of large landowners because of the ease with which such landowners could create short-term interests on the part of loyal employees. And, even apart from the fear of such manipulation, California may well have felt that landowners would be unwilling to join in the forming of a water storage district if short-term lessees whose fortunes were not in the long run tied to the land were to have a major vote in the affairs of the district.

The administration of a voting system which allowed short-term lessees to vote could also pose significant difficulties. Apparently, assessment rolls as well as state and federal land lists are used by election boards in determining the qualifications of the voters. Calif. Water Code § 41016. Such lists, obviously, would not ordinarily disclose either long- or short-term leaseholds.

While reference could be made to appropriate conveyancing records to determine the existence of leases which had been recorded, leases for terms less than one year need not be recorded under California law in order to preserve the right of the lessee. Calif. Civil Code § 1214.

Finally, we note that California has not left the lessee without remedy for his disenfranchised state. Sections 41002 and 41005 of the California Water Code provide for voting in the general election by proxy. To the extent that a lessee entering into a lease of substantial duration, thereby likening his status more to that of a landowner, feels that the right to vote in the election of directors of the district is of sufficient import to him, he may bargain for that right at the time he negotiates his lease. And the longer the term of the lease, and the more the interest of the lessee becomes akin to that of the landowner, presumably the more willing the lessor will be to assign his right. Just as the lessee may by contract be required to reimburse the lessor for the district assessments so he may by contract acquire the right to vote for district directors.

Under these circumstances, the exclusion of lessees from voting in general elections for the directors of the district does not violate the Equal Protection Clause.

IV

The last claim by appellants is that § 41001, which weights the vote according to assessed valuation of the land, is unconstitutional. They point to the fact that several of the smaller landowners have only one vote per person whereas the J. G. Boswell Company has 37,825 votes, and they place reliance on the various decisions of this Court holding that wealth has no relation to resident-voter qualifications and that equality of voting power may not be evaded. See, *e. g.*, *Gray* v. *Sanders*,

372 U. S. 368 (1963); *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966).

Appellants' argument ignores the realities of water storage district operation. Since its formation in 1926, appellee district has put into operation four multi-million-dollar projects. The last project involved the construction of two laterals from the Basin to the California State Aqueduct at a capital cost of about $2,500,000. Three small landowners having land aggregating somewhat under four acres with an assessed valuation of under $100 were given one vote each in the special election held for the approval of the project. The J. G. Boswell Company, which owns 61,665.54 acres with an assessed valuation of $3,782,220 was entitled to cast 37,825 votes in the election. By the same token, however, the assessment commissioners determined that the benefits of the project would be uniform as to all of the acres affected, and assessed the project equally as to all acreage. Each acre has to bear $13.26 of cost and the three small landowners, therefore, must pay a total of $46, whereas the company must pay $817,685 for its part.[10] Thus, as the District Court found, "the benefits and burdens to each landowner . . . are in proportion to the assessed value of the land." 342 F. Supp. 144, 146. We cannot say that the California legislative decision to permit voting in the same proportion is not rationally based.

Accordingly, we affirm the judgment of the three-judge District Court and hold that the voter qualification statutes for California water storage district elections

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[10] As was pointed out in n. 3, small landowners are protected from crippling assessments resulting from district projects by the dual vote which must be taken in order to approve a project. Not only must a majority of the votes be cast for approval, but also a majority of the voters must approve. In this case, about 189 landowners constitute a majority and 189 of the smallest landowners in the district have only 2.34% of the land.

are rationally based, and therefore do not violate the Equal Protection Clause.

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

The vices of this case are fourfold.

First. Lessees of farmlands, though residents of the district, are not given the franchise.

Second. Residents who own no agricultural lands but live in the district and face all the perils of flood which the district is supposed to control are disfranchised.

Third. Only agricultural landowners are entitled to vote and their vote is weighted, one vote for each one hundred dollars of assessed valuation as provided in § 41001 of the California Water Code.

Fourth. The corporate voter is put in the saddle.

There are 189 landowners who own up to 80 acres each. These 189 represent 2.34% of the agricultural acreage of the district. There are 193,000 acres in the district. Petitioner Salyer Land Co. is one large operator, West Lake Farms and South Lake Farms are also large operators. The largest is J. G. Boswell Co. These four farm almost 85% of all the land in the district. Of these, J. G. Boswell Co. commands the greatest number of votes, 37,825, which are enough to give it a majority of the board of directors. As a result, it is permanently in the saddle. Almost all of the 77 residents of the district are disfranchised. The hold of J. G. Boswell Co. is so strong that there has been no election since 1947, making little point of the provision in § 41300 of the California Water Code for an election every other year.

The result has been calamitous to some who, though landless, have even more to fear from floods than the ephemeral corporation.

I

In *Phoenix* v. *Kolodziejski*, 399 U. S. 204, 209, we set out the following test for state election schemes which selectively distribute the franchise:

> "Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise."

Provisions authorizing a selective franchise are disfavored, because they "always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives." *Kramer* v. *Union School District*, 395 U. S. 621, 627. In order to overcome this strong presumption, it had to be shown up to now (1) that there is a compelling state interest for the exclusion, and (2) that the exclusions are necessary to promote the State's articulated goal. *Phoenix* v. *Kolodziejski*, *supra*; *Cipriano* v. *City of Houma*, 395 U. S. 701; *Kramer* v. *Union School District*, *supra*. See also *Police Jury of Vermillion Parish* v. *Hebert*, 404 U. S. 807; *Stewart* v. *Parish School Board of St. Charles*, 310 F. Supp. 1172, aff'd, 400 U. S. 884. In my view, appellants in this case have made a sufficient showing to invoke the above principles, and the presumption thus established has not been overcome.

Assuming, *arguendo*, that a State may, in some circumstances, limit the franchise to that portion of the electorate "primarily affected" by the outcome of an election, *Kramer* v. *Union School District*, *supra*, at 632, the limitation may only be upheld if it is demonstrated that "all those excluded are in fact substantially less interested or affected than those the [franchise] includes." *Ibid.* The majority concludes that "there is no way that the

economic burdens of district operations can fall on residents *qua* residents, and the operations of the districts primarily affect the land within their boundaries."

But, with all respect, that is a great distortion. In these arid areas of our Nation a water district seeks water in time of drought and fights it in time of flood. One of the functions of water districts in California is to manage flood control. That is general California statutory policy.[1] It is expressly stated in the Water Code that governs water districts.[2] The California Supreme Court ruled some years back that flood control and irrigation are different but complementary aspects of one problem.[3]

From its inception in 1926, this district has had repeated flood control problems. Four rivers, Kings, Kern, Tule, and Kaweah, enter Tulare Lake Basin. South of Tulare Lake Basin is Buena Vista Lake. In the past, Buena Vista has been used to protect Tulare Lake Basin by storing Kern River water in the former. That is how Tulare Lake Basin was protected from menacing floods in 1952. But that was not done in the great 1969 flood, the result being that 88,000 of the 193,000 acres in respondent district were flooded. The board of the respondent district—dominated by the big landowner J. G. Boswell Co.—voted 6–4 to table the motion that would put into operation the machinery to divert the flood waters to the Buena Vista Lake. The reason is that J. G. Boswell Co. had a long-term agricultural lease in the Buena Vista Lake Basin and flooding it would have interfered with the planting, growing, and harvesting of crops the next season.

The result was that water in the Tulare Lake Basin rose to 192.5 USGS datum. Ellison, one of the appellants

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[1] Calif. Stat. 1921, c. 914, § 58.

[2] Calif. Water Code § 44001.

[3] *Tarpey* v. *McClure,* 190 Cal. 593, 213 P. 983.

who lives in the district, is not an agricultural landowner. But his residence was 15½ feet below the water level of the crest of the flood in 1969.

The appellee district has large levees; and if they are broken, damage to houses and loss of life are imminent.

Landowners—large or small, resident or nonresident lessees or landlords, sharecroppers [4] or owners—all should have a say. But irrigation, water storage, the building of levees, and flood control, implicate the entire community. All residents of the district must be granted the franchise.

This case, as I will discuss below, involves the performance of vital and important governmental functions by water districts clothed with much of the paraphernalia of government. The weighting of votes according to one's wealth is hostile to our system of government. See

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[4] Since 1938, sharecroppers have been included in federal regulations defining "farmers" who are entitled to vote on referenda concerning marketing quotas under the Agricultural Adjustment Act.

"*Farmers engaged in the production of a commodity.* For purposes of referenda with respect to marketing quotas for tobacco, extra long staple cotton, rice and peanuts the phrase 'farmers engaged in the production of a commodity' includes any person who is entitled to share in a crop of the commodity, or the proceeds thereof because he shares in the risks of production of the crop as an owner, landlord, tenant, or sharecropper (landlord whose return from the crop is fixed regardless of the amount of the crop produced is excluded) on a farm on which such crop is planted in a workmanlike manner for harvest: *Provided,* That any failure to harvest the crop because of conditions beyond the control of such person shall not affect his status as a farmer engaged in the production of the crop. In addition, the phrase 'farmers engaged in the production of a commodity' also includes each person who it is determined would have had an interest as a producer in the commodity on a farm for which a farm allotment for the crop of the commodity was established and no acreage of the crop was planted but an acreage of the crop was regarded as planted for history acreage purposes under the applicable commodity regulations." 7 CFR § 717.3 (b).

Stewart v. *Parish School Board of St. Charles,* 310 F. Supp. 1172, aff'd, 400 U. S. 884. As a nonlandowning bachelor was held to be entitled to vote on matters affecting education, *Kramer* v. *Union School District, supra,* so all the prospective victims of mismanaged flood control projects should be entitled to vote in water district elections, whether they be resident nonlandowners, resident or nonresident lessees, and whether they own 10 acres or 10,000 acres. Moreover, their votes should be equal regardless of the value of their holdings, for when it comes to performance of governmental functions all enter the polls on an equal basis.

The majority, however, would distinguish the water storage district from "units of local government having general governmental powers over the entire geographic area served by the body," *Avery* v. *Midland County,* 390 U. S. 474, 485, and fit this case within the exception contemplated for "a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents." *Id.,* at 483–484. The *Avery* test was significantly liberalized in *Hadley* v. *Junior College District,* 397 U. S. 50. At issue was an election for trustees of a special-purpose district which ran a junior college. We said,

> "[S]ince the trustees can levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college, their powers are equivalent, for apportionment purposes, to those exercised by the county commissioners in *Avery*. . . . [T]hese powers, while not fully as broad as those of the Midland County Commissioners, certainly show that the trustees *perform important governmental functions* . . . and have *suffi-*

> *cient impact throughout the district* to justify the conclusion that the principle which we applied in *Avery* should also be applied here." *Id.*, at 53–54. (Emphasis added; footnote omitted.)

Measured by the *Hadley* test, the Tulare Lake Basin Water Storage District surely performs "important governmental functions" which "have sufficient impact throughout the district" to justify the application of the *Avery* principle.

Water storage districts in California are classified as irrigation, reclamation, or drainage districts.[5] Such state agencies "are considered exclusively governmental," and their property is "held only for governmental purpose," not in the "proprietary sense."[6] They are a "public entity," just as "any other political subdivision."[7] That is made explicit in various ways. The Water Code of California states that "[a]ll waters and water rights" of the State "within the district are given, dedicated, and set apart for the uses and purposes of the district."[8] Directors of the district are "public officers of the state."[9] The district possesses the power of eminent domain.[10] Its works may not be taxed.[11] It carries a governmental immunity against suit.[12] A district has powers that relate to irrigation, storage of water, drainage, flood control, and generation of hydroelectric energy.[13]

Whatever may be the parameters of the exception alluded to in *Avery* and *Hadley*, I cannot conclude that

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[5] Calif. Water Code § 39060.

[6] *Glenn-Colusa Irrigation District* v. *Ohrt*, 31 Cal. App. 2d 619, 623, 88 P. 2d 763, 765.

[7] Calif. Govt. Code § 811.2.

[8] Section 43158. See also *id.*, § 39061.

[9] *In re Madera Irrigation District*, 92 Cal. 296, 322, 28 P. 272, 278.

[10] Calif. Water Code § 43530.

[11] *Id.*, § 43508.

[12] Calif. Govt. Code §§ 811.2, 815.

[13] Calif. Water Code §§ 42200, 43000, 43025, 44001.

this water storage district escapes the constitutional restraints relative to a franchise within a governmental unit.

II

When we decided *Reynolds* v. *Sims*, 377 U. S. 533, and discussed the problems of malapportionment we thought and talked about people—of population, of the constitutional right of "qualified citizens to vote," (*id.*, at 554) of "the right of suffrage," (*id.*, at 555) of the comparison of "one man's vote" to that of another man's vote. *Id.*, at 559. We said:

> "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Id.*, at 562.

It is indeed grotesque to think of corporations voting within the framework of political representation of people. Corporations were held to be "persons" for purposes both of the Due Process Clause of the Fourteenth Amendment [14] and of the Equal Protection Clause.[15] Yet, it is unthinkable in terms of the American tradition that corporations should be admitted to the franchise. Could a State allot voting rights to its corporations, weighting each vote according to the wealth of the corporation? Or could it follow the rule of one corporation, one vote?

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[14] *Minneapolis & St. Louis R. Co.* v. *Beckwith*, 129 U. S. 26, 28.

[15] *Pembina Consolidated Silver Mining & Milling Co.* v. *Pennsylvania*, 125 U. S. 181, 188–189; *Santa Clara County* v. *Southern Pacific R. Co.*, 118 U. S. 394, 397.

It would be a radical and revolutionary step to take, as it would change our whole concept of the franchise. California takes part of that step here by allowing corporations to vote in these water district matters [16] that entail performance of vital governmental functions. One corporation can outvote 77 individuals in this district. Four corporations can exercise these governmental powers as they choose, leaving every individual inhabitant with a weak, ineffective voice. The result is a corporate political kingdom undreamed of by those who wrote our Constitution.

[16] Calif. Water Code § 41004.

ASSOCIATED ENTERPRISES, INC., ET AL. *v.* TOLTEC WATERSHED IMPROVEMENT DISTRICT

APPEAL FROM THE SUPREME COURT OF WYOMING

No. 71–1069. Argued January 8, 1973—Decided March 20, 1973

Limitation of the franchise to property owners in the creation and maintenance of a Wyoming watershed improvement district, for which they bear the primary burden and share the benefits, *held* not violative of equal protection requirements. *Salyer Land Co.* v. *Tulare Water District, ante,* p. 719.

490 P. 2d 1069, affirmed.

Henry A. Burgess argued the cause and filed a brief for appellants.

Fred W. Phifer argued the cause and filed a brief for appellee.*

PER CURIAM.

In this case, we are confronted with an issue similar to the one determined today in *Salyer Land Co.* v. *Tulare Water District, ante,* p. 719. Appellee Toltec Watershed Improvement District was established after referendum held pursuant to Wyoming's Watershed Improvement District Act, Wyo. Stat. Ann. §§ 41–354.1 to 41–354.26 (Supp. 1971). After formation, appellee sought a right of entry onto lands owned by appellant Associated Enterprises, Inc., and leased by Johnston Fuel Liners, for the purpose of carrying out studies to determine the feasibility of constructing a dam and reservoir. When Associated Enterprises resisted, the district sought to enforce its right in state court. Arguing that the stat-

**Melvin L. Wulf, Sanford Jay Rosen, Joel M. Gora,* and *David Hall* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

utes authorizing the referendum violated the Equal Protection Clause since under § 41–354.9 only landowners are entitled to vote and under § 41–354.10 a watershed improvement district cannot be determined to be administratively practicable and feasible unless a majority of the votes cast, representing a majority of the acreage in the district, favor its creation, appellants maintained that the district was illegally formed. The trial court agreed that had the district been formed in violation of the Equal Protection Clause, appellants would have a good defense under state law to the asserted right of entry, but it held against them on the merits. The Wyoming Supreme Court affirmed. 490 P. 2d 1069.

Appellants urge here that the provisions entitling only landowners to vote and weighting the vote according to acreage violate the Equal Protection Clause. Like the California water storage district, the Wyoming watershed district is a governmental unit of special or limited purpose whose activities have a disproportionate effect on landowners within the district. The district's operations are conducted through projects and the land is assessed for any benefits received. Wyo. Stat. Ann. §§ 41–354.17, 41–354.21, 41–354.22. Such assessments constitute a lien on the land until paid. *Id.*, § 41–354.23.

We cannot agree with the dissent's intimation that the Wyoming Legislature has in any sense abdicated to a wealthy few the ultimate authority over land management in that State. The statute authorizing the establishment of improvement districts was enacted by a legislature in which all of the State's electors have the unquestioned right to be fairly represented. Under the act, districts may be formed only as subdivisions of soil and water conservation districts. *Id.*, § 41–354.3. And a precondition to their formation referendum is a determination by a board of supervisors of the affected conservation district, popularly elected by both occupiers

and owners of land within the district, that the watershed improvement district is both necessary and administratively practicable. *Id.*, §§ 41–354.7, 41–354.8; Wyoming Conservation Districts Law, Wyo. Stat. Ann. § 11–234 *et seq.*, § 11–243 (Supp. 1971). As in *Salyer, supra,* we hold that the State could rationally conclude that landowners are primarily burdened and benefited by the establishment and operation of watershed districts and that it may condition the vote accordingly. The judgment appealed from is, therefore,

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

I

For the reasons set forth in my dissenting opinion in *Salyer Land Co.* v. *Tulare Water District, ante,* p. 735, I cannot agree that the voting provisions of Wyoming's Watershed Improvement District Act pass muster under the Equal Protection Clause. Accordingly, I dissent.

At issue is Wyoming's Watershed Improvement District Act, Wyo. Stat. Ann. §§ 41–354.1 to 41–354.26 (Supp. 1971). Appellee Toltec Watershed Improvement District was established as a result of a referendum held pursuant to this Act, May 12, 1969.[1]

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[1] Establishment of a Watershed Improvement District entails several steps. First, a petition proposing the creation of such a district must be filed with the board of supervisors of the soil and water conservation district in which the proposed watershed district will lie. Wyo. Stat. Ann. § 41–354.5. The petition must set forth the boundaries of the proposed district and reasons justifying its creation, and must be signed by a majority of the landowners in the proposed district. *Ibid.*

On receipt of the petition, the board of supervisors must call a public hearing, which "[a]ll owners of land within the proposed

The purposes of the Wyoming Act are "to provide for the prevention and control of erosion, floodwater and sediment damages, and the storage, conservation, development, utilization, and disposal of water." *Id.*, § 41–354.2. These are not purposes related only to special, narrow interests of landowners. As noted in the *Salyer Land Co.* case, flood control is a purpose that affects at least everyone in a watershed district, whether he be owner, lessee, or a resident not engaged in farming, grazing, or other agricultural activity.

In June 1970, appellee sought a right of entry onto lands owned by appellant Associated Enterprises, and leased by appellant Johnston Fuel Liners, for the purpose of carrying out foundation studies for a dam site. When appellant Associated Enterprises resisted, Toltec sought to enforce its right of entry in state court. The trial court agreed with appellants that if Toltec had been illegally formed, they would have a good defense to

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watershed improvement district and all other interested parties shall have the right to attend . . . and to be heard." *Id.*, § 41–354.7 (A). The board of supervisors may, after such hearing, determine that there is no need for the creation of the district. If so, the petition is forthwith denied. *Id.*, § 41–354.7 (C).

If the supervisors do think there is a need, however, they must further determine whether the proposed district is "administratively practicable and feasible." *Id.*, § 41–354.8. "To assist the board of supervisors in this determination," a referendum *must* be held in the proposed district "upon the proposition of the creation of such district." *Ibid.* Only owners of land lying within the boundaries of the proposed district may vote in this referendum. *Id.*, § 41–354.9 (B). If a majority of the landowners representing a majority of the acreage within the district do not vote against creation of the district, the board of supervisors is permitted to determine that the district is administratively practicable and feasible, and to declare it created. *Ibid.*

Once created, a watershed improvement district has broad powers. It may exercise the power of eminent domain, levy and collect assessments, and issue bonds. *Id.*, §§ 41–354.13 to 41–354.14.

the asserted right of entry, but held against them on the merits, despite appellants' objections that the referendum which authorized the creation of the watershed improvement district violated the Equal Protection Clause, the franchise being limited to property owners, and the votes being weighted by the amount of property owned. On appeal, the Wyoming Supreme Court affirmed.

I conclude that the presumption set out in *Phoenix* v. *Kolodziejski,* 399 U. S. 204, has not been overcome, for "[p]lacing voting power in property owners alone can be justified only by some overriding interest of those owners that the State is entitled to recognize." *Id.,* at 209. Here, the suggestion was made below that property owners are those "primarily concerned" with the affairs of the watershed district. But assuming, *arguendo,* that a State may, in some circumstances, limit the franchise to that portion of the electorate "primarily affected" by the outcome of an election, *Kramer* v. *Union School District,* 395 U. S. 621, 632, the limitation may only be upheld if it is demonstrated that "all those excluded are in fact substantially less interested or affected than those the [franchise] includes." *Ibid.*

Other than the bald assertion by the court below that it "makes sense" to limit the franchise in watershed district referenda to property owners, there is nothing in the record to support the exclusion. Appellant Johnston is a lessee of land in the District. Why a lessee is "substantially less interested" in the creation of a watershed district than is a titleholder is left to speculation.[2] And

[2] The Watershed Improvement District Act itself contemplates that nonlandowners are interested in the proposed creation of a district, by giving them the right to appear and be heard at the public hearing required by the Act prior to the referendum. See n. 1, *supra.* No reason is advanced why a person not owning property can be sufficiently interested in the district to be given a forum, yet is not

mere speculation is insufficient to justify an infringement on the right to vote, a right which is "the essence of a democratic society," *Reynolds* v. *Sims,* 377 U. S. 533, 555.

Moreover, we recently stated that "a percentage reduction of an individual's voting power in proportion to the amount of property he owned would be [constitutionally] defective. See *Stewart* v. *Parish School Board,* 310 F. Supp. 1172 (ED La.), aff'd, 400 U. S. 884 (1970)." *Gordon* v. *Lance,* 403 U. S. 1, 4 n. 1.

II

It is argued, however, that unlike "units of local government having general governmental powers over the entire geographic area served by the body," *Avery* v. *Midland County,* 390 U. S. 474, 485, a watershed improvement district is "a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents," *id.,* at 483–484. The court below sought to make such an analysis.

The *Avery* test, however, was significantly liberalized in *Hadley* v. *Junior College District,* 397 U. S. 50. At issue was an election for trustees of a special purpose district which ran a junior college. We said,

> "[S]ince the trustees can levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college, their powers are equivalent, for apportionment purposes, to those exercised by the county commissioners

sufficiently interested to be allowed to implement the views he expresses at that forum through the ballot box.

> in *Avery*. . . . [T]hese powers, while not fully as broad as those of the Midland County Commissioners, certainly show that the trustees *perform important governmental functions* . . . and have *sufficient impact throughout the district* to justify the conclusion that the principle which we applied in *Avery* should also be applied here." *Id.*, at 53–54. (Emphasis added, footnote omitted.)

Measured by the *Hadley* test, the Toltec Watershed Improvement District surely performs "important governmental functions" which "have sufficient impact throughout the district" to justify the application of the *Avery* principle. The District may: levy and collect special assessments, Wyo. Stat. Ann. § 41–354.13 (A); acquire and dispose of property, § 41–354.13 (B); exercise the power of eminent domain, § 41–354.13 (C); and borrow money and issue bonds, § 41–354.13 (E)—all to exercise flood control. § 41–354.2.

The lower court characterized these functions as "proprietary" in nature, rather than "governmental." But that is a meaningless distinction when control of public affairs is at issue. *Cipriano* v. *City of Houma,* 395 U. S. 701; *Stewart* v. *Parish School Board of St. Charles,* 310 F. Supp. 1172, 1176, aff'd, 400 U. S. 884. It is hardly to be argued that a public body with the power to take land by eminent domain, to issue bonds, to levy taxes, and to provide plans for flood control does not "perform important governmental functions."

It is also inconceivable that a body with the power to destroy a river by damming it and so deprive a watershed of one of its salient environmental assets does not have "sufficient impact" on the interests of people generally to invoke the principles of *Avery* and *Hadley.*

It is said that there is a difference between an election to create a special-purpose district, and an election either

to authorize the district to issue bonds, or to elect district officers. In my view, such a distinction is not tenable.

> "Our exacting examination [of statutes which selectively distribute the franchise] is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not." *Kramer* v. *Union School District, supra,* at 629.

As we said in *Hadley:*

> "If the purpose of a particular election were to be the determining factor in deciding whether voters are entitled to equal voting power, courts would be faced with the difficult job of distinguishing between various elections. We cannot readily perceive judicially manageable standards to aid in such a task. It might be suggested that equal apportionment is required only in 'important' elections, but good judgment and common sense tell us that what might be a vital election to one voter might well be a routine one to another." 397 U. S., at 55.

The mere creation of the Watershed Improvement District subjects residents of the area to constraints. The District may condemn land without further electoral approval; and it has the power to finance improvements through special taxes levied against land to be benefited by the improvements without further electoral approval. While such assessments fall in the first instance on the landowner, lessees and tenants would be substantially affected, as well.[3] And its power to reshape or control the watershed and to provide flood control enables it to

[3] Landowners are often able to pass property taxes through to their lessees and tenants. D. Netzer, Economics of the Property Tax (1966). This is especially true in urban areas where the demand for rental housing is price inelastic, but there is no reason why it may not also be true in rural areas, as well.

turn rivers into flumes or to destroy them by erecting dams to build reservoirs. Dams may be vital or they may be disastrous. The sedimentation rate in some areas is so fast as to reduce the life of dams to a few decades. Dams may destroy valued fish runs. Dams substitute a reservoir for a river and wipe out the varied life of a river course, including its wildlife, canoe waters, camping and picnic grounds, and nesting areas of birds. This reshaping of the face of the Nation may be disastrous, no matter who casts the ballots. The enormity of the violation of our environmental ethics, represented by state and federal laws, is only increased when the ballot is restricted to or heavily weighted on behalf of the few who are important only because they are wealthy.

The issues I tender are disposed of by the suggestions that the members of the Legislature of Wyoming passed the Act now challenged, that they represented the people of Wyoming, and that they could therefore put the landowners in command of the environmental problems tendered by this case. That would, of course, be true if the case presented no federal question. But adherence to *Reynolds* v. *Sims* and its progeny makes the federal rule dominant, *viz.*, that important governmental functions may not be assigned to special groups, whether powerful lobbies or other discrete groups to which a state legislature is often beholden.

I would reverse the judgment below.

ROSARIO ET AL. *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL.

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

No. 71–1371. Argued December 13, 1972—Decided March 21, 1973

Petitioners challenge the constitutionality of New York Election Law § 186, which requires a voter to enroll in the party of his choice at least 30 days before the general election in order to vote in the next party primary. Though eligible to enroll before the previous general election, petitioners failed to do so and were therefore ineligible to vote in the 1972 primary. The Court of Appeals, reversing the District Court, upheld the New York scheme, which it found to be a permissible deterrent against the practice of primary election "raiding" by opposing party members. *Held:* New York's delayed-enrollment scheme did not violate petitioners' constitutional rights. Pp. 756–762.

(a) Section 186 did not absolutely prohibit petitioners from voting in the 1972 primary, but merely imposed a time deadline on their enrollment, which they chose to disregard. Pp. 756–758.

(b) The statute does not deprive voters of their right under the First and Fourteenth Amendments to associate with the party of their choice or subsequently to change to another party, provided that the statutory time limit for doing so is observed. Pp. 758–759.

(c) The cutoff date for enrollment, which occurs about eight months before a presidential, and 11 months before a nonpresidential, primary, is not arbitrary when viewed in light of the legitimate state purpose of avoiding disruptive party raiding. Pp. 760–761.

458 F. 2d 649, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. POWELL, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined, *post*, p. 763.

Burt Neuborne argued the cause for petitioners. With him on the brief were *Melvin L. Wulf* and *Seymour Friedman.*

A. Seth Greenwald, Assistant Attorney General of New York, argued the cause for respondents Rockefeller et al. With him on the brief were *Louis J. Lefkowitz,* Attorney General, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Irving Galt,* Assistant Attorney General. *Joseph Jaspan* filed a brief for respondents Meisser et al. *David N. Dinkins, pro se,* filed a brief for respondents Dinkins et al.

MR. JUSTICE STEWART delivered the opinion of the Court.

For more than 60 years, New York has had a closed system of primary elections, whereby only enrolled members of a political party may vote in that party's primary.[1] Under the State's Election Law, a registered voter enrolls as a party member by depositing an enrollment blank in a locked enrollment box. The last day for enrollment is 30 days before the general election each year. Section 186 of the Election Law provides that the enrollment boxes shall not be opened until the Tuesday following the general election, and party affiliations are then entered on the State's official registration books. The voter is then duly enrolled as a member of his party and may vote in a subsequent primary election.[2]

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[1] See N. Y. Election Law § 131. The State's first comprehensive primary law was enacted in 1911.

[2] Section 186 provides, in pertinent part:

"All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration, provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the

The effect of § 186 is to require a voter to enroll in the party of his choice at least 30 days before the general election in November in order to vote in the next subsequent party primary. If a voter fails to meet this deadline, he cannot participate in a party primary until after the following general election. Section 187 provides an exemption from this waiting period for certain classes of voters, including persons who have attained voting age after the last general election, persons too ill to enroll during the previous enrollment period, and persons who moved from one place to another within a single county. Under § 187, these classes of voters may be specially enrolled as members of a party even after the general election has taken place.[3]

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appropriate column of the two copies of the register containing enrollment numbers for the election district in which such voter resides. . . . Such enrollment shall be complete before the succeeding first day of February in each year." This section finds its roots in the 1911 law. Laws 1911, c. 891, § 19.

[3] Section 187 provides, in pertinent part:

"Application for special enrollment, transfer or correction of enrollment. 1. At any time after January first and before the thirtieth day preceding the next fall primary, except during the thirty days preceding a spring primary, and except on the day of a primary, a voter may enroll with a party, transfer his enrollment after moving within a county, and under certain circumstances, correct his enrollment, as hereinafter in this section provided.

"2. A voter may enroll with a party if he did not enroll on the day of the annual enrollment (a) because he became of age after the preceding general election, or (b) because he was naturalized subsequent to ninety days prior to the preceding general election, or (c) because he did not have the necessary residential qualifications as provided by section one hundred fifty, to enable him to enroll in the preceding year, or (d) because of being or having been at all previous times for enrollment a member of the armed forces of the United States as defined in section three hundred three, or (e) because of being the spouse, child or parent of such member of the armed forces and being absent from his or her county of residence

The petitioners are New York residents who became eligible to vote when they came of age in 1971. Although they could have registered and enrolled in a political party before the cutoff date in 1971—October 2—they failed to do so.[4] Instead, they waited until early December 1971 to register and to deposit their enrollment blanks. At that time, they could not be specially and immediately enrolled in a party under § 187, since they had attained the voting age before, rather than after, the 1971 general election. Hence, pursuant to § 186, their party enrollment could not become effective until after the November 1972 general election. Because of New York's enrollment scheme, then, the petitioners were not eligible to vote in the presidential primary election held in June 1972.

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at all previous times for enrollment by reason of accompanying or being with such member of the armed forces, or (f) because he was an inmate or patient of a veterans' bureau hospital located outside the state of New York at all previous times for enrollment, or the spouse, parent or child of such inmate or patient accompanying or being with such inmate or patient at such times, or (g) because he was incapacitated by illness during the previous enrollment period thereby preventing him from enrolling."

[4] The petitioners themselves admit this failure. The present consolidated case originated in two complaints, one by the petitioner Rosario and other named plaintiffs, on behalf of a class, and one by the petitioner Eisner. Paragraph 6 of Rosario's complaint stated that "[e]ach of these plaintiffs could have registered and enrolled on or before October 2nd, 1971, the last date of registration for the November 1971 elections. They each did not do so." Similarly, Eisner's complaint stated, in paragraph 5: "Plaintiff, Eisner, first became eligible to vote on December 30, 1970, upon the attainment of his twenty-first birthday." Whether the petitioners failed to enroll before the deadline because of inadvertence, because of lack of interest in the essentially local 1971 general election, or for other reasons is not clear, since none of them advances any explanation for this failure to enroll.

The petitioners filed these complaints for declaratory relief, pursuant to 42 U. S. C. § 1983, alleging that § 186 unconstitutionally deprived them of their right to vote in the June primary and abridged their freedom to associate with the political party of their choice. The District Court, in an unreported opinion, granted them the declaratory relief sought. The Court of Appeals for the Second Circuit reversed, holding § 186 constitutional. 458 F. 2d 649. We granted certiorari, but denied the petitioners' motion for summary reversal, expedited consideration, and a stay. 406 U. S. 957 (1972).[5]

The petitioners argue that, through § 186, New York disenfranchised them by refusing to permit them to vote in the June 1972 primary election on the ground that they had not enrolled in a political party at least 30 days prior to the preceding general election. More specifically, they contend that § 186 has operated to preclude newly registered voters, such as themselves, from participating in the primary election of the party of their choice. According to the petitioners, New York has no "compelling state interest" in its delayed-enrollment scheme so as to justify such disenfranchisement, and hence the scheme must fall. In support of this argument, the petitioners rely on several cases in which this Court has struck down, as violative of the Equal Protection Clause, state statutes that disenfranchised certain groups of people. *Carrington* v. *Rash,* 380 U. S. 89 (1965); *Kramer* v. *Union*

[5] Although the June primary election has been completed and the petitioners will be eligible to vote in the next scheduled New York primary, this case is not moot, since the question the petitioners raise is "'capable of repetition, yet evading review.'" *Dunn* v. *Blumstein,* 405 U. S. 330, 333 n. 2 (1972); *Moore* v. *Ogilvie,* 394 U. S. 814, 816 (1969); *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911).

School District, 395 U. S. 621 (1969); *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969); *Evans* v. *Cornman,* 398 U. S. 419 (1970); *City of Phoenix* v. *Kolodziejski,* 399 U. S. 204 (1970); *Dunn* v. *Blumstein,* 405 U. S. 330 (1972).

We cannot accept the petitioners' contention. None of the cases on which they rely is apposite to the situation here. In each of those cases, the State totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote. In *Carrington,* for instance, the Texas Constitution disabled all servicemen from voting in Texas, no matter how long they had lived there. In *Kramer,* residents who were not property owners or parents were completely precluded from voting in school board elections. In *Cipriano* and *Kolodziejski,* the States prohibited non-property owners from ever voting in bond elections. In *Evans,* Maryland refused to permit residents at the National Institutes of Health, located within its borders, ever to vote in state elections. And in *Dunn,* Tennessee totally disenfranchised newly arrived residents, *i. e.,* those who had been residents of the State less than a year or residents of the county less than three months before the election.

Section 186 of New York's Election Law, however, is quite different. It did not absolutely disenfranchise the class to which the petitioners belong—newly registered voters who were eligible to enroll in a party before the previous general election. Rather, the statute merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary. Since the petitioners attained voting age before the October 2, 1971, deadline, they clearly could have registered and enrolled in the party of their choice before that date and been eligible to vote in the June 1972

primary.[6] Indeed, if the petitioners had not been able to enroll by the October 2, 1971, deadline because they did not attain the requisite age until after the 1971 general election, they would have been eligible for special enrollment under § 187. The petitioners do not say why they did not enroll prior to the cutoff date; however, it is clear that they could have done so, but chose not to. Hence, if their plight can be characterized as disenfranchisement at all, it was not caused by § 186, but by their own failure to take timely steps to effect their enrollment.[7]

For the same reason, we reject the petitioners' argument that § 186 violated their First and Fourteenth Amendment right of free association with the political party of their choice. Since they could have enrolled in a party in time to participate in the June 1972 primary, § 186 did not constitute a ban on their freedom of association, but merely a time limitation on when they had to act in order to participate in their chosen party's next primary.[8]

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[6] Not only would the petitioners have been eligible for the 1972 primary, but, since they were eligible in 1971 for special enrollment under § 187, they could have, if they had timely registered and enrolled, participated in the September 14, 1971, primary.

[7] The District Court held that the petitioners' failure to enroll before the cutoff date was not truly voluntary, because it was not done with sufficient awareness of the relevant circumstances and likely consequences. But this argument could well be made any time a State imposes a time limitation or cutoff point for registration or enrollment. The petitioners do not claim that they were unaware of New York's deadline for enrollment.

[8] The dissent states that "[t]he Court apparently views this statute as a mere 'time deadline' on petitioners' enrollment . . . that postpones through the next primary rather than denies altogether petitioners' voting and associational rights." *Post,* at 766. And it argues that our decisions "have never required a permanent ban on the exercise of voting and associational rights before a constitutional breach is incurred." *Post,* at 766–767. But the dissent mischaracterizes our view of § 186. We do not uphold the statute on

Indeed, under the New York law, a person may, if he wishes, vote in a different party primary each year. All he need do is to enroll in a new political party between the prior primary and the October cutoff date. For example, one June he could be a registered Republican and vote in the Republican primary. Before enrollment closed the following October, he could enroll in the Democratic Party. Since that enrollment would be effective after the November general election and before the following February 1, he could then vote in the next Democratic primary. Before the following October, he could register to vote as a Liberal, and so on. Thus, New York's scheme does not "lock" a voter into an unwanted pre-existing party affiliation from one primary to the next.[9]

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the ground that it is merely a prohibition on voting in one particular primary, rather than a permanent ban on voting. That is neither our point nor the effect of the law. The point is that the statute did not prohibit the petitioners from voting in *any* election, including the 1972 primary, had they chosen to meet the deadline established by the law.

[9] The petitioners also argue that § 186 establishes a durational residence requirement unconstitutional under *Dunn* v. *Blumstein*, 405 U. S. 330 (1972), and violates the right to travel under *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). Since the exemption in § 187 applies only to persons whose new residence is within the same county as their old residence, persons who arrive in New York State or move from one county to another after the cutoff date, and deposit their enrollment blank at that time, are barred by the delayed-enrollment scheme from voting in the next primary election. According to the petitioners, this constitutes an unconstitutional durational residence requirement and is violative of the 1970 amendments to the Voting Rights Act of 1965, 84 Stat. 316, 42 U. S. C. § 1973aa–1.

The petitioners, however, lack standing to raise these contentions. They make no claim that they are recently arrived residents of the State or that they have moved from one county to another nor even that they have changed their residence at all within the period relevant here. The petitioners cannot represent a class to which they do not belong.

The only remaining question, then, is whether the time limitation imposed by § 186 is so severe as itself to constitute an unconstitutionally onerous burden on the petitioners' exercise of the franchise or on their freedom of political association. As the dissent acknowledges, the State is certainly justified in imposing some reasonable cutoff point for registration or party enrollment, which citizens must meet in order to participate in the next election. *Post,* at 765. Hence, our inquiry must be whether the particular deadline before us here is so justified.

The cutoff date for enrollment prescribed by § 186 occurs approximately eight months prior to a presidential primary (held in June) and 11 months prior to a nonpresidential primary (held in September). The petitioners argue that this period is unreasonably long, and that it therefore unduly burdens the exercise of their constitutional rights. According to the petitioners, § 186 requires party enrollment before prospective voters have knowledge of the candidates or issues to be involved in the next primary elections. The requirement is especially onerous, the petitioners say, as applied to new voters, who have never before registered to vote or enrolled in a political party.

It is true that the period between the enrollment deadline and the next primary election is lengthy. But that period is not an arbitrary time limit unconnected to any important state goal. The purpose of New York's delayed-enrollment scheme, we are told, is to inhibit party "raiding," whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary. This purpose is accomplished, the Court of Appeals found, not only by requiring party enrollment several months in advance of the primary, on the theory that "long-range planning in politics is quite difficult,"

458 F. 2d, at 653, but also by requiring enrollment prior to a general election. The reason for the latter requirement was well stated by the court below:

> "[T]he notion of raiding, its potential disruptive impact, and its advantages to one side are not likely to be as apparent to the majority of enrolled voters nor to receive as close attention from the professional politician just prior to a November general election when concerns are elsewhere as would be true during the 'primary season,' which, for the country as a whole, runs from early February until the end of June. Few persons have the effrontery or the foresight to enroll as say, 'Republicans' so that they can vote in a primary some seven months hence, when they full well intend to vote 'Democratic' in only a few weeks. And, it would be the rare politician who could successfully urge his constituents to vote for him or his party in the upcoming general election, while at the same time urging a cross-over enrollment for the purpose of upsetting the opposite party's primary. Yet the operation of section 186 requires such deliberate inconsistencies if large-scale raiding were to be effective in New York. Because of the statute, it is all but impossible for any group to engage in raiding." *Ibid.*

It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal. Cf. *Dunn* v. *Blumstein, supra,* at 345; *Bullock* v. *Carter,* 405 U. S. 134, 145 (1972). In the service of that goal, New York has adopted its delayed-enrollment scheme; and an integral part of that scheme is that, in order to participate in a primary election, a person must enroll *before* the preceding general election. As the Court of Appeals stated: "Allowing enrollment any time after

the general election would not have the same deterrent effect on raiding for it would not put the voter in the unseemly position of asking to be enrolled in one party while at the same time intending to vote immediately for another." 458 F. 2d, at 653. For this reason, New York's scheme requires an insulating general election between enrollment and the next party primary. The resulting time limitation for enrollment is thus tied to a particularized legitimate purpose, and is in no sense invidious or arbitrary. Cf. *Lippitt* v. *Cipollone,* 404 U. S. 1032 (1972).[10]

New York did not prohibit the petitioners from voting in the 1972 primary election or from associating with the political party of their choice. It merely imposed a legitimate time limitation on their enrollment, which they chose to disregard.

Accordingly, the judgment below is

Affirmed.

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[10] The petitioners contend that New York already has less drastic means to prevent raiding—means that would accomplish the State's goal yet would permit the registrant who inadvertently failed to enroll in time to vote in the primary. Specifically, the petitioners point to § 332 of the State's Election Law, which provides that the party enrollment of any voter may be challenged by any party member and, upon the determination by the chairman of the party's county committee that the voter is not in sympathy with the principles of the party, may be canceled by a justice of the State Supreme Court after a hearing. That section, however, is clearly too cumbersome to have any real deterrent effect on raiding in a primary. Every challenge to a would-be raider requires a full administrative and judicial inquiry; proof that the challenged voter is not in sympathy with the party's principles demands inquiry into the voter's mind; and even if the challenge is successful, it strikes from the enrollment books only one name at a time. In the face of large-scale raiding, § 332 alone would be virtually ineffectual. We agree with the Court of Appeals that "[i]n requiring that the state use to a proper end the means designed to impinge minimally upon fundamental rights, the Constitution does not require that the state choose ineffectual means." 458 F. 2d, at 654.

MR. JUSTICE POWELL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

I

It is important at the outset to place New York's cutoff date for party enrollment in perspective. It prevents prospective voters from registering for a party primary some eight months before a presidential primary and 11 months before a nonpresidential one.[1] The Court recognizes, as it must, that the period between the enrollment and the primary election is a "lengthy" one.[2] Indeed, no other State has imposed upon voters previously unaffiliated with any party restrictions which even approach in severity those of New York.[3] And New York

[1] October 2, 1971, was the last day on which petitioners' enrollment could have been effective. June 20, 1972, was the date of New York's presidential primary. Thus, the deadline was actually some eight and one-half months before the primary. In nonpresidential years, the cutoff runs from early October until the following September.

[2] *Ante,* at 760.

[3] The State does not dispute this point. See Tr. of Oral Arg. 34.

Massachusetts, Illinois, New Jersey, Texas, and Ohio permit previously unaffiliated voters to declare their initial party affiliation immediately prior to voting in the primary of their choice. See Mass. Gen. Laws Ann., c. 53, §§ 37, 38 (Supp. 1973); Ill. Rev. Stat., c. 46, §§ 5–30, 7–43, 7–45 (1971); N. J. Stat. Ann. § 19:23–45 (1964); Tex. Election Code, Art. 13.01a (Supp. 1972–1973); Ohio Rev. Code Ann. § 3513.19 (1960).

California and Pennsylvania permit previously unaffiliated voters to declare an initial party preference up to the close of registration immediately preceding the primary. Calif. Elections Code §§ 22, 203, 311–312 (1961) (registration closes in California 53 days before a primary); Pa. Stat. Ann., Tit. 25, §§ 623–17, 951–16 (1963 and Supp. 1972–1973) (registration closes in Pennsylvania 50 days before a primary).

Michigan permits any registered voter to participate in the primary of his choice. Mich. Comp. Laws §§ 168.570, 168.575 to 168.576, Mich. Stat. Ann. §§ 6.1570, 6.1575–6.1576 (1972). See Brief for Petitioners 32–33.

concedes that only one other State—Kentucky—has imposed as stringent a primary registration deadline on persons with prior party affiliations.[4] Confronted with such a facially burdensome requirement, I find the Court's opinion unconvincing.

The right of all persons to vote, once the State has decided to make it available to some, becomes a basic one under the Constitution. *Dunn* v. *Blumstein,* 405 U. S. 330 (1972); *Kramer* v. *Union School District,* 395 U. S. 621 (1969); *Carrington* v. *Rash,* 380 U. S. 89 (1965). Self-expression through the public ballot equally with one's peers is the essence of a democratic society. *Reynolds* v. *Sims,* 377 U. S. 533 (1964). A citizen without a vote is to a large extent one without a voice in decisions which may profoundly affect him and his family. Whatever his disagreement may be with the judgments of public officials, the citizen should never be given just cause to think that he was denied an equal right to elect them.

Yet the Court today upholds a statute which imposes substantial and unnecessary restrictions on this right, as well as on the closely related right to associate with the party of one's choice. See *Williams* v. *Rhodes,* 393 U. S. 23 (1968); *NAACP* v. *Alabama,* 357 U. S. 449 (1958); *United States* v. *Robel,* 389 U. S. 258 (1967). The Court justifies this holding by placing the responsibility upon petitioners for their failure to enroll, as required by New York law, eight months prior to the presidential primary. We are told that petitioners "clearly could have registered and enrolled in the party of their choice" before the cutoff date and been eligible to vote in the primary, but for undetermined reasons "chose not to," and that their disfranchisement re-

[4] Tr. of Oral Arg. 34.

sulted from "their own failure to take timely steps to effect their enrollment." [5]

If the cutoff date were a less severe one, I could agree. Certainly, the State is justified in imposing a reasonable registration cutoff prior to any primary or general election, beyond which a citizen's failure to register may be presumed a negligent or wilful act forfeiting his right to vote in a particular election. But it is difficult to perceive any persuasive basis for a registration or party enrollment deadline eight to 11 months prior to election. Failure to comply with such an extreme deadline can hardly be used to justify denial of a fundamental constitutional right. Numerous prior decisions impose on us the obligation to protect the continuing availability of the franchise for all citizens, not to sanction its prolonged deferment or deprivation. *Ex parte Siebold,* 100 U. S. 371 (1880); *Nixon* v. *Herndon,* 273 U. S. 536 (1927); *Lane* v. *Wilson,* 307 U. S. 268 (1939); *Baker* v. *Carr,* 369 U. S. 186 (1962); *Gray* v. *Sanders,* 372 U. S. 368 (1963); *Wesberry* v. *Sanders,* 376 U. S. 1 (1964); *Reynolds* v. *Sims, supra; Carrington* v. *Rash, supra; Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663 (1966); *Kramer* v. *Union School District, supra; Cipriano* v. *City of Houma,* 395 U. S. 701 (1969); *Evans* v. *Cornman,* 398 U. S. 419 (1970); *City of Phoenix* v. *Kolodziejski,* 399 U. S. 204 (1970); *Bullock* v. *Carter,* 405 U. S. 134 (1972); *Dunn* v. *Blumstein, supra.*

The majority excuses the challenged statute because it does not "absolutely" disenfranchise petitioners or impose any absolute ban on their freedom of association.[6]

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[5] *Ante,* at 757, 758. See also *ante,* at 762, where the Court refers to § 186 as merely imposing "a legitimate time limitation on their [petitioners'] enrollment, which they chose to disregard."

[6] See *ante,* at 757:

"Section 186 of New York's Election Law, however, is quite different. It did not absolutely disenfranchise the class to which the

The State likewise contends this is "not a disenfranchising statute." [7] The Court apparently views this statute as a mere "time deadline" on petitioners' enrollment that disadvantages no identifiable class and that postpones through the next primary rather than denies altogether petitioners' voting and associational rights.[8] I cannot agree. Deferment of a right, especially one as sensitive and essential as the exercise of the first duty of citizenship, can be tantamount to its denial. And any statute which imposes for eight or 11 months an absolute freeze on party enrollment and the consequent right to vote totally disfranchises a class of persons who, for quite legitimate reasons, decide to register closer than eight months to the primary date and those who, for equally legitimate reasons, wish to choose or alter party affiliation. Our decisions, moreover, have never required

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petitioners belong—newly registered voters who were eligible to enroll in a party before the previous general election. Rather, the statute merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary."

Similarly at 758:

"For the same reason, we reject the petitioners' argument that § 186 violated their First and Fourteenth Amendment right of free association with the political party of their choice. Since they could have enrolled in a party in time to participate in the June 1972 primary, § 186 did not constitute a ban on their freedom of association, but merely a time limitation on when they had to act in order to participate in their chosen party's next primary."

And at 762:

"New York did not prohibit the petitioners from voting in the 1972 primary election or from associating with the political party of their choice. It merely imposed a legitimate time limitation on their enrollment, which they chose to disregard."

In all these instances, the majority seeks to distinguish a "time limitation" from an absolute disenfranchisement of petitioners or an absolute ban on their associational rights.

[7] Tr. of Oral Arg. 35.

[8] *Ante*, at 757 and n. 6, *supra*.

a permanent ban on the exercise of voting and associational rights before a constitutional breach is incurred. Rather, they have uniformly recognized that any serious burden or infringement on such "constitutionally protected activity" is sufficient to establish a constitutional violation, *Dunn* v. *Blumstein, supra,* at 343; *NAACP* v. *Button,* 371 U. S. 415, 438 (1963); *Reynolds* v. *Sims, supra,* at 561–562.

II

The majority does not identify the standard of scrutiny it applies to the New York statute. We are told only that the cutoff date is "not an arbitrary time limit unconnected to any important state goal";[9] that it is "tied to a particularized legitimate purpose, and is in no sense invidious or arbitrary."[10] The Court does not explain why this formulation was chosen, what precedents support it, or how and in what contexts it is to be applied. Such nebulous promulgations are bound to leave the lower courts and state legislatures in doubt and confusion as to how we will approach future significant burdens on the right to vote and to associate freely with the party of one's choice.

The Court's formulation, though the terminology is somewhat stronger, resembles the traditional equal protection "rational basis" test. One may agree that the challenged cutoff date is rationally related to the legitimate interest of New York in preventing party "raiding." But this Court's prior decisions simply do not permit such an approach. Rather, they recognize that:

> "[T]he 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

[9] *Ante,* at 760.

[10] *Ante,* at 762.

> and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims, supra,* at 561–562.

See also *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886).

Voting in a party primary is as protected against state encroachment as voting in a general election. *Bullock* v. *Carter, supra; Terry* v. *Adams,* 345 U. S. 461 (1953); *United States* v. *Classic,* 313 U. S. 299 (1941). And the Court has said quite explicitly that "if a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.'" *Dunn* v. *Blumstein, supra,* at 337, quoting *Kramer* v. *Union School District, supra,* at 627 (emphasis added in *Dunn*). See also *Cipriano* v. *City of Houma, supra,* at 704; *City of Phoenix* v. *Kolodziejski, supra,* at 205, 209. Likewise, the Court has asserted that "the right of individuals to associate for the advancement of political beliefs" is "among our most precious freedoms," *Williams* v. *Rhodes,* 393 U. S., at 30, and must be carefully protected from state encroachment. *NAACP* v. *Alabama, supra; Bates* v. *Little Rock,* 361 U. S. 516 (1960); *Gibson* v. *Florida Legislative Investigation Committee,* 372 U. S. 539 (1963).

The inquiry thus becomes whether the instant statute, burdening as it does fundamental constitutional rights, can withstand the strict judicial scrutiny called for by our prior cases. The asserted state interest in this case is the prevention of party "raiding," which consists of the movement or "crossover" by members of one party into another's primary to "defeat a candidate who is adverse to the interests they care to advance." [11] The typical example is a member of one party deliberately entering

[11] Tr. of Oral Arg. 29.

another's primary to help nominate a weaker candidate, so that his own party's nominee might win more easily in the general election. A State does have an interest in preventing such behavior, lest "the efficacy of the party system in the democratic process—its usefulness in providing a unity of divergent factions in an alliance for power—would be seriously impaired," *Rosario* v. *Rockefeller,* 458 F. 2d 649, 652 (CA2). The court below held flatly that the state interest in deterring "raiding" was a "compelling" one. *Ibid.*

The matter, however, is not so easily resolved. The importance or significance of any such interest cannot be determined in a vacuum but, rather, in the context of the means advanced by the State to protect it and the constitutionally sensitive activity it operates to impede. The state interest here is hardly substantial enough to sustain the presumption, upon which the statute appears to be based, that most persons who change or declare party affiliation nearer than eight to 11 months to a party primary do so with intent to raid that primary. Any such presumption assumes a willingness to manipulate the system which is not likely to be widespread.

Political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership. And citizens generally declare or alter party affiliation for reasons quite unconnected with any premeditated intention to disrupt or frustrate the plans of a party with which they are not in sympathy. Citizens customarily choose a party and vote in its primary simply because it presents candidates and issues more responsive to their immediate concerns and aspirations. Such candidates or issues often are not apparent eight to 11 months before a primary. That a citizen should be absolutely precluded so far in advance from voting in a party primary in response to a sympathetic candidate, a new or meaningful issue, or changing party philosophies in his State, runs contrary to the fundamental rights of

personal choice and expression which voting in this country was designed to serve.

Whatever state interest exists for preventing crossovers from one party to another is appreciably lessened where, as in the case of petitioners, there has been no previous affiliation with any political party. The danger of voters in sympathy with one party "raiding" another party is insubstantial where the voter has made no prior party commitment at all. Certainly, the danger falls short of the overriding state interest needed to justify denying petitioners, so far in advance, the right to declare an *initial* party affiliation and vote in the party primary of their choice.

III

In *Dunn, supra,* at 343, the Court emphasized that the State, in pursuing its legitimate interest,

> "cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' *NAACP* v. *Button,* 371 U. S. 415, 438 (1963); *United States* v. *Robel,* 389 U. S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro* v. *Thompson, supra,* at 631. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960)."

The Court indicates that placing the enrollment deadline before the preceding general election serves well the state interest in discouraging party "raiding." [12] This fails to address the critical question of whether that interest may be protected adequately by less severe measures.

[12] *Ante,* at 761.

A foreshortening of the challenged period in this case would not leave the party structure of New York helpless and vulnerable to "raiding" activities. Other States, with varied and complex party systems, have maintained them successfully without the advanced enrollment deadline imposed by New York.

Partisan political activities do not constantly engage the attention of large numbers of Americans, especially as party labels and loyalties tend to be less persuasive than issues and the qualities of individual candidates. The crossover in registration from one party to another is most often impelled by motives quite unrelated to a desire to raid or distort a party's primary. To the extent that deliberate raiding occurs, it is usually the result of organized effort which depends for its success upon some relatively immediate concern or interest of the voters. This type of effort is more likely to occur as a primary date draws near. If New York were to adopt a more reasonable enrollment deadline, say 30 to 60 days, the period most vulnerable to raiding activity would be protected. More importantly, a less drastic enrollment deadline than the eight or 11 months now imposed by New York would make the franchise and opportunities for legitimate party participation available to those who constitutionally have the right to exercise them.[13]

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[13] Petitioners also suggest other "less drastic" means of protecting the State's interest: greater reliance on the summary disenrollment procedures of § 332 of the State's election law and loyalty oaths, restrictive party affiliation rules optional for those parties who wish them, limitation of the statute's operation to persons with pre-existing party affiliations, and criminal sanctions for fraudulent participation in the electoral process. Tr. of Oral Arg. 13–21. I make no judgment either on the efficacy of these alternatives in protecting the State's interest or on their potential infringement of constitutionally protected rights. Their presence, however, points to the range and variety of other experimental techniques available for New York to consider.

Reporter's Note

The next page is purposely numbered 901. The numbers between 771 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM JANUARY 22 THROUGH MARCH 19, 1973

JANUARY 22, 1973

Affirmed on Appeal

No. 72–524. MARYLAND PEOPLE'S PARTY ET AL. *v.* MANDEL, GOVERNOR OF MARYLAND, ET AL. Affirmed on appeal from D. C. Md. MR. JUSTICE BRENNAN would dismiss the appeal as moot.

Appeal Dismissed

No. 72–638. LAKE CHARLES AMERICAN PRESS *v.* FRANCIS. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would postpone question of jurisdiction to hearing of case on the merits. MR. JUSTICE BRENNAN would dismiss appeal for want of jurisdiction, being of the view that the decision of the Louisiana Supreme Court was based on an adequate state ground. Reported below: 262 La. 875, 265 So. 2d 206.

Certiorari Granted—Vacated and Remanded

No. 72–5119. ROSS *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Ham* v. *South Carolina,* 409 U. S. 524 (1973). Reported below: —— Mass. ——, 282 N. E. 2d 70.

Miscellaneous Orders

No. 59, Orig. UNITED STATES *v.* NEVADA ET AL. Motion of Association on American Indian Affairs, Inc., for leave to file a brief as *amicus curiae* in support of motion for leave to file bill of complaint granted. Motion for leave to file bill of complaint set for oral argument in due course.

No. A–762. SIGLER, CHAIRMAN, BOARD OF PAROLE, ET AL. *v.* BERRIGAN ET AL. C. A. D. C. Cir. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted. Reported below: 154 U. S. App. D. C. 334, 475 F. 2d 918.

MR. JUSTICE DOUGLAS, dissenting from the grant of the stay by the Court.

I agree with Mr. Justice Black in his dissent in *Zemel* v. *Rusk,* 381 U. S. 1, 20, that the power to regulate the right to travel is vested in Congress and not in the Executive Branch. There is no law barring the Berrigans from foreign travel to North Vietnam; there is no law barring paroled citizens from travel in foreign countries.* It is not enough to argue that the State Department has determined that the proposed foreign travel is not in the national interest.

The right to travel is a peripheral right of every citizen under the First Amendment. *Zemel* v. *Rusk, supra,* at 24 (DOUGLAS, J., dissenting). Therefore, no travel could be prohibited except under a narrowly drawn statute. In my dissent in *Zemel,* I enumerated several national interests which might support a restriction on the right to travel; none of those interests exists here. To the contrary, the national interest embodied in the First Amendment right to freedom of speech and information would be furthered by such a visit. As in *Zemel,* the danger feared here is the contact of the Berrigans with a Communist regime. "The world, however, is filled with Communist thought . . . . [Communist regimes] are part of the world spectrum; and if we are to know them and under-

*Title 28 CFR § 2.28 (c) provides that "Board approval shall be required for travel outside the continental limits of the United States . . . ." Like all action by federal governmental officials, the powers of the Parole Board may be exercised only with regard to constitutional restraints. No purpose of fleeing the country is even suggested.

stand them, we must mingle with them . . . ." *Id.*, at 25. Keeping alive intellectual intercourse between seemingly opposing groups has always been important, and is even more important in view of the bridges of communication long destroyed between this country and North Vietnam which are now being restored. Part of the restoration of these bridges has been the allowance by North Vietnam of many United States citizens to visit that country as well as the peace negotiations under way for some months.

The ability to understand this pluralistic world filled with clashing ideologies is a prerequisite of any hope for world peace. The late Pope John XXIII in his famous encyclical Pacem in Terris emphasized that without knowledge and understanding among all peoples there can be no hope for love and peace. One of the best ways to insure this knowledge and understanding is to allow the people of the world to mingle freely with one another.

I would allow the respondents their constitutional right to travel.

No. A–570. FULLER *v.* MICHIGAN. Ct. App. Mich. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–634. MARION ET AL. *v.* UNITED STATES. C. A. 6th Cir. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–674. B. P. O. E. LODGE NO. 2043 OF BRUNSWICK ET AL. *v.* INGRAHAM ET AL. Appeal from Sup. Jud. Ct. Me. Application for stay of mandate presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, granted. Reported below: 297 A. 2d 607.

No. A–740. GRIT ET AL. *v.* WOLMAN ET AL. D. C. S. D. Ohio. Application for stay of judgment presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. Reported below: 353 F. Supp. 744.

No. 71–224. SWENSON, WARDEN *v.* STIDHAM, 409 U. S. 224. Motion of respondent to modify this Court's opinion is hereby granted. The penultimate paragraph of the opinion is amended by striking the sentence reading, "Neither the District Court nor the Court of Appeals reached this issue" and substituting therefor the following: "The Court of Appeals did not reach this issue."*

No. 72–214. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* WICHITA BOARD OF TRADE ET AL.; and No. 72–433. INTERSTATE COMMERCE COMMISSION *v.* WICHITA BOARD OF TRADE ET AL. Appeals from D. C. Kan. [Probable jurisdiction noted, 409 U. S. 1005.] Motion of appellants for additional time for oral argument and for two counsel to argue granted. Five additional minutes allotted to both appellants and appellees for that purpose.

No. A–721 (72–434). BYRN, GUARDIAN *v.* NEW YORK CITY HEALTH & HOSPITALS CORP. ET AL. Appeal from Ct. App. N. Y. Application for temporary restraining order presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Reported below: 31 N. Y. 2d 194, 286 N. E. 2d 887.

No. 72–630. HALL ET AL. *v.* COLE. C. A. 2d Cir. [Certiorari granted, 409 U. S. 1074.] Motion to dismiss writ as improvidently granted denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 72–5323. KEEBLE *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 409 U. S. 1037.] Motion of William J. Janklow, Esquire, to permit Mark V. Meierhenry, Esquire, to argue *pro hac vice* on behalf of petitioner granted.

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*[REPORTER'S NOTE: The opinion is reported as so amended at 409 U. S. 224.]

No. 72–147. BULLOCK, SECRETARY OF STATE OF TEXAS, ET AL. *v.* REGESTER ET AL. Appeal from D. C. W. D. Tex. [Probable jurisdiction noted, 409 U. S. 840.] Motion of appellees for additional time and for permission for more than one counsel to argue granted. Fifteen additional minutes allotted to both appellees and appellants for that purpose.

No. A–714 (72–917). TURNOF *v.* UNITED STATES. C. A. 2d Cir. Application for stay of judgment of conviction of the United States District Court for the Southern District of New York presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–761 (72–977). JACK *v.* UNITED STATES. C. A. 2d Cir. Application for stay of judgment presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this application.

No. D–3. IN RE DISBARMENT OF KONIGSBERG. It having been reported to this Court that Sidney Konigsberg of New York, New York, has been disbarred from the practice of law in all the courts of the State of New York, and this Court by order of November 6, 1972 [409 U. S. 974], having suspended the said Sidney Konigsberg from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time within which to file a return has expired;

IT IS ORDERED that the said Sidney Konigsberg be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–6. IN RE DISBARMENT OF YUDOW. It having been reported to this Court that Daniel D. Yudow of New York, New York, has been disbarred from the practice of law in all the courts of the State of New York, and this Court by order of November 6, 1972 [409 U. S. 975], having suspended the said Daniel D. Yudow from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time within which to file a return has expired;

IT IS ORDERED that the said Daniel D. Yudow be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–7. IN RE DISBARMENT OF SCHERMAN. It having been reported to this Court that Benjamin B. Scherman of New York, New York, has been disbarred from the practice of law in all the courts of the State of New York, and this Court by order of November 6, 1972 [409 U. S. 975], having suspended the said Benjamin B. Scherman from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time within which to file a return has expired;

IT IS ORDERED that the said Benjamin B. Scherman be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 72–5460. PILACIOS *v.* BRITTON, WARDEN; and

No. 72–5629. SPROUSE *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied.

No. 72–5705. MCDONALD *v.* MOTT ET AL.; and

No. 72–5768. PENNA *v.* NIXON, PRESIDENT OF THE UNITED STATES, ET AL. Motions for leave to file petitions for writs of mandamus and other relief denied.

Probable Jurisdiction Noted

No. 72–459. SLOAN, TREASURER OF PENNSYLVANIA, ET AL. *v.* LEMON ET AL.; and

No. 72–620. CROUTER *v.* LEMON ET AL. Appeals from D. C. E. D. Pa. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. These cases to be argued immediately following consolidated cases Nos. 72–694, 72–753, 72–791, and 72–929 [immediately *infra*]. Reported below: 340 F. Supp. 1356.

No. 72–694. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL. *v.* NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL.;

No. 72–753. ANDERSON *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL.;

No. 72–791. NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL.; and

No. 72–929. CHERRY ET AL. *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL. Appeals from D. C. S. D. N. Y. Probable jurisdiction noted. Cases consolidated and a total of two hours allotted for oral argument. Reported below: 350 F. Supp. 655.

Certiorari Granted. (See also No. 72–438, *ante,* p. 257.)

No. 72–822. RENEGOTIATION BOARD *v.* BANNERCRAFT CLOTHING CO., INC., ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 151 U. S. App. D. C. 174, 466 F. 2d 345.

No. 72–312. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* WARE. Ct. App. Cal., 1st App. Dist. Certiorari granted. Reported below: 24 Cal. App. 3d 35, 100 Cal. Rptr. 791.

No. 72–397. BONELLI CATTLE CO. ET AL. *v.* ARIZONA ET AL. Sup. Ct. Ariz. Certiorari granted. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 107 Ariz. 465, 489 P. 2d 699, and 108 Ariz. 258, 495 P. 2d 1312.

Certiorari Denied

No. 71–1097. YUMICH ET AL. *v.* CITY OF CHICAGO; and

No. 71–1098. CITY OF CHICAGO *v.* YUMICH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 452 F. 2d 59.

No. 71–5991. SELLERS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 257 S. C. 35, 183 S. E. 2d 889.

No. 72–480. RIDGEWAY *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 72–511. CALIFORNIA *v.* HILLS. App. Dept., Super. Ct. Cal., County of San Francisco. Certiorari denied.

No. 72–647. CALIFORNIA *v.* FOREMAN. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 72–675. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 590.

No. 72–692. DENTAMARO ET AL. *v.* UNITED STATES;

No. 72–693. IACOVETTI *v.* UNITED STATES; and

No. 72–5659. CARDILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 466 F. 2d 1147.

No. 72–681. ERNST *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 1403.

No. 72–701. BARR ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–704. JOHNSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 467 F. 2d 804.

No. 72–705. FIRST STATE BANK OF CROSSETT, ARKANSAS *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 465 F. 2d 1264.

No. 72–708. NOA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 355.

No. 72–710. CITIZENS OF INDIANAPOLIS FOR QUALITY SCHOOLS, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 466 F. 2d 573.

No. 72–717. BONANNO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 467 F. 2d 14.

No. 72–720. BLACKWELL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 152 U. S. App. D. C. 325, 470 F. 2d 1234.

No. 72–721. DISLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–726. LOCAL 1291, INTERNATIONAL LONGSHOREMEN'S ASSN. *v.* HODGSON, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 461 F. 2d 1262.

No. 72–736. MILLER, AKA MULLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 467 F. 2d 129.

No. 72–741. MY STORE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 468 F. 2d 1146.

No. 72–755. TRIPP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 468 F. 2d 569.

No. 72–756. BERNARD SCREEN PRINTING CORP. *v.* UNIVERSAL TERMINAL & STEVEDORING CORP. C. A. 2d Cir. Certiorari denied. Reported below: 464 F. 2d 934.

No. 72–767. BUDDIES SUPERMARKETS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 461 F. 2d 847.

No. 72–771. PHOENIX MUTUAL LIFE INSURANCE CO. *v.* MONTAGUE, TRUSTEE. C. A. 4th Cir. Certiorari denied.

No. 72–799. ELLER ET AL. *v.* BOARD OF EDUCATION OF PRINCE GEORGES COUNTY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 468 F. 2d 894.

No. 72–821. PEACOCK *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 48 Ala. App. 391, 265 So. 2d 175.

No. 72–834. HUBBARD ET AL. *v.* AMMERMAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 1169.

No. 72–5218. GOFF *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 2d and 11th Jud. Dists. Certiorari denied.

No. 72–5368. TYLER *v.* LARK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 72–5381. HORSLEY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 72–5453. MOORE *v.* BOUNDS, CORRECTIONS COMMISSIONER. C. A. 4th Cir. Certiorari denied.

No. 72–5434. HINTON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 31 N. Y. 2d 71, 286 N. E. 2d 265.

No. 72–5464. RICHARDSON *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 461 F. 2d 860.

No. 72–5469. PETERSON *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 72–5542. SANTELLANES *v.* UNITED STATES; and
No. 72–5657. TELLEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 1136.

No. 72–5622. NICHOLS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 466 F. 2d 998.

No. 72–5630. MCINTYRE ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 467 F. 2d 274.

No. 72–5639. MAZATINI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 72–5652. MELENDEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–5668. MCFADDEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 458 F. 2d 440.

No. 72–5673. TRIGG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 72–5682. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 447 F. 2d 589.

No. 72–5686. DE TIENNE *v.* UNITED STATES; and
No. 72–5812. ASKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 468 F. 2d 151.

No. 72–5683. BOYDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 463 F. 2d 229.

No. 72–5684. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 467 F. 2d 283.

No. 72–5692. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 466 F. 2d 535.

No. 72–5699. PAYNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 467 F. 2d 828.

No. 72–5703. DODD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–5708. O'DAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 467 F. 2d 1387.

No. 72–5714. FARRIES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 72–5742. JONES *v.* TAYLOR, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied.

No. 72–5748. HENDERSON *v.* EASTERN FREIGHTWAYS, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 460 F. 2d 258.

No. 72–5749. WASHINGTON *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–5750. MERRITT *v.* FANNING ET AL. C. A. 8th Cir. Certiorari denied.

No. 72–5755. AGNEW *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE (COUNTY OF RIVERSIDE ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 72–5811. LARGE *v.* OHIO. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 72–5778. HOHENSEE *v.* PENNSYLVANIA DEPARTMENT OF HIGHWAYS. Pa. Commw. Ct. Certiorari denied.

No. 72–5782. HOHENSEE *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL. Pa. Commw. Ct. Certiorari denied.

No. 72–5823. DANEFF *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 30 N. Y. 2d 793, 286 N. E. 2d 273.

No. 72–408. MALAVARCO *v.* UNITED STATES; and

No. 72–566. CURICO *v.* UNITED STATES. C. A. 2d Cir. Motion to dispense with printing petition in No. 72–566 granted. Certiorari denied. Reported below: 467 F. 2d 610.

No. 72–689. ACREE *v.* UNITED STATES. C. A. 10th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 466 F. 2d 1114.

No. 72–744. FIERRO-SOZA *v.* UNITED STATES. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 467 F. 2d 484.

No. 72–718. KIRSHNIT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–725. ROBBINS TIRE & RUBBER CO., INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 462 F. 2d 684.

No. 72–769. KNUTH ET AL. *v.* ERIE-CRAWFORD DAIRY COOPERATIVE ASSN. ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 463 F. 2d 470.

No. 72–623. TIERNEY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 806.

MR. JUSTICE DOUGLAS, dissenting.

Petitioners and other Irish-Americans living in New York were subpoenaed to appear before a federal grand jury sitting in the Northern District of Texas. Even though they had been granted immunity under 18 U. S. C. §§ 6002–6003, petitioners refused to answer various questions regarding the purchase of firearms in the United States. Petitioners were held in civil contempt.

Petitioners based their refusal to testify on the grounds that their counsel had been overheard on a Government wiretap two days prior to their appearance before the grand jury, and that the use immunity they had been granted under 18 U. S. C. §§ 6002–6003 was ineffective to protect them against foreign prosecution. At the time the contempt hearing was held before the District Court, the Government alleged that there were no overhearings of the petitioners' counsel, and the District Court held that there was no substantial possibility of foreign prosecution. By the time the appeal was heard by the Court of Appeals, the Government had disclosed the wiretapped conversation, which the Court of Appeals examined *in camera,* and determined was not relevant to the petitioners. The Court of Appeals sustained the determination of contempt. 465 F. 2d 806.

I granted petitioners bail pending the determination of their petition for certiorari on the ground that the issues presented were substantial. 409 U. S. 1232 (in chambers). I would grant certiorari for the same reason.

In my dissent from denial of certiorari in *Russo* v. *Byrne,* 409 U. S. 1013, I pointed out the Court's concern in *Alderman* v. *United States,* 394 U. S. 165, with the necessity of allowing the parties themselves to assess

and argue whether or not overhearings were relevant to their specific case. An *in camera* determination of relevancy will seldom, if ever, be a sufficient safeguard against the governmental interference with the constitutionally protected area of right to counsel. In the instant case, upon admitting that the overhearing had occurred, the Government stated that it was "in connection with a separate aspect of the investigation." If the overhearing had anything to do with the grand jury investigation for which petitioners were called as witnesses, no one but petitioners and their counsel were in a position to determine in what ways the conversation might relate to overall strategy or defense. The right to counsel is especially important to a person involved in a grand jury investigation. Numerous and complex rights and liabilities are often involved, yet the average citizen may have even less knowledge of these rights than of his rights as a defendant in a criminal proceeding. Anything which undermines the effective assistance of counsel will severely handicap those who are forced to testify.

The Court itself in *Zicarelli* v. *New Jersey State Commission of Investigation,* 406 U. S. 472, 481, although not deciding the questions raised by the possibility of testimony for which a witness had been granted §§ 6002–6003 immunity being used against him in a foreign prosecution, indicated the constitutional importance of such questions. In the instant case, the possibility of foreign prosecution is not insignificant. There are indications that the impetus for the grand jury investigation was the request of foreign powers.[1] It is not enough to say

[1] News articles in both the New York Times, July 17, 1972, and in the Dallas Morning News, June 23, 1972, indicated that the British Government had requested that the Nixon administration take steps to cut off the alleged flow of arms from the United States to Northern Ireland.

that petitioners are not subject to a foreign jurisdiction: At any time petitioners could be traveling in a foreign country or find themselves the subjects of various international extradition treaties. Neither is it an answer that grand jury testimony is secret. There are innumerable circumstances in which access to grand jury testimony can be had.[2]

I would grant the writ of certiorari.

No. 72–5538. CASTRO-CASTRO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 464 F. 2d 336.

No. 72–5547. KILLS PLENTY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 466 F. 2d 240.

No. 72–5645. SEWAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 468 F. 2d 236.

No. 72–5662. HITCHCOCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 467 F. 2d 1107.

No. 72–5665. WRIGHT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 466 F. 2d 1256.

No. 72–5693. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 466 F. 2d 1210.

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[2] A witness' compelled grand jury testimony can be used as a basis for a perjury prosecution, wherein an *in camera* proceeding would violate the accused's right to a public trial. In addition, grand jury testimony is regularly disclosed to criminal defendants without a court order pursuant to *Brady* v. *Maryland,* 373 U. S. 83, and *Jencks* v. *United States,* 353 U. S. 657.

No. 72–5839. JOHNSON *v.* BOARD OF PUBLIC INSTRUCTION OF DADE COUNTY, FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–758. UNITED TRANSPORTATION UNION *v.* CHICAGO & NORTH WESTERN RAILWAY CO.; and

No. 72–789. UNITED TRANSPORTATION UNION *v.* CHICAGO & NORTH WESTERN RAILWAY CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN would grant certiorari.

No. 72–5773. MARCELIN *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari because on reading the record and Judge Kaufman's dissent in the Court of Appeals, 462 F. 2d 36, 46, he believes a substantial question is raised whether petitioner had effective assistance of counsel in the trial for murder. Cf. *Ellis* v. *United States,* 356 U. S. 674, 675. Reported below: 462 F. 2d 36.

Rehearing Denied

No. 71–1497. BECK *v.* CONNECTICUT GENERAL LIFE INSURANCE CO., 409 U. S. 845 and 1093; and

No. 71–6873. NEELY *v.* FIELD, U. S. DISTRICT JUDGE, ET AL., 409 U. S. 871 and 1050. Motions for leave to file second petitions for rehearing denied.

No. 72–553. IN RE SCHWARZ, 409 U. S. 1047. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 72–5223. O'CLAIR *v.* UNITED STATES, 409 U. S. 986. Motion for leave to file petition for rehearing denied.

No. 71–1465. ROSENTHAL *v.* ARKANSAS LOUISIANA FINANCE CORP., 409 U. S. 1037;

No. 72–484. FELLAND *v.* SCHAEFER ET AL., 409 U. S. 1031;

No. 72–589. KRAUSE, ADMINISTRATOR *v.* OHIO, 409 U. S. 1052;

No. 72–5301. NUGENT *v.* UNITED STATES, 409 U. S. 1065;

No. 72–5313. DUNK ET AL. *v.* MANUFACTURERS LIGHT & HEAT CO., 409 U. S. 1078;

No. 72–5408. JACKSON *v.* BOHLINGER, 409 U. S. 1043;

No. 72–5420. OLDEN *v.* WILSON, WARDEN, ET AL., 409 U. S. 1044; and

No. 72–5515. HARMON *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, 409 U. S. 1063. Petitions for rehearing denied.

JANUARY 26, 1973

Miscellaneous Orders

No. A–789. VAUGHNS ET AL. *v.* BOARD OF EDUCATION OF PRINCE GEORGES COUNTY, MARYLAND, ET AL.; and

No. A–790. VAUGHNS ET AL. *v.* BOARD OF EDUCATION OF PRINCE GEORGES COUNTY, MARYLAND, ET AL. C. A. 4th Cir. Applications for stays presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. MR. JUSTICE BRENNAN, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL took no part in the consideration or decision of these applications.

FEBRUARY 5, 1973

Dismissal Under Rule 60

No. 72–750. SIEGEL ET UX. *v.* UNITED STATES. C. A. 9th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 464 F. 2d 891.

FEBRUARY 6, 1973

Dismissal Under Rule 60

No. 72–5851. BARR ET UX *v.* THORP CREDIT, INC. Sup. Ct. Iowa. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 200 N. W. 2d 535.

FEBRUARY 20, 1973

Affirmed on Appeal

No. 72–719. NON-RESIDENT TAXPAYERS ASSOCIATION OF PENNSYLVANIA AND NEW JERSEY ET AL. *v.* MURRAY, SHERIFF, ET AL. Affirmed on appeal from D. C. E. D. Pa. Reported below: 347 F. Supp. 399.

No. 72–886. PRIGMORE ET UX. *v.* RENFRO ET AL. Affirmed on appeal from D. C. N. D. Ala. Reported below: 356 F. Supp. 427.

No. 72–889. TOLPO ET AL. *v.* BULLOCK, SECRETARY OF STATE OF TEXAS. Affirmed on appeal from D. C. E. D. Tex.

No. 72–811. NORTH CAROLINA UTILITIES COMMISSION ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. Affirmed on appeal from D. C. E. D. N. C. MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 347 F. Supp. 103.

No. 72–823. NADER ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. Conn. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument on issue of right of intervention. Reported below: 349 F. Supp. 22.

No. 72–5789. WARNER ET AL. *v.* TROMBETTA, DIRECTOR, PENNSYLVANIA BUREAU OF TRAFFIC SAFETY, ET AL. Affirmed on appeal from D. C. M. D. Pa. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 348 F. Supp. 1068.

Appeals Dismissed

No. 71–6886. GLADDEN *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 260 La. 735, 257 So. 2d 388.

No. 72–808. ANDERSON *v.* OREGON. Appeal from Ct. App. Ore. Motion to dispense with printing jurisdictional statement granted. Appeal dismissed for want of substantial federal question. Reported below: 6 Ore. App. 22, 485 P. 2d 446.

No. 72–5642. TILLMAN *v.* MARYLAND. Appeal from D. C. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–829. LEGGETT, DBA INVESTIGATIONS, LTD. *v.* OHIO DEPARTMENT OF COMMERCE, DIVISION OF LICENSING. Appeal from Ct. App. Ohio, Hamilton County, dismissed for want of substantial federal question.

No. 72–902. WOJTYCHA *v.* NEW JERSEY. Appeal from Super. Ct. N. J. dismissed for want of substantial federal question. Reported below: See 62 N. J. 78, 299 A. 2d 76.

No. 72–897. HOFFMAN ET AL. *v.* CITY OF CINCINNATI. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument on issue of systematic exclusion of voters between the ages of 18 and 21 from the jury. Reported below: 31 Ohio St. 2d 163, 285 N. E. 2d 714.

No. 72–931. HANDLERY, TRUSTEE, ET AL. *v.* CALIFORNIA FRANCHISE TAX BOARD. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. Reported below: 26 Cal. App. 3d 970, 103 Cal. Rptr. 465.

Miscellaneous Orders

No. A–811. AGUAYO ET AL. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 2d Cir. Application for stay or writ of injunction presented to MR. JUSTICE MARSHALL and by him referred to the Court, denied. Reported below: 473 F. 2d 1090.

No. D–9. IN RE DISBARMENT OF THALER. It is ordered that Seymour R. Thaler of New York, New York, be suspended from the practice of law in this Court and that a rule issue returnable within 40 days requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 59, Orig. UNITED STATES *v.* NEVADA ET AL. Motion of Pyramid Lake Paiute Tribe of Indians for leave to participate in oral argument as *amicus curiae* denied.

No. 71–1442. COLGROVE *v.* BATTIN, U. S. DISTRICT JUDGE. C. A. 9th Cir. [Certiorari granted, 409 U. S. 841.] Motion of California Trial Lawyers Assn. for leave to file a brief as *amicus curiae* in support of petitioner granted.

No. 71–1553. GILLIGAN, GOVERNOR OF OHIO, ET AL. *v.* MORGAN ET AL. C. A. 6th Cir. [Certiorari granted, 409 U. S. 947.] Motion of petitioners to restrict issues denied inasmuch as the issues upon which certiorari is granted cannot be expanded by an *amicus curiae*. See Rule 23 (1)(c) of the Rules of this Court.

No. 72–178. STRUCK *v.* SECRETARY OF DEFENSE ET AL., 409 U. S. 1071. Motion for double costs denied.

No. 71–1623. BULLOCK, SECRETARY OF STATE OF TEXAS *v.* WEISER ET AL. Appeal from D. C. N. D. Tex. [Probable jurisdiction noted, 409 U. S. 947.] Motion of appellees to divide oral argument denied.

No. 72–212. CUPP, PENITENTIARY SUPERINTENDENT *v.* MURPHY. C. A. 9th Cir. [Certiorari granted, 409 U. S. 1036.] Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 72–535. UNITED STATES ET AL. *v.* STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (SCRAP) ET AL.; and

No. 72–562. ABERDEEN & ROCKFISH RAILROAD CO. ET AL. *v.* STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (SCRAP) ET AL. Appeals from D. C. D. C. [Probable jurisdiction noted, 409 U. S. 1073.] Motion of appellee SCRAP for leave to dispense with printing brief granted. Motion of appellants for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Appellees likewise granted 15 additional minutes for oral argument. Motion of John F. Banzhaf III, Esquire, to permit Peter H. Meyers, Esquire, to argue *pro hac vice* on behalf of appellee SCRAP granted. Motion of Philip Elman, Esquire, to permit John F. Dienelt, Esquire, to argue *pro hac vice* on behalf of appellees Environmental Defense Fund et al. granted.

No. 72–770. COMMISSIONER OF SOCIAL SERVICES OF NEW YORK ET AL. *v.* KLEIN ET AL.; and

No. 72–803. NASSAU COUNTY MEDICAL CENTER ET AL. *v.* KLEIN ET AL. Appeals from D. C. E. D. N. Y. The Solicitor General is invited to file a brief expressing the views of the United States on the statutory issue. Reported below: 347 F. Supp. 496.

No. 72–846. BALL, DIRECTOR, DEPARTMENT OF AGRICULTURE OF MICHIGAN, ET AL. *v.* ARMOUR & CO. ET AL. C. A. 6th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 468 F. 2d 76.

No. 72–851. ONEIDA INDIAN NATION OF NEW YORK ET AL. *v.* COUNTY OF ONEIDA, NEW YORK, ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 464 F. 2d 916.

No. 72–943. FISHER ET AL. *v.* GRAVES ET AL. Appeal from D. C. Me. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 361 F. Supp. 1356.

No. 72–1026. DURHAM *v.* MCLEOD, ATTORNEY GENERAL OF SOUTH CAROLINA, ET AL. Appeal from Sup. Ct. S. C. Motion to expedite consideration denied. Reported below: 259 S. C. 409, 192 S. E. 2d 202.

No. A–630 (72–1126). HATTERSLEY *v.* TEXAS. Ct. Crim. App. Tex. Application for stay and/or recall of mandate of Court of Criminal Appeals of Texas presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 487 S. W. 2d 354.

No. 72–5401. CASON *v.* CITY OF COLUMBUS, 409 U. S. 1053. Appellee is directed to file a response to petition for rehearing and to motion for leave to supplement petition for rehearing within 30 days.

No. 72–510. FALKNER ET UX. *v.* BROWN, CHIEF JUDGE, U. S. COURT OF APPEALS. Motion to dispense with printing petition for writ of mandamus and respondent's brief granted. Motion for leave to file petition for writ of mandamus denied.

No. 72–5766. MORTON *v.* UNITED STATES ET AL.;

No. 72–5774. JOHNSON *v.* MEACHAM, WARDEN, ET AL.;

No. 72–5820. POLK *v.* HENDERSON, WARDEN;

No. 72–5901. SIMMS *v.* WYOMING ET AL.;

No. 72–5916. THERIAULT *v.* LAMB, SHERIFF; and

No. 72–5932. SANDERS *v.* NELSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 72–5565. BRUTON *v.* MATTHES, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL.; and

No. 72–5841. ALVAREZ *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 72–5854. RUDERER *v.* WEBSTER, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 72–5788. MAGEE *v.* CARROW ET AL. Motion for leave to file petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 72–331. LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK, ET AL. *v.* TURLEY ET AL. Appeal from D. C. W. D. N. Y. Probable jurisdiction noted. Reported below: 342 F. Supp. 544.

No. 72–848. UNITED STATES DEPARTMENT OF AGRICULTURE ET AL. *v.* MURRY ET AL. Appeal from D. C. D. C. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 348 F. Supp. 242.

Certiorari Granted

No. 72–617. GERTZ *v.* ROBERT WELCH, INC. C. A. 7th Cir. Certiorari granted. Reported below: 471 F. 2d 801.

No. 72–734. UNITED STATES *v.* CALANDRA. C. A. 6th Cir. Certiorari granted. Reported below: 465 F. 2d 1218.

No. 72–888. ZAHN ET AL. *v.* INTERNATIONAL PAPER CO. C. A. 2d Cir. Motion of National Council of Senior Citizens et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 469 F. 2d 1033.

No. 72–5794. DAVIS *v.* ALASKA. Sup. Ct. Alaska. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition which reads as follows:

"Did the trial court err in not permitting cross examination of chief identification witness Green concerning the nature of his juvenile record to bring before the jury the fact that Green was himself on probation for burglary at the time of the identification, thereby denying petitioner his Sixth Amendment right to confrontation?" Reported below: 499 P. 2d 1025.

No. 72–5847. ALEXANDER *v.* GARDNER-DENVER CO. C. A. 10th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 466 F. 2d 1209.

Certiorari Denied. (See also Nos. 71–6886, 72–5642, and 72–897, *supra.*)

No. 71–5510. IRVING *v.* CASSCLES, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 448 F. 2d 741.

No. 72–137. Wu *v.* National Endowment for the Humanities et al. C. A. 5th Cir. Certiorari denied. Reported below: 460 F. 2d 1030.

No. 72–425. McDonald *v.* Ohio. Sup. Ct. Ohio. Certiorari denied.

No. 72–643. Rappa *v.* United States; and
No. 72–5756. D'Aloisio *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 72–677. Board of Education of the Memphis City Schools et al. *v.* Northcross et al. C. A. 6th Cir. Certiorari denied. Reported below: 466 F. 2d 890.

No. 72–682. Local Union 749, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL–CIO *v.* National Labor Relations Board et al. C. A. D. C. Cir. Certiorari denied. Reported below: 151 U. S. App. D. C. 172, 466 F. 2d 343.

No. 72–724. Barham *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 466 F. 2d 1138.

No. 72–731. Lindstrom *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 1406.

No. 72–740. J. P. Stevens & Co., Inc., et al. *v.* National Labor Relations Board. C. A. 2d Cir. Certiorari denied. Reported below: 464 F. 2d 1326.

No. 72–743. Tortorello *v.* United States;
No. 72–766. Calabro *v.* United States;
No. 72–5730. Conforti *v.* United States;
No. 72–5733. Conforti *v.* United States; and
No. 72–5909. Picciano et al. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 467 F. 2d 973.

No. 72–751. RUBEO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–757. HEISLER ET UX. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 463 F. 2d 375.

No. 72–763. LIPTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 467 F. 2d 1161.

No. 72–764. WALLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 327.

No. 72–772. STRAWN *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 464 F. 2d 457.

No. 72–774. COOPER *v.* FLORIDA BOARD OF DENTISTRY. Sup. Ct. Fla. Certiorari denied. Reported below: See 265 So. 2d 432.

No. 72–776. CITY WELDING & MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 463 F. 2d 254.

No. 72–783. SEELEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 467 F. 2d 571.

No. 72–788. GERNIE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–793. HOUSING AUTHORITY OF THE CITY OF OMAHA, NEBRASKA, ET AL. *v.* UNITED STATES HOUSING AUTHORITY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 468 F. 2d 1.

No. 72–796. MCCORMICK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 468 F. 2d 68.

No. 72–797. BOWERS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 72–798. STRIPLING ET AL. *v.* JEFFERSON COUNTY BOARD OF EDUCATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 466 F. 2d 1213.

No. 72–800. MAITA ET AL. *v.* ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 72–807. ROMEO ET UX. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 1036.

No. 72–809. PERMISOHN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–810. GRAVES ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 458 F. 2d 631.

No. 72–813. CAPONIGRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 374.

No. 72–814. MID-CONTINENT SPRING COMPANY OF KENTUCKY *v.* MITCHELL. C. A. 6th Cir. Certiorari denied. Reported below: 466 F. 2d 24.

No. 72–820. CASSINO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 467 F. 2d 610.

No. 72–825. UNIVERSITY OF SOUTHERN CALIFORNIA *v.* COST OF LIVING COUNCIL ET AL. U. S. Temp. Emergency Ct. App. Certiorari denied. Reported below: 472 F. 2d 1065.

No. 72–830. LEWIS, SECRETARY OF STATE OF ILLINOIS *v.* ILLINOIS STATE EMPLOYEES UNION, COUNCIL 34, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL–CIO, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 473 F. 2d 561.

No. 72–827. DETROIT BANK & TRUST CO., EXECUTOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 467 F. 2d 964.

No. 72–831. UNARCO INDUSTRIES, INC., ET AL. *v.* KELLEY CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 465 F. 2d 1303.

No. 72–832. WALTER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 466 F. 2d 63.

No. 72–838. GREER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 467 F. 2d 1064.

No. 72–840. LIND, GUARDIAN *v.* HALE. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 263 So. 2d 654.

No. 72–841. ECLIPSE FUEL ENGINEERING CO. *v.* MAXON PREMIX BURNER CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 471 F. 2d 308.

No. 72–845. ADOLPH COORS CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 464 F. 2d 1270.

No. 72–854. VALE DO RI DOCE NAVEGACAI, S. A. *v.* KYZAR. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 285.

No. 72–856. PECOS COUNTY STATE BANK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 466 F. 2d 1040.

No. 72–858. GATEWOOD *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 72–862. POTTER *v.* MOULDINGS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 1101.

No. 72–861. WAITKUS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 470 F. 2d 18.

No. 72–866. COOPER *v.* FLORIDA STATE BOARD OF DENTISTRY. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 265 So. 2d 432.

No. 72–867. ROTEK, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied.

No. 72–868. BRICKER *v.* CRANE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 468 F. 2d 1228.

No. 72–882. POWELL *v.* SOUTH JERSEY NATIONAL BANK ET AL. Sup. Ct. N. J. Certiorari denied.

No. 72–891. BRYANT, ADMINISTRATRIX, ET AL. *v.* INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 467 F. 2d 1.

No. 72–892. LOUIS ENDER, INC. *v.* GENERAL FOODS CORP. C. A. 2d Cir. Certiorari denied. Reported below: 467 F. 2d 327.

No. 72–903. AALCO WRECKING CO., INC. *v.* FIREMAN'S FUND INSURANCE CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 466 F. 2d 179.

No. 72–904. KROLL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 4 Ill. App. 3d 203, 280 N. E. 2d 528.

No. 72–906. BAILEY ET AL. *v.* CONSOLIDATION COAL CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 467 F. 2d 1124.

No. 72–919. OLYMPIC INSURANCE CO. *v.* H. D. HARRISON, INC., DBA HARRISON'S INSURANCE SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 1049.

No. 72–909. J. M. Wood Manufacturing Co., Inc. *v.* National Labor Relations Board et al. C. A. 5th Cir. Certiorari denied. Reported below: 466 F. 2d 201.

No. 72–910. Burger *v.* Anderson, Governor of Montana, et al. Sup. Ct. Mont. Certiorari denied. Reported below: —— Mont. ——, 500 P. 2d 921.

No. 72–913. Cheramie *v.* Louisiana. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 263 So. 2d 487.

No. 72–921. Newport Associates, Inc. *v.* Solow. Ct. App. N. Y. Certiorari denied. Reported below: 30 N. Y. 2d 263, 283 N. E. 2d 600.

No. 72–928. Drobnick et al. *v.* Andrulis, Executrix. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 4 Ill. App. 3d 436, 281 N. E. 2d 417.

No. 72–934. Gordon, Receiver *v.* Nationwide Mutual Insurance Co. Ct. App. N. Y. Certiorari denied. Reported below: 30 N. Y. 2d 427, 285 N. E. 2d 849.

No. 72–935. Township of Freehold *v.* Schere et al. Super. Ct. N. J. Certiorari denied. Reported below: 119 N. J. Super. 433, 292 A. 2d 35.

No. 72–939. Dowell *v.* Aetna Life Insurance Co. C. A. 4th Cir. Certiorari denied. Reported below: 468 F. 2d 802.

No. 72–945. Scott *v.* New Jersey. Super. Ct. N. J. Certiorari denied.

No. 72–947. Gillies *v.* Aeronaves de Mexico, S. A. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 281.

No. 72–950. Reed *v.* Reed. Ct. App. Ky. Certiorari denied. Reported below: 484 S. W. 2d 844.

No. 72–949. FORT WORTH NATIONAL BANK ET AL. *v.* COGDELL ET AL. Ct. Civ. App. Tex., 11th Sup. Jud. Dist. Certiorari denied. Reported below: 482 S. W. 2d 337.

No. 72–987. SOLIS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 1113.

No. 72–5312. THOMPSON *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–5319. JONES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 482 S. W. 2d 194.

No. 72–5343. ROSS *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 72–5358. CORBY *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–5413. JEFFERIES *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 6 Ill. App. 3d 648, 285 N. E. 2d 592.

No. 72–5472. GRACE *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–5477. BITTAKER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–5509. LEFEBRE *v.* CADY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 72–5546. GONCALVES *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 72–5591. WHITE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 467 F. 2d 630.

No. 72–5648. PINEDA *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 465 F. 2d 999.

No. 72–5618. LeBrun *v.* Cupp, Penitentiary Superintendent. Sup. Ct. Ore. Certiorari denied.

No. 72–5661. Peterson *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 467 F. 2d 892.

No. 72–5670. Lee *v.* United States; and
No. 72–5676. Armstrong et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 1136.

No. 72–5677. Hessel *v.* Arizona et al. C. A. 9th Cir. Certiorari denied. Reported below: 465 F. 2d 958.

No. 72–5687. Scalia *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 464 F. 2d 1301.

No. 72–5688. Houston *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 467 F. 2d 1226.

No. 72–5689. Heavlow *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 468 F. 2d 842.

No. 72–5711. Grider *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 72–5712. Higginbotham *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 72–5713. Froniabarger *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 467 F. 2d 845.

No. 72–5715. Brown *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 72–5721. Gonzalez *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 72–5726. Furgerson *v.* Casper. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 72–5727. WEBSTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 468 F. 2d 769.

No. 72–5728. BORKENHAGEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 468 F. 2d 43.

No. 72–5729. BLANKENSHIP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 1406.

No. 72–5737. DEATON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 541.

No. 72–5738. GOLIDAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 468 F. 2d 170.

No. 72–5739. LYNOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 622.

No. 72–5740. PEREZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 72–5741. MUNCASTER *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied.

No. 72–5747. THOMPSON *v.* BREWER, JUDGE, ET AL. C. A. 4th Cir. Certiorari denied.

No. 72–5751. ARCHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 948.

No. 72–5753. ADLER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 72–5754. SAN MARTIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 469 F. 2d 5.

No. 72–5759. SIGNER *v.* CINCINNATI BAR ASSN. Sup. Ct. Ohio. Certiorari denied. Reported below: 30 Ohio St. 2d 303, 285 N. E. 2d 10.

No. 72–5757. GURLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–5760. NUTTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5761. WARFORD *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 293 Minn. 339, 200 N. W. 2d 301.

No. 72–5762. ALLEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 612.

No. 72–5763. MILLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 468 F. 2d 1041.

No. 72–5764. THOMAS ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 468 F. 2d 422.

No. 72–5767. PELTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 952.

No. 72–5769. WREN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–5771. JAKALSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 72–5772. NOBLE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 72–5775. QUINN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 467 F. 2d 624.

No. 72–5777. DONELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 469 F. 2d 85.

No. 72–5779. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 468 F. 2d 1388.

No. 72–5780. JEFFERSON *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 72–5781. DENMAN ET AL. *v.* BERKMAN. C. A. 6th Cir. Certiorari denied.

No. 72–5784. JOHNSON *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–5786. TARZWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5787. ROUNDTREE *v.* BRIERLEY, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 72–5790. ALLEN *v.* FOSTER. C. A. 4th Cir. Certiorari denied.

No. 72–5795. WILLIAMS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 1406.

No. 72–5798. COLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5803. MCCRAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–5804. FEDDER *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 72–5805. FUSELIER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 72–5806. ERVIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 464 F. 2d 1021.

No. 72–5816. CUMMINS *v.* OHIO. Ct. App. Ohio, Logan County. Certiorari denied.

No. 72–5810. MELLER *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 72–5807. MARSHALL *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 72–5814. ANDERSON *v.* SCHOENY ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–5817. BURROUGHS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 72–5818. ACRES *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 484 S. W. 2d 534.

No. 72–5821. PERONDI ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 72–5822. VORT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–5825. MAGEE *v.* CLOVIN, JUDGE, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 72–5826. FARROW *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 61 N. J. 434, 294 A. 2d 873.

No. 72–5827. ALEXANDER *v.* PROCUNIER, CORRECTIONS DIRECTOR, ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–5832. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 462 F. 2d 423.

No. 72–5834. HARLING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–5837. GUZMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 468 F. 2d 1245.

No. 72–5836. DADDANO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 72–5840. PREZZI *v.* COOPER, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied.

No. 72–5843. WRIGHT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 72–5844. PETERSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–5846. WILSON *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 72–5848. GOYNES ET UX. *v.* BURNS ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 15 Md. App. 293, 290 A. 2d 165.

No. 72–5850. TERRELL, AKA TERRY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 294 A. 2d 860.

No. 72–5853. NOORLANDER *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 465 F. 2d 1106.

No. 72–5855. BRINGHURST *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 604.

No. 72–5856. TANZELLA *v.* DEVOS. Ct. App. Md. Certiorari denied.

No. 72–5858. HARVEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 1286.

No. 72–5867. JACQUILLON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 380.

No. 72–5863. BITTINGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–5864. FISHMAN *v.* FISHMAN. Sup. Ct. Va. Certiorari denied.

No. 72–5870. HILL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 469 F. 2d 673.

No. 72–5871. HAIRSTON *v.* BRANTLEY, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 72–5872. THOMAS ET AL. *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 72–5873. BRIDDLE ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 72–5874. STEBBINS *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. C. A. 4th Cir. Certiorari denied.

No. 72–5878. DENMAN ET AL. *v.* ESTATE OF GOODRICH. C. A. 6th Cir. Certiorari denied.

No. 72–5879. SALAS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 7 Cal. 3d 812, 500 P. 2d 7.

No. 72–5882. WALKER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 48 Ala. App. 518, 266 So. 2d 322.

No. 72–5883. PISCIOTTA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–5884. YOUNG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5905. STEBBINS *v.* NATIONWIDE MUTUAL INSURANCE CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 469 F. 2d 268.

No. 72–5885. SELLARS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 72–5890. TATUM *v.* HAWKINS ET AL. C. A. 7th Cir. Certiorari denied.

No. 72–5894. WILLIAMS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 72–5900. LEAGUE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 72–5907. RUSSO *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 52 Ill. 2d 425, 288 N. E. 2d 412.

No. 72–5914. ANDERSON *v.* FRODERMAN ET AL. Sup. Jud. Ct. Mass. Certiorari denied.

No. 72–5923. HOLCOMB *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 484 S. W. 2d 929 and 938.

No. 72–5926. WAGGONER *v.* CRAMER ET AL. C. A. 6th Cir. Certiorari denied.

No. 72–5927. HINTON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 52 Ill. 2d 239, 287 N. E. 2d 657.

No. 72–5937. ODEN *v.* COX, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 72–5941. WILLIAMS *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 72–5944. CARTER *v.* FERGUSON, JUDGE. C. A. 5th Cir. Certiorari denied.

No. 72–5949. YARNAL *v.* BRIERLEY, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 468 F. 2d 816.

No. 72–5952. Voss *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 6 Ill. App. 3d 362, 285 N. E. 2d 816.

No. 72–5954. Lightle *v.* Kansas. Sup. Ct. Kan. Certiorari denied. Reported below: 210 Kan. 415, 502 P. 2d 834.

No. 72–5955. Glenn et al. *v.* New York. Ct. App. N. Y. Certiorari denied.

No. 72–5962. Frisco *v.* Illinois. App. Ct. Ill., 1st Jud. Dist. Certiorari denied. Reported below: 4 Ill. App. 3d 1034, 283 N. E. 2d 277.

No. 72–5965. Cunningham, Administratrix *v.* Columbia Union Conference of Seventh Day Adventists, Inc., trading as Hadley Memorial Hospital, et al. C. A. D. C. Cir. Certiorari denied.

No. 72–5976. Scott *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 52 Ill. 2d 432, 288 N. E. 2d 478.

No. 72–5983. Jenkins *v.* Cowan, Penitentiary Superintendent. C. A. 6th Cir. Certiorari denied. Reported below: 471 F. 2d 292.

No. 72–6019. Cothrum *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 503 P. 2d 1298.

No. 71–6522. Schwartz *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 457 F. 2d 895.

No. 71–6763. Walker *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Mr. Justice Douglas would grant certiorari.

No. 72–5991. DeVito *v.* Vincent, Correctional Superintendent. C. A. 2d Cir. Certiorari denied.

No. 72–407. Maita *v.* Superior Court of California, County of San Mateo, et al. Ct. App. Cal., 1st App. Dist. Certiorari denied. Mr. Justice Douglas would grant certiorari.

No. 72–738. Parisi *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari.

No. 72–773. Hilburn et al. *v.* Butz, Secretary of Agriculture, et al. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 463 F. 2d 1207.

No. 72–775. Bates *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 48 Ala. App. 489, 266 So. 2d 155.

No. 72–816. Rattenni *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 467 F. 2d 610.

No. 72–826. Broussard *v.* Patton et al. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 466 F. 2d 816.

No. 72–839. Williams *v.* Mississippi Export Railroad. Sup. Ct. Miss. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 266 So. 2d 28.

No. 72–852. Zatsky *v.* United States; and

No. 72–933. Leisner *v.* United States. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 469 F. 2d 336.

No. 72–855. ALLEGHENY AIRLINES, INC. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 465 F. 2d 237.

No. 72–869. BOOTSTRAP TRADING CO., INC. *v.* PHOENIX TALLOW CO. ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–880. BRUSH *v.* SAN FRANCISCO NEWSPAPER PRINTING CO. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 469 F. 2d 89.

No. 72–896. ILLINOIS STATE EMPLOYEES UNION, COUNCIL 34, AMERICAN FEDERATION OF STATE, COUNTY, & MUNICIPAL EMPLOYEES, AFL–CIO, ET AL. *v.* LEWIS, SECRETARY OF STATE OF ILLINOIS. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 473 F. 2d 561.

No. 72–900. MCDOWELL *v.* TEXAS BOARD OF MENTAL HEALTH AND MENTAL RETARDATION ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 465 F. 2d 1342.

No. 72–920. ZORN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 31 N. Y. 2d 134, 286 N. E. 2d 706.

No. 72–926. HORELICK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 30 N. Y. 2d 453, 285 N. E. 2d 864.

No. 72–5475. MARTIN *v.* BRIERLEY, WARDEN. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 464 F. 2d 529.

No. 72–5414. DANIELS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 262 La. 475, 263 So. 2d 859.

No. 72–5494. GARDNER ET AL. *v.* THOMPKINS, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 464 F. 2d 1031.

No. 72–5503. SHARP *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 7 Cal. 3d 448, 499 P. 2d 489.

No. 72–5504. BRYAN ET AL. *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 7 Cal. 3d 575, 498 P. 2d 1079.

No. 72–5512. JONES *v.* SUPERINTENDENT, VIRGINIA STATE FARM. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 460 F. 2d 150.

No. 72–5525. REYNOLDS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 483 S. W. 2d 747.

No. 72–5576. PEREZ *v.* TURNER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 462 F. 2d 1056.

No. 72–5799. ALBANY WELFARE RIGHTS ORGANIZATION DAY CARE CENTER, INC., ET AL. *v.* SCHRECK, COMMISSIONER, ALBANY COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 463 F. 2d 620.

No. 72–5720. TORRES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5765. TAFOYA *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 500 P. 2d 247.

No. 72–5785. INZERILLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 468 F. 2d 1084.

No. 72–5796. PETILLO *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 61 N. J. 165, 293 A. 2d 649.

No. 72–5809. JOUBERT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 468 F. 2d 952.

No. 72–5819. JOHNSON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 466 F. 2d 528.

No. 72–5857. VELASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 469 F. 2d 264.

No. 72–5861. SOSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 469 F. 2d 271.

No. 72–5868. VASQUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 468 F. 2d 565.

No. 72–5948. CURTIS *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 466 F. 2d 1092.

No. 72–5880. GREEN, AKA LEWIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5979. MCMANUS ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 263 La. 164, 267 So. 2d 559.

No. 71–1672. GUTHRIE ET AL. *v.* ALABAMA BY-PRODUCTS CO. ET AL. C. A. 5th Cir. Motion of Environmental Defense Fund for leave to file brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE WHITE would grant certiorari. Reported below: 456 F. 2d 1294.

No. 72–245. SCARBOROUGH *v.* MISSISSIPPI. Sup. Ct. Miss. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 261 So. 2d 475.

No. 72–690. HYLAND *v.* PAROLE AND COMMUNITY SERVICES DIVISION, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 72–784. PERSICO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 467 F. 2d 485.

No. 72–850. MANNING ET AL. *v.* GENERAL MOTORS CORP. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 466 F. 2d 812.

No. 72–881. WAINWRIGHT, CORRECTIONS DIRECTOR *v.* ARRANT. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 468 F. 2d 677.

No. 72–5607. SIRHAN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 7 Cal. 3d 710, 497 P. 2d 1121.

Rehearing Denied

No. 70–5260. HARPER *v.* CICCONE, MEDICAL CENTER DIRECTOR, 404 U. S. 841;

No. 71–1648. NAPOLITANO *v.* WARD, JUSTICE, SUPREME COURT OF ILLINOIS, ET AL., 409 U. S. 1037;

No. 71–6759. HUTCHINSON *v.* CRAVEN, WARDEN, 409 U. S. 979;

No. 72–590. ANDERS *v.* UNITED STATES, 409 U. S. 1064; and

No. 72–5430. FLETCHER *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT, 409 U. S. 1044. Motions for leave to file petitions for rehearing denied.

No. 72–564. BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWN OF ADDISON ET AL. *v.* JAMES, 409 U. S. 1042. Motion of Commissioner of Education for leave to file a brief as *amicus curiae* in support of rehearing granted. Motion for leave to file petition for rehearing denied.

No. 72–5513. CORRADO, DBA PERRY'S SECOND HAND PLUMBING *v.* PROVIDENCE REDEVELOPMENT AGENCY, 409 U. S. 1003; and

No. 72–5514. CORRADO *v.* PROVIDENCE REDEVELOPMENT AGENCY, 409 U. S. 1011. Motion for leave to file petitions for rehearing now and a later date denied.

No. 71–36. California et al. *v.* LaRue et al., 409 U. S. 109;

No. 71–6449. Ellingburg *v.* Goodson, Judge, et al., 409 U. S. 1106;

No. 72–388. Gerace et vir *v.* County of Los Angeles et al., 409 U. S. 1012;

No. 72–602. Harsh Building Co. et al. *v.* Bialac et al., 409 U. S. 1060;

No. 72–5170. Sayles *v.* Nunzio et al., Judges, 409 U. S. 1071;

No. 72–5244. Rigdon *v.* United States, 409 U. S. 1116;

No. 72–5468. Carr *v.* Texas, 409 U. S. 1099;

No. 72–5497. Clizer *v.* United States, 409 U. S. 1086;

No. 72–5527. Szijarto *v.* Nelson, Warden, 409 U. S. 1073;

No. 72–5530. Arnold *v.* Oliver, Judge, 409 U. S. 1071;

No. 72–5583. Escofil *v.* Commissioner of Internal Revenue, 409 U. S. 1112;

No. 72–5587. Ritch et al. *v.* Tarrant County Hospital District, 409 U. S. 1079;

No. 72–5614. Champagne et al. *v.* Penrod Drilling Co., 409 U. S. 1113; and

No. 72–5666. Ottomano *v.* United States, 409 U. S. 1128. Petitions for rehearing denied.

February 26, 1973

Affirmed on Appeal

No. 71–439. Barlow, District Attorney of Bexar County, et al. *v.* Gallant et al. Affirmed on appeal from D. C. W. D. Tex.

Appeals Dismissed

No. 72–434. BYRN, GUARDIAN *v.* NEW YORK CITY HEALTH & HOSPITALS CORP. ET AL. Appeal from Ct. App. N. Y. Motion to postpone jurisdiction until hearing of appeal on the merits denied. Appeal dismissed for want of substantial federal question. *Roe* v. *Wade, ante,* p. 113. Reported below: 31 N. Y. 2d 194, 286 N. E. 2d 887.

No. 72–806. RAMSAY TRAVEL, INC., ET AL. *v.* KONDO, DIRECTOR OF TAXATION OF HAWAII. Appeal from Sup. Ct. Haw. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 53 Haw. 419, 495 P. 2d 1172.

No. 72–5829. FLESCH *v.* OHIO. Appeal from Ct. App. Ohio, Franklin County, dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

No. 72–5925. RUDERER *v.* SESSIONS ET AL. Appeal from D. C. W. D. Tex. dismissed for want of jurisdiction. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this appeal.

No. 72–5935. RUDERER *v.* KLEINDIENST, ATTORNEY GENERAL. Appeal from D. C. D. C. dismissed for want of jurisdiction. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this appeal.

Vacated and Remanded on Appeal

No. 70–89. RODGERS ET AL. *v.* DANFORTH, ATTORNEY GENERAL OF MISSOURI, ET AL. Appeal from D. C. W. D. Mo. Motion of appellees to dismiss for failure to timely docket appeal denied. Judgment vacated and case remanded for further consideration in light of *Roe* v. *Wade, ante,* p. 113, and *Doe* v. *Bolton, ante,* p. 179.

No. 70–105. HANRAHAN, STATE'S ATTORNEY OF COOK COUNTY *v.* DOE ET AL.; and

No. 70–106. HEFFERNAN, GUARDIAN *v.* DOE ET AL. Appeals from D. C. N. D. Ill. Motion to vacate stay heretofore granted by MR. JUSTICE MARSHALL granted. Judgment vacated and cases remanded for further consideration in light of *Roe* v. *Wade, ante,* p. 113. Reported below: 321 F. Supp. 1385.

No. 71–92. CORKEY ET AL. *v.* EDWARDS ET AL. Appeal from D. C. W. D. N. C. Judgment vacated and case remanded for further consideration in light of *Roe* v. *Wade, ante,* p. 113, and *Doe* v. *Bolton, ante,* p. 179 Reported below: 322 F. Supp. 1248.

No. 71–1200. THOMPSON *v.* TEXAS. Appeal from Ct. Crim. App. Tex. Judgment vacated and case remanded for further consideration in light of *Roe* v. *Wade, ante,* p. 113.

No. 71–5666. DOE *v.* RAMPTON, GOVERNOR OF UTAH, ET AL. Appeal from D. C. Utah. Motion of appellant for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Roe* v. *Wade, ante,* p. 113.

No. 72–631. MUNSON *v.* SOUTH DAKOTA. Appeal from Sup. Ct. S. D. Judgment vacated and case remanded for further consideration in light of *Roe* v. *Wade, ante,* p. 113. Reported below: 86 S. D. 663, 201 N. W. 2d 123.

No. 72–256. CROSSEN ET AL. *v.* ATTORNEY GENERAL OF KENTUCKY ET AL. Appeal from D. C. E. D. Ky. Judgment vacated and case remanded for further consideration in light of *Roe* v. *Wade, ante,* p. 113. Reported below: 344 F. Supp. 587.

No. 72–56. MARKLE ET AL. *v.* ABELE ET AL. Appeal from D. C. Conn. Judgment vacated and case remanded for consideration of question of mootness of this appeal. Reported below: 342 F. Supp. 800.

No. 72–730. MARKLE ET AL. *v.* ABELE ET AL. Appeal from D. C. Conn. Judgment vacated and case remanded for further consideration in light of *Roe* v. *Wade, ante,* p. 113, and *Doe* v. *Bolton, ante,* p. 179. Reported below: 351 F. Supp. 224.

No. 72–957. SASAKI *v.* KENTUCKY. Appeal from Ct. App. Ky. Judgment vacated and case remanded for further consideration in light of *Roe* v. *Wade, ante,* p. 113. Reported below: 485 S. W. 2d 897.

Certiorari Granted—Vacated and Remanded. (See also No. 72–686, *ante,* p. 425.)

No. 72–69. KRUZE *v.* OHIO. Sup. Ct. Ohio. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Roe* v. *Wade, ante,* p. 113.

Miscellaneous Orders

No. A–856. BOBEK *v.* OHIO. Sup. Ct. Ohio. Application for stay and/or bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. 72–269. LEVITT, COMPTROLLER OF NEW YORK, ET AL. *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL.;

No. 72–270. ANDERSON *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL.; and

No. 72–271. CATHEDRAL ACADEMY ET AL. *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL. Appeals from D. C. S. D. N. Y. [Probable jurisdiction noted, 409 U. S. 977.] Motion of appellants to permit three counsel to argue orally denied.

No. 71–1523. HUNT *v.* MCNAIR, GOVERNOR OF SOUTH CAROLINA, ET AL. Appeal from Sup. Ct. S. C. [Probable jurisdiction noted, 409 U. S. 911.] Motion of the Attorney General of New Jersey for leave to file an untimely brief as *amicus curiae* granted.

No. 72–486. FEDERAL POWER COMMISSION *v.* MEMPHIS LIGHT, GAS & WATER DIVISION ET AL.; and

No. 72–488. TEXAS GAS TRANSMISSION CORP. *v.* MEMPHIS LIGHT, GAS & WATER DIVISION ET AL. C. A. D. C. Cir. [Certiorari granted, 409 U. S. 1036.] Motions of Independent Natural Gas Association of America and Jersey Central Power & Light Co. et al. for leave to file briefs as *amici curiae* granted.

No. 72–490. MCDONNELL DOUGLAS CORP. *v.* GREEN. C. A. 8th Cir. [Certiorari granted, 409 U. S. 1036.] Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted.

No. 72–586. CADY, WARDEN *v.* DOMBROWSKI. C. A. 7th Cir. [Certiorari granted, 409 U. S. 1059.] Motion of respondent for appointment of counsel granted. It is ordered that William J. Mulligan, Esquire, of Milwaukee, Wisconsin, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 72–1139. GRIT ET AL. *v.* WOLMAN ET AL. Appeal from D. C. S. D. Ohio. Motion to expedite and to advance oral argument denied. Reported below: 353 F. Supp. 744.

No. 72–6032. BOYDEN *v.* CARLSON, DIRECTOR OF PRISONS;

No. 72–6046. RENTSCHELER *v.* TEXAS;

No. 72–6054. COSCO *v.* MEACHAM; and

No. 72–6126. JONES *v.* BARRETT ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 72–5531. BAGGETT *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied. MR. JUSTICE DOUGLAS would grant the motion.

No. 72–968. SOLO CUP CO. *v.* AUSTIN, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and other relief denied.

No. 72–5681. LANDIS *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN. Motion for leave to file petition for writ of mandamus denied.

No. 72–6119. RUDERER *v.* FOREMAN, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of prohibition denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

Certiorari Granted

No. 72–702. GOLDEN STATE BOTTLING CO., INC., FORMERLY PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari granted. Reported below: 467 F. 2d 164.

No. 72–885. UNITED STATES ET AL. *v.* RICHARDSON. C. A. 3d Cir. Certiorari granted. Reported below: 465 F. 2d 844.

No. 72–782. GATEWAY COAL CO. *v.* UNITED MINE WORKERS OF AMERICA ET AL. C. A. 3d Cir. Motions of Bituminous Coal Operators' Assn., Inc., National Association of Manufacturers of the United States of America, and Chamber of Commerce of the United States of America for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 466 F. 2d 1157.

No. 72–5581. STEFFEL *v.* THOMPSON ET AL. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 459 F. 2d 919.

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No. 72–844. FALK ET AL. *v.* BRENNAN, SECRETARY OF LABOR. C. A. 4th Cir. Certiorari granted limited to Questions 2 and 3 presented by the petition which read as follows:

"2. Under the Fair Labor Standards Act to be covered an enterprise must have an 'annual gross volume of sales made or business done' of $500,000. Is this figure to be measured by the gross rentals collected by the agent or by that agent's gross commissions?

"3. Are maintenance workers employed at the buildings managed by petitioners employees of the apartment owner or of the petitioners?"

No. 72–5881. MARSHALL *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 470 F. 2d 34.

Certiorari Denied

No. 72–713. SMITH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 72–747. BLOOMFIELD HILLS SCHOOL DISTRICT *v.* ROTH, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied.

No. 72–748. WEST BLOOMFIELD SCHOOL DISTRICT OF OAKLAND COUNTY, MICHIGAN, ET AL. *v.* ROTH, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied.

No. 72–752. THURMAN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 72–817. SCHOOL DISTRICT OF THE CITY OF BIRMINGHAM, OAKLAND COUNTY, MICHIGAN *v.* ROTH, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied.

No. 72–836. ZANNINO ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 468 F. 2d 1299.

No. 72–870. CLEMONS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–873. STAUNTON ET AL. *v.* DONAHUE. C. A. 7th Cir. Certiorari denied. Reported below: 471 F. 2d 475.

No. 72–874. JOHNSTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 72–875. SIEGEL ET AL. *v.* McMILLEN, U. S. DISTRICT JUDGE, ET AL. C. A. 7th Cir. Certiorari denied.

No. 72–884. GORDON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–894. RICHARDSON *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 465 F. 2d 844.

No. 72–895. RIVERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–907. YEAGER ET UX. *v.* TOWNSHIP OF MANSFIELD, WARREN COUNTY, ET AL. Super. Ct. N. J. Certiorari denied.

No. 72–938. ADAM ET AL. *v.* DEL BIANCO & ASSOCIATES, INC. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 6 Ill. App. 3d 286, 285 N. E. 2d 480.

No. 72–954. VILLAGE OF LAKE BLUFF ET AL. *v.* CITY OF NORTH CHICAGO ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 5 Ill. App. 3d 142, 282 N. E. 2d 780.

No. 72–963. HUTTER ET AL. *v.* COOK COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 72–964. DUMESTRE ET AL. *v.* TRAVELERS INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied.

No. 72–972. WESTERN RAILWAY OF ALABAMA *v.* BLUE. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 487.

No. 72–5125. PERKINS *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of San Bernardino. Certiorari denied.

No. 72–5640. TAYLOR *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied. Reported below: 466 F. 2d 1119.

No. 72–5697. SHAFFNER *v.* COWAN, WARDEN. Ct. App. Ky. Certiorari denied.

No. 72–5718. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 468 F. 2d 251.

No. 72–5800. DAWSON, AKA ROACH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 467 F. 2d 668.

No. 72–5842. MOORER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–5845. HOWARD *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 466 F. 2d 1356.

No. 72–5862. KORTSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5875. NELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 467 F. 2d 944.

No. 72–5876. RAEL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 467 F. 2d 333.

No. 72–5877. COSTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–5888. DECOSTA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 72–5886. THOMAS, AKA TUTTLE *v.* UNITED STATES; and

No. 72–5906. THOMAS, AKA TUTTLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 469 F. 2d 145.

No. 72–5889. MCCRAY *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 1406.

No. 72–5891. PARISH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 152 U. S. App. D. C. 72, 468 F. 2d 1129.

No. 72–5902. FRAZIER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–5904. GALAZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5908. VAN ORDEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 469 F. 2d 461.

No. 72–5910. LOUNDMANNZ *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 153 U. S. App. D. C. 301, 472 F. 2d 1376.

No. 72–5917. WILSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 153 U. S. App. D. C. 104, 471 F. 2d 1072.

No. 72–5918. DREIER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 471 F. 2d 656.

No. 72–5940. STRIBLING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 469 F. 2d 443.

No. 72–5996. NELSON *v.* STRATTON. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 1155.

No. 72–6001. WHITE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 282 N. C. 93, 191 S. E. 2d 745.

No. 72–6003. BRAXTON *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 72–6013. LOTT *v.* TEXAS BOARD OF PARDONS AND PAROLES ET AL. Ct. Crim. App. Tex. Certiorari denied.

No. 72–6039. DANIEL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 486 S. W. 2d 944.

No. 72–540. WATKINS ET AL. *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 262 So. 2d 422.

No. 72–5734. DEAN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 265 So. 2d 15.

No. 72–5783. GUNN ET AL. *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 487 S. W. 2d 666.

No. 72–5828. KELLY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 469 F. 2d 1310.

No. 72–5838. DE AVILA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 468 F. 2d 184.

No. 72–5922. LONG *v.* CARLSON, DIRECTOR OF PRISONS, ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–883. PLUCHINO *v.* UNITED STATES. C. A. 4th Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 72–966. CONFEDERATION LIFE INSURANCE CO. *v.* CONTE. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN would grant certiorari and set case for oral argument. See *Confederation Life Insurance Co.* v. *De Lara,* 409 U. S. 953 (dissenting opinion).

No. 72–5641. KUCHENREUTHER *v.* IOWA. Dist. Ct. Iowa, Pocahontas County. Certiorari denied for want of final judgment. See 28 U. S. C. § 1257.

No. 72–5745. LOPEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Motion for leave to use record in No. 804, Misc., October Term 1963 [*Lopez* v. *California,* 375 U. S. 994] granted. Certiorari denied.

Rehearing Denied

No. 70–18. ROE ET AL. *v.* WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, *ante,* p. 113;

No. 70–40. DOE ET AL. *v.* BOLTON, ATTORNEY GENERAL OF GEORGIA, ET AL., *ante,* p. 179;

No. 71–564. DISTRICT OF COLUMBIA *v.* CARTER, 409 U. S. 418;

No. 71–6272. ROBINSON *v.* NEIL, WARDEN, 409 U. S. 505;

No. 72–243. CLEAN AIR COORDINATING COMMITTEE *v.* ROTH ADAM FUEL CO. ET AL., 409 U. S. 1117;

No. 72–451. KENNEDY ET AL. *v.* BUREAU OF NARCOTICS AND DANGEROUS DRUGS, UNITED STATES DEPARTMENT OF JUSTICE, ET AL., 409 U. S. 1115;

No. 72–474. SCHATTMAN *v.* TEXAS EMPLOYMENT COMMISSION ET AL., 409 U. S. 1107;

No. 72–483. SALAZAR *v.* UNITED STATES, 409 U. S. 1107;

No. 72–485. NORMAN *v.* UNITED STATES, 409 U. S. 1107; and

No. 72–525. COOPER *v.* UNITED STATES, 409 U. S. 1107. Petitions for rehearing denied.

No. 72–645. BRIOLA *v.* UNITED STATES, 409 U. S. 1108;

No. 72–662. BATA *v.* BATA ET AL., 409 U. S. 1108;

No. 72–672. POGUE *v.* RETAIL CREDIT CO., 409 U. S. 1109;

No. 72–790. ALABAMA ET AL. *v.* BRINKS, 409 U. S. 1130;

No. 72–5218. GOFF *v.* NEW YORK, *ante,* p. 910;

No. 72–5368. TYLER *v.* LARK, WARDEN, ET AL., *ante,* p. 910;

No. 72–5372. LUCAS *v.* WYOMING ET AL., 409 U. S. 1123;

No. 72–5438. WARNER *v.* UNITED STATES PATENT OFFICE ET AL., 409 U. S. 1045;

No. 72–5454. COOPER *v.* UNITED STATES, 409 U. S. 1107;

No. 72–5568. DAVIS *v.* NEAHER, U. S. DISTRICT JUDGE, ET AL., 409 U. S. 1105;

No. 72–5608. HEINDL *v.* WASHINGTON TERMINAL CO., 409 U. S. 1113;

No. 72–5628. BERNSTEIN *v.* UNITED STATES, 409 U. S. 1114;

No. 72–5633. REILLY *v.* NELSON, WARDEN, 409 U. S. 1114;

No. 72–5646. DABNEY *v.* DISTRICT OF COLUMBIA, 409 U. S. 1114;

No. 72–5649. MILSTEAD ET AL. *v.* CALIFORNIA ET AL., 409 U. S. 1114;

No. 72–5682. JONES *v.* UNITED STATES, *ante,* p. 911;

No. 72–5716. BENNETT *v.* DISTRICT DIRECTOR OF INTERNAL REVENUE, 409 U. S. 1128; and

No. 72–5735. STENGEL *v.* CITY OF ANAHEIM ET AL., 409 U. S. 1129. Petitions for rehearing denied.

No. 71–858. RICCI *v.* CHICAGO MERCANTILE EXCHANGE ET AL., 409 U. S. 289. Motion to dispense with printing petition granted. Petition for rehearing denied.

No. 72–277. FORTENBERRY *v.* NEW YORK LIFE INSURANCE CO., 409 U. S. 981. Motion for leave to file petition for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

Assignment Orders

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Seventh Circuit for the week of April 2, 1973, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of the THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Seventh Circuit for the week of May 21, 1973, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

MARCH 1, 1973

Dismissal Under Rule 60

No. 72–5953. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

MARCH 5, 1973

Affirmed on Appeal. (See also No. 72–759, *infra.*)

No. 72–876. CURTIS, INC. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. Colo. Reported below: 346 F. Supp. 1034.

No. 72–768. ARIZONA EX REL. STATE CORPORATION COMMISSION ET AL. *v.* UNITED STATES ET AL.;

No. 72–779. SOUTHWEST GAS CORP. *v.* UNITED STATES ET AL.;

No. 72–781. PACIFIC GAS & ELECTRIC CO. *v.* EL PASO NATURAL GAS CO. ET AL.; and

No. 72–785. EL PASO NATURAL GAS CO. ET AL. *v.* UNITED STATES ET AL. Affirmed on appeals from D. C. Colo. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases. Reported below: 358 F. Supp. 820.

No. 72–865. CITY OF PETERSBURG, VIRGINIA *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. D. C. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 354 F. Supp. 1021.

Appeals Dismissed

No. 72–759. CALIFORNIA-PACIFIC UTILITIES CO. ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. Colo. Appeal as to California-Pacific Utilities Co. dismissed for want of jurisdiction for failure to file timely notice of appeal. 28 U. S. C. § 2101 (b). Judgment as to the six other appellants affirmed. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case. Reported below: 358 F. Supp. 820.

No. 72–998. LEHANE ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question.

Miscellaneous Orders

No. A–839. SMALDONE *v.* UNITED STATES. C. A. 10th Cir. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–840 (72–1138). HARRISON *v.* UNITED STATES. C. A. 2d Cir. Application for stay or recall of mandate of United States Court of Appeals for the Second Circuit presented to MR. JUSTICE POWELL, and by him referred to the Court, denied.

No. 71–1553. GILLIGAN, GOVERNOR OF OHIO, ET AL. *v.* MORGAN ET AL. C. A. 6th Cir. [Certiorari granted, 409 U. S. 947.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* on behalf of petitioners granted and 15 minutes allotted for that purpose. Respondents allotted 15 additional minutes for oral argument.

No. 71–1647. FEDERAL MARITIME COMMISSION *v.* SEATRAIN LINES, INC., ET AL. C. A. D. C. Cir. [Certiorari granted, 409 U. S. 1058.] Motion of R. J. Reynolds Tobacco Co. for leave to file a brief as *amicus curiae* granted.

No. 72–11. PALMORE *v.* UNITED STATES. Appeal from Ct. App. D. C. [Probable jurisdiction postponed, 409 U. S. 840.] Motion of appellant for leave to file supplemental brief after argument granted.

No. 72–419. PITTSBURGH PRESS CO. *v.* PITTSBURGH COMMISSION ON HUMAN RELATIONS ET AL. Pa. Commw. Ct. [Certiorari granted, 409 U. S. 1036.] Motions of International Association of Official Human Rights Agencies and American Civil Liberties Union et al. for leave to file briefs as *amici curiae* granted.

No. 72–269. LEVITT, COMPTROLLER OF NEW YORK, ET AL. *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL.;

No. 72–270. ANDERSON *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL.; and

No. 72–271. CATHEDRAL ACADEMY ET AL. *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL. Appeals from D. C. S. D. N. Y. [Probable jurisdiction noted, 409 U. S. 977.] Motion of appellants to permit two counsel to argue orally granted.

No. 72–493. VLANDIS *v.* KLINE ET AL. Appeal from D. C. Conn. [Probable jurisdiction noted, 409 U. S. 1036.] Motion of American Civil Liberties Union of Ohio, Inc., for leave to file a brief as *amicus curiae* granted.

No. 72–634. UNITED STATES CIVIL SERVICE COMMISSION ET AL *v.* NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL–CIO, ET AL. Appeal from D. C. D. C. [Probable jurisdiction noted, 409 U. S. 1058.] Motion of appellees for additional time for oral argument granted and 10 additional minutes allotted for that purpose. Appellants also granted 10 additional minutes for oral argument.

No. 72–730. MARKLE ET AL. *v.* ABELE ET AL., *ante*, p. 951. Stay heretofore granted by this Court on October 16, 1972 [409 U. S. 908], is hereby vacated.

No. 71–157. R. J. REYNOLDS TOBACCO CO. ET AL. *v.* UNITED STATES ET AL. D. C. N. J. Motion to grant certiorari and consolidate for oral argument with No. 71–1647, *Federal Maritime Commission* v. *Seatrain Lines, Inc.* [certiorari granted, 409 U. S. 1058], denied. Motion for leave to file petition for writ of certiorari denied. Reported below: 325 F. Supp. 656.

No. 72–694. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL. *v.* NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL.;

No. 72–753. ANDERSON *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL.;

No. 72–791. NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL.; and

No. 72–929. CHERRY ET AL. *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL. Appeals from D. C. S. D. N. Y. [Probable jurisdiction noted, *ante,* p. 907.] Motion of Sidney A. Seegers et al. for leave to file a brief as *amici curiae* granted.

No. 72–878. HO SEE *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. Motion for leave to file petition for writ of mandamus denied.

No. 72–969. KEEGAN *v.* WILLIAMS, JUDGE. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

Probable Jurisdiction Noted

No. 72–812. STORER ET AL. *v.* BROWN, SECRETARY OF STATE OF CALIFORNIA, ET AL.; and

No. 72–6050. FROMMHAGEN *v.* BROWN, SECRETARY OF STATE OF CALIFORNIA, ET AL. Appeals from D. C. N. D. Cal. Motion of appellant in No. 72–6050 for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument.

No. 72–887. AMERICAN PARTY OF TEXAS ET AL. *v.* BULLOCK, SECRETARY OF STATE OF TEXAS; and

No. 72–942. HAINSWORTH *v.* BULLOCK, SECRETARY OF STATE OF TEXAS. Appeals from D. C. W. D. Tex. Probable jurisdiction noted. Cases consolidated and a

total of one hour allotted for oral argument. Reported below: No. 72–887, 349 F. Supp. 1272.

Certiorari Denied

No. 72–707. BLAND ET AL. *v.* MCHANN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 21.

No. 72–722. SCHOOL BOARD OF ORANGE COUNTY, FLORIDA *v.* ELLIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 878.

No. 72–877. CHEATHEM ET UX. *v.* CITY OF EVANSVILLE. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 278 N. E. 2d 602.

No. 72–879. NCR EMPLOYEES' INDEPENDENT UNION *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 466 F. 2d 945.

No. 72–890. HO SEE *v.* PANGELINAN. C. A. 9th Cir. Certiorari denied.

No. 72–908. JOFTES *v.* WEXLER ET AL. C. A. D. C. Cir. Certiorari denied.

No. 72–911. KAPLAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 470 F. 2d 100.

No. 72–915. WYATT *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied.

No. 72–916. STOCKWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 469 F. 2d 680.

No. 72–917. TURNOF *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–956. HARRIS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 72–959. YOUNG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 470 F. 2d 962.

No. 72–970. ASSOCIATED CULTURAL CLUBS, INC., ET AL. *v.* MONARCH TRAVEL SERVICES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 466 F. 2d 552.

No. 72–971. WARDEN, NEW JERSEY STATE PRISON *v.* MONKS. C. A. 3d Cir. Certiorari denied.

No. 72–973. HICKS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 282 N. C. 103, 191 S. E. 2d 593.

No. 72–986. WESTERN VENTURES, INC. *v.* DADE DRYDOCK CORP. C. A. 5th Cir. Certiorari denied. Reported below: 467 F. 2d 1361.

No. 72–1000. MOORE *v.* HIGHWAY DEPARTMENT OF GEORGIA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 467 F. 2d 944.

No. 72–5596. FINNEGAN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 6 Wash. App. 612, 495 P. 2d 674.

No. 72–5685. WHITTAKER *v.* COINER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 72–5717. HENDRIXSON *v.* LASH, WARDEN. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 282 N. E. 2d 792.

No. 72–5852. ARMES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 470 F. 2d 1353.

No. 72–5869. GONZALES *v.* UNITED STATES; and

No. 72–5896. VICARS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 467 F. 2d 452.

No. 72–5911. McCants *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 470 F. 2d 142.

No. 72–5913. Wilson *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 72–5929. Moore *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 72–5931. Haywood *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 907.

No. 72–5933. Henriques *v.* Immigration and Naturalization Service et al. C. A. 2d Cir. Certiorari denied. Reported below: 465 F. 2d 119.

No. 72–5942. Hines *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 470 F. 2d 225.

No. 72–5987. Halpern *v.* Zelker, Correctional Superintendent. C. A. 2d Cir. Certiorari denied.

No. 72–6008. Di Maggio *v.* Cady, Warden. C. A. 7th Cir. Certiorari denied.

No. 72–6015. Partin *v.* Ohio. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 72–6020. Scasserra *v.* Pennsylvania State Civil Service Commission. Sup. Ct. Pa. Certiorari denied.

No. 72–6022. Millinger *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 467 F. 2d 943.

No. 72–6024. Thibadoux *v.* United States et al. C. A. 2d Cir. Certiorari denied.

No. 72–6027. Smith *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 282 N. C. 147, 191 S. E. 2d 598.

No. 72–6040. FAYNE *v.* BERG. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–6043. MCCORD *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 1406.

No. 72–6044. REECE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 1406.

No. 72–6049. HEADS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 240.

No. 72–6058. CRANDALL *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 297 A. 2d 94.

No. 72–169. COOK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: See 448 F. 2d 925.

No. 72–1018. BREITWIESER ET VIR *v.* KMS INDUSTRIES, INC., DBA ADVO SYSTEMS. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 467 F. 2d 1391.

No. 72–5221. MITCHELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 463 F. 2d 187.

No. 72–5308. WILSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 15 Md. App. 73, 289 A. 2d 348.

No. 72–5543. VAWTER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: —— Ind. ——, 279 N. E. 2d 805.

No. 72–5550. WRENN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5930. DINNELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6014. TODD *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6029. FIELDS *v.* HUTTO, CORRECTIONS COMMISSIONER. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–912. DELLINGER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Motion of Yetta Machtinger et al. to dispense with printing *amici curiae* brief granted. Motion of petitioners to dispense with printing granted. Certiorari denied. Reported below: 472 F. 2d 340.

No. 72–5600. CASIAS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Petition for writ of certiorari denied as untimely filed. 28 U. S. C. § 2101 (c). Reported below: 459 F. 2d 54.

Rehearing Denied

No. 71–1119. INDIANA EMPLOYMENT SECURITY DIVISION ET AL. *v.* BURNEY, 409 U. S. 540;

No. 72–737. WEISS *v.* WALSH ET AL., 409 U. S. 1129; and

No. 72–5622. NICHOLS *v.* UNITED STATES, *ante*, p. 911. Petitions for rehearing denied.

No. 72–250. GOLDSBERRY ET AL. *v.* HIEBER, JUDGE, 409 U. S. 1117. Petition for rehearing and other relief denied.

No. 71–5743. TORRES ET AL. *v.* NEW YORK STATE DEPARTMENT OF LABOR ET AL., 405 U. S. 949. Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted. Petition for rehearing denied.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN concur, dissenting.

By summarily denying this petition for rehearing, the Court finally disposes of important issues of constitutional law and statutory construction in a fashion which can only be characterized as bizarre. Although the case has now been before us on three separate occasions, my Brethren have yet to write so much as a single word in defense of a disposition which is seemingly inconsistent with a raft of our prior cases. See, *e. g., Indiana Employment Security Division* v. *Burney,* 409 U. S. 540 (1973); *California Human Resources Dept.* v. *Java,* 402 U. S. 121 (1971); *Goldberg* v. *Kelly,* 397 U. S. 254 (1970). I cannot concur in this cavalier treatment of a question that is of vital importance to the thousands of citizens who, through no fault of their own, are temporarily unemployed.

Even a brief chronological recitation of the tortured progression of this case makes plain that it has not been treated in accordance with the high standards that litigants before the Court have come to expect. Petitioners originally instituted this action in United States District Court to enjoin the enforcement of New York Labor Law §§ 597, 598, and 620 "insofar as they authorize the suspension or termination of unemployment compensation benefits without a prior hearing." They based their claim on the Due Process Clause of the Fourteenth Amendment, which had been interpreted in *Goldberg* v. *Kelly, supra,* to require a hearing prior to the suspension

of welfare benefits, and on the Social Security Act, which requires a state plan "reasonably calculated to insure full payment of unemployment compensation when due." 42 U. S. C. § 503 (a)(1). A three-judge court was convened, but that court, over a dissent by Judge Lasker, found both the constitutional and statutory claims to be without merit.

An appeal was timely noted and docketed in this Court. But before we had considered petitioners' jurisdictional statement, our decision in *California Human Resources Dept.* v. *Java, supra,* was handed down. In *Java,* a unanimous Court held that 42 U. S. C. § 503 (a)(1) invalidated a California statute which provided for the automatic suspension of unemployment compensation when the employer took an appeal from the initial eligibility determination.

Inasmuch as *Java* interpreted the very provision of the Social Security Act relied upon by the appellant in *Torres,* we entered an order vacating the District Court's decision in *Torres* and remanding for reconsideration in light of *Java.* See 402 U. S. 968 (1971). When the case returned to the District Court, however, that court purported to find *Java* distinguishable and, in a brief *per curiam,* adhered to its prior decision. See *Torres* v. *New York State Department of Labor,* 333 F. Supp. 341 (SDNY 1971).

Once again, petitioners docketed an appeal in this Court, but this time an order was entered summarily affirming the District Court without the benefit of full briefing, oral argument, or an opinion. See 405 U. S. 949 (1972).* Shortly thereafter, however, the Court did note probable jurisdiction in *Indiana Employment Security Division* v. *Burney, supra,* a case presenting iden-

*MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN and I indicated in a separate statement that we would have noted probable jurisdiction and reversed on the basis of *Goldberg* v. *Kelly,* 397 U. S. 254.

tical issues with respect to the Indiana unemployment compensation scheme. See 406 U. S. 956 (1972). At the same time, the Court held in abeyance any disposition of the petition for rehearing in this case.

It thus appeared that the Court would finally rule upon the legality of prehearing suspensions of unemployment compensation in *Burney* and that the petition for rehearing in this case would be disposed of in accordance with the *Burney* decision. When *Burney* was ultimately decided, however, the Court failed to reach the merits. Instead, it pointed out that Mrs. Burney had eventually received a post-termination hearing at which it had been held that she had been wrongfully terminated. Pursuant to this decision, Mrs. Burney had received full retroactive compensation. In light of these developments, the Court remanded to the District Court for consideration of whether the case was moot. See 409 U. S. 540 (1973).

Thus, the questions which were initially to be decided in *Burney* must now be resolved in this petition for rehearing. Although I dissented from the remand in *Burney,* I think that, at the very least, by a parity of reasoning, the Court is obliged to treat this case in an identical fashion. The representative parties here, like the representative party in *Burney,* all received post-termination hearings at which their claims to compensation were decided on the merits. True, Mrs. Burney's claim was vindicated at the hearing, while the termination of Mr. Torres' benefits was reaffirmed. But this is a distinction without a difference. Since it has already been determined that the representative parties in this case are not in any event entitled to compensation payments, they no longer have any more stake in the outcome of this litigation than did Mrs. Burney in her case once her claim had been administratively resolved. Thus, under the Court's apparent reasoning in *Burney,* the

resolution of both parties' claims on the merits may moot the controversy concerning the timing of a hearing, thereby calling for a remand of the case to consider that issue.

But even if I accepted the Court's unarticulated conclusion that this case is distinguishable from *Burney,* I would still object to the summary fashion in which the District Court's judgment is affirmed today. When probable jurisdiction was noted in *Burney,* it was apparently thought that the questions posed by that case were of sufficient importance and complexity to require briefing and oral argument. Since the Court failed to reach the merits in *Burney,* the proper course would seem to be a notation of probable jurisdiction in this case so that the questions can be addressed in that context. But instead, the issues which in *Burney* were considered so significant as to require setting the case for argument have now, inexplicably, become so trivial as not even to require an opinion. It is not without irony that petitioners, who claim a deprivation of due process because vital benefits are denied them without a hearing, are unable to secure a hearing before this Court.

Since we have not had the benefit of full briefing and oral argument on the questions presented by petitioners, I am not prepared to state my views at length. But from the papers before us, it seems quite likely to me that by withholding benefits from putatively eligible recipients without a pretermination hearing, New York has failed to comply with the federal requirement that benefits be provided "when due." Cf. *California Human Resources Dept.* v. *Java, supra.* More significantly, the decision below seems flatly inconsistent with our prior decision in *Goldberg* v. *Kelly, supra,* wherein we held that due process demands a pretermination hear-

ing for welfare benefits. See also *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *Bell* v. *Burson*, 402 U. S. 535 (1971).

Apparently a majority of the Court disagrees, although it is impossible to discern from the Court's silence either the source or nature of this disagreement. I would have thought that if the rights recognized in *Goldberg* and *Java* were to be sharply limited, the Court would at least have found it necessary to explicate the basis for this limitation and delineate the new reach of those decisions. Instead, the Court has elected to bury an apparently significant shift in the law in that portion of the United States Reports devoted to petitions for rehearing. Because I cannot agree that this disposition is consistent with our obligation to engage in reasoned decisionmaking, I must respectfully dissent.

No. 71–827. HUGHES TOOL CO. ET AL. *v.* TRANS WORLD AIRLINES, INC.; and

No. 71–830. TRANS WORLD AIRLINES, INC. *v.* HUGHES TOOL CO. ET AL., 409 U. S. 363. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 72–5410. BLACK *v.* UNITED STATES, 409 U. S. 1027; and

No. 72–5470. CASTANEDA *v.* CALIFORNIA, 409 U. S. 1126. Motions for leave to file petitions for rehearing denied.

MARCH 7, 1973

Dismissal Under Rule 60

No. 72–960. CREAMER *v.* GEORGIA. Sup. Ct. Ga. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 229 Ga. 511, 192 S. E. 2d 350.

MARCH 16, 1973

Dismissal Under Rule 60

No. 72–1039. UNITED STATES *v.* KISMETOGLU. C. A. 9th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 468 F. 2d 1386.

MARCH 19, 1973

Affirmed on Appeal

No. 72–990. WHITCOMB, GOVERNOR OF INDIANA, ET AL. *v.* COMMUNIST PARTY OF INDIANA ET AL. Affirmed on appeal from D. C. N. D. Ind.

No. 72–996. KOELFGEN ET AL. *v.* JACKSON, DIRECTOR, CIVIL SERVICE DEPARTMENT OF MINNESOTA, ET AL. Affirmed on appeal from D. C. Minn. Reported below: 355 F. Supp. 243.

Appeals Dismissed

No. 72–608. COLORADO EX REL. L. B. ET AL. *v.* L. V. B. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. Reported below: 179 Colo. 11, 498 P. 2d 1157.

No. 72–1008. CITY OF PINEY POINT VILLAGE ET AL. *v.* HARRIS COUNTY ET AL. Appeal from Ct. Civ. App. Tex., 1st Sup. Jud. Dist. dismissed for want of substantial federal question. Reported below: 479 S. W. 2d 358.

No. 72–5960. FAIR ET AL. *v.* NIXON, PRESIDENT OF THE UNITED STATES, ET AL. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE POWELL took no part in the consideration or decision of this appeal.

No. 72–1021. BARRY & BARRY, INC., ET AL. *v.* DEPARTMENT OF MOTOR VEHICLES OF WASHINGTON ET AL. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 81 Wash. 2d 155, 500 P. 2d 540.

No. 72–849. AVERY *v.* MARYLAND. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 15 Md. App. 520, 292 A. 2d 728.

No. 72–6082. SHAFFER *v.* GRAHAM, COMMISSIONER, DEPARTMENT OF PUBLIC WELFARE OF ARIZONA, ET AL. Appeal from Ct. App. Ariz. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 17 Ariz. App. 497, 498 P. 2d 571.

Certiorari Granted—Reversed. (See No. 72–794, *ante*, p. 667.)

Certiorari Granted—Reversed and Remanded. (See No. 72–905, *ante*, p. 690.)

Miscellaneous Orders

No. A–935 (72–1147). DORFMAN *v.* UNITED STATES. C. A. 2d Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 470 F. 2d 246.

No. 40, Orig. PENNSYLVANIA *v.* NEW YORK ET AL. Supplemental report of Special Master hereby adopted by the Court. [For earlier orders herein, see, *e. g.*, 409 U. S. 1122.]

No. D–5. IN RE DISBARMENT OF SIGNER. It having been reported to the Court that Burton R. Signer, of Cincinnati, Ohio, has been disbarred from the practice of law by the Supreme Court of Ohio, duly entered June 28, 1972, and this Court by order of November 6, 1972 [409 U. S. 975], having suspended the said Burton R. Signer from the practice of law in this Court and directing that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent, and that a response thereto has been filed;

IT IS ORDERED that the said Burton R. Signer be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 60, Orig. PENNSYLVANIA *v.* NEW YORK ET AL. Motion for leave to file bill of complaint denied. MR. JUSTICE STEWART would set motion for leave to file bill of complaint for oral argument.

No. 71–1182. MATTZ *v.* ARNETT, DIRECTOR, DEPARTMENT OF FISH AND GAME. Ct. App. Cal., 1st App. Dist. [Certiorari granted, 409 U. S. 1124.] Motion of petitioner to divide oral argument granted.

No. 72–459. SLOAN, TREASURER OF PENNSYLVANIA, ET AL. *v.* LEMON ET AL.; and

No. 72–620. CROUTER *v.* LEMON ET AL. Appeals from D. C. E. D. Pa. [Probable jurisdiction noted, *ante,* p. 907.] Motion of the Attorney General of Pennsylvania for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Appellees also allotted 15 additional minutes for oral argument.

No. 72–402. UNITED STATES *v.* GENERAL DYNAMICS CORP. ET AL. Appeal from D. C. N. D. Ill. [Probable jurisdiction noted, 409 U. S. 1058.] Motion of the Solicitor General for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Appellees also allotted 15 additional minutes for oral argument.

No. 72–419. PITTSBURGH PRESS CO. *v.* PITTSBURGH COMMISSION ON HUMAN RELATIONS ET AL. Pa. Ct. Commw. [Certiorari granted, 409 U. S. 1036.] Motion to permit two counsel to argue orally on behalf of respondents granted.

No. 72–490. MCDONNELL DOUGLAS CORP. *v.* GREEN. C. A. 8th Cir. [Certiorari granted, 409 U. S. 1036.] Motion of respondent for leave to proceed further herein *in forma pauperis* denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would grant the motion.

No. 72–549. SCHOOL BOARD OF CITY OF RICHMOND, VIRGINIA, ET AL. *v.* STATE BOARD OF EDUCATION OF VIRGINIA ET AL.; and

No. 72–550. BRADLEY ET AL. *v.* STATE BOARD OF EDUCATION OF VIRGINIA ET AL. C. A. 4th Cir. [Certiorari granted, 409 U. S. 1124.] Motion of petitioners for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 72–624. UNITED STATES *v.* PENNSYLVANIA INDUSTRIAL CHEMICAL CORP. C. A. 3d Cir. [Certiorari granted, 409 U. S. 1074.] Motion of United States Steel Corp. et al. for leave to participate in oral argument as *amici curiae* denied.

No. 72–486. FEDERAL POWER COMMISSION *v.* MEMPHIS LIGHT, GAS & WATER DIVISION ET AL.; and

No. 72–488. TEXAS GAS TRANSMISSION CORP. *v.* MEMPHIS LIGHT, GAS & WATER DIVISION ET AL. C. A. D. C. Cir. [Certiorari granted, 409 U. S. 1037.] Motion to permit two counsel to argue orally on behalf of respondents granted.

No. 72–694. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL. *v.* NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL.;

No. 72–753. ANDERSON *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL.;

No. 72–791. NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL.; and

No. 72–929. CHERRY ET AL. *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL. Appeals from D. C. S. D. N. Y. [Probable jurisdiction noted, *ante*, p. 907.] Motion of United Americans for Public Schools for leave to file a brief as *amicus curiae* granted.

No. 72–1035. ROGERS *v.* LOETHER ET AL. C. A. 7th Cir. The Solicitor General is invited to file a brief expressing the views of the United States. Reported below: 467 F. 2d 1110.

No. 72–1227. MORTON, SECRETARY OF THE INTERIOR *v.* WILDERNESS SOCIETY ET AL. C. A. D. C. Cir. Motion to expedite consideration granted insofar as it requests that respondents file a brief on or before March 28, 1973. Reported below: 156 U. S. App. D. C. 121, 479 F. 2d 842.

No. 72–5592. GOLDSMITH *v.* WYOMING ET AL.; and

No. 72–5849. REARDON *v.* MEACHAM ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 72–6100. GERARDI *v.* FAVER; and

No. 72–6129. GERARDI *v.* MACLAUGHLIN ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 72–6035. RUDERER *v.* SIRICA, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of prohibition denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

Probable Jurisdiction Noted or Postponed

No. 72–847. MEMORIAL HOSPITAL ET AL. *v.* MARICOPA COUNTY ET AL. Appeal from Sup. Ct. Ariz. Motion of Legal Aid Society of Maricopa County, Arizona, to dispense with printing *amicus curiae* brief granted. Probable jurisdiction noted. Reported below: 108 Ariz. 373, 498 P. 2d 461.

No. 72–1040. COMMUNIST PARTY OF INDIANA ET AL. *v.* WHITCOMB, GOVERNOR OF INDIANA, ET AL. Appeal from D. C. N. D. Ind. Further consideration of question of jurisdiction postponed to hearing of case on the merits.

Certiorari Granted

No. 72–403. KUNZIG, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL. *v.* MURRAY. C. A. D. C. Cir. Certiorari granted. Reported below: 149 U. S. App. D. C. 256, 462 F. 2d 871.

No. 72–481. DEPARTMENT OF GAME OF WASHINGTON *v.* PUYALLUP TRIBE ET AL.; and

No. 72–746. PUYALLUP TRIBE *v.* DEPARTMENT OF GAME OF WASHINGTON. Sup. Ct. Wash. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 80 Wash. 2d 561, 497 P. 2d 171.

No. 71–1669. GUSTAFSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari granted and case set for oral argument with No. 72–936, immediately *infra*. Reported below: 258 So. 2d 1.

No. 72–936. UNITED STATES *v.* ROBINSON. C. A. D. C. Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for oral argument with No. 71–1669, immediately *supra*. Reported below: 153 U. S. App. D. C. 114, 471 F. 2d 1082.

Certiorari Denied. (See also Nos. 72–849, 72–5960, and 72–6082, *supra*.)

No. 71–992. WOLLACK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–1210. FIGUEROA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–1479. MOORE *v.* UNITED STATES; and

No. 71–6769. GURIDI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 458 F. 2d 1234.

No. 71–6085. WOODEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 453 F. 2d 1258.

No. 72–818. SCHOOL BOARD OF BREVARD COUNTY, FLORIDA *v.* WEAVER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 467 F. 2d 473.

No. 72–828. BRATKO *v.* UNITED STATES; and

No. 72–5824. NIELSEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 467 F. 2d 1032.

No. 72–941. LUGOSCH *v.* UNITED STATES; and

No. 72–946. MUSTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 72–843. POWERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 467 F. 2d 1089.

No. 72–940. PACELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 470 F. 2d 67.

No. 72–962. PHELPS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 828.

No. 72–989. ALEMAN *v.* SUGARMAN, COMMISSIONER, NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES. C. A. 2d Cir. Certiorari denied.

No. 72–999. HIATT *v.* STANADYNE, INC. C. A. 6th Cir. Certiorari denied.

No. 72–1006. GRAHAM *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 72–1030. HARVEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 5 Ill. App. 3d 499, 285 N. E. 2d 179.

No. 72–1033. RUSS *v.* MIRA COMPANIA NAVIERA, S. A., ET AL. C. A. 5th Cir. Certiorari denied.

No. 72–1036. BLOOM *v.* A. H. ROBINS CO., INC. Ct. Civ. App. Tex., 10th Sup. Jud. Dist. Certiorari denied. Reported below: 479 S. W. 2d 780.

No. 72–1043. LOVE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 72–1044. JOHNSON BONDING CO., INC., ET AL. *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 487 S. W. 2d 911.

No. 72–1055. GLASSER *v.* WILLARD ALEXANDER, INC. Ct. App. N. Y. Certiorari denied. Reported below: 31 N. Y. 2d 270, 290 N. E. 2d 813.

No. 72–1049. SCHULMAN *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 72–1065. MALONEY, DBA APALACHICOLA TIMES *v.* GIBSON ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 263 So. 2d 632.

No. 72–5068. SINGLETON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 460 F. 2d 1148.

No. 72–5300. BARBARA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–5442. MCKINNEY *v.* JONES, SHERIFF. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 776.

No. 72–5528. CORBETT ET AL. *v.* UNITED STATES; and No. 72–5865. MILISCI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 700.

No. 72–5609. CURLEY *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied.

No. 72–5698. KAREN *v.* PARK ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–5702. STODDARD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 72–5719. SMITH *v.* KANSAS. C. A. 10th Cir. Certiorari denied.

No. 72–5725. POLAK *v.* CRAVEN, WARDEN. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 72–5744. CARTER *v.* MASCO MECHANICAL CONTRACTORS, INC. County Civ. Ct. at Law No. 2, Harris County, Tex. Certiorari denied.

No. 72–5752. FIORE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 467 F. 2d 86.

No. 72–5791. ANGLIN *v.* CALDWELL, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 970.

No. 72–5792. MCRAE *v.* BOUNDS ET AL. C. A. 4th Cir. Certiorari denied.

No. 72–5893. HENDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 1074.

No. 72–5895. EDWARDS *v.* UNITED STATES MARSHAL. C. A. 4th Cir. Certiorari denied.

No. 72–5915. NAVALLEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 467 F. 2d 1375.

No. 72–5920. KING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 782.

No. 72–5921. STOKES *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–5934. TYSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 152 U. S. App. D. C. 233, 470 F. 2d 381.

No. 72–5936. ROMERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 469 F. 2d 1078.

No. 72–5938. LANDMAN *v.* CARLSON, DIRECTOR, BUREAU OF PRISONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 218.

No. 72–5945. HARDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 65.

No. 72–5946. RODRIQUEZ-CAMACHO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 468 F. 2d 1220.

No. 72–5957. LUCAS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–5959. SOLOMON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 468 F. 2d 848.

No. 72–5963. MATSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 469 F. 2d 1234.

No. 72–5967. SEIBERT *v.* ANDERSON, WARDEN. Ct. Crim. App. Okla. Certiorari denied.

No. 72–5970. ESPERTI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 950.

No. 72–5975. NELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 912.

No. 72–5977. BRADFORD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 72–5980. PAIGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5985. HARRIS *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 9th Cir. Certiorari denied. Reported below: 468 F. 2d 1260.

No. 72–5986. PENIX *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 9th Cir. Certiorari denied. Reported below: 468 F. 2d 1259.

No. 72–5989. BARNES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 150 U. S. App. D. C. 319, 464 F. 2d 828.

No. 72–5994. DELKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 72–5997. GANDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 1134.

No. 72–6000. WILKERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 963.

No. 72–5999. ROOTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–6004. TATE *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 2d 971.

No. 72–6005. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–6010. HOLLOMAN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 282 N. C. 92, 191 S. E. 2d 745.

No. 72–6018. LISZNYAI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 470 F. 2d 707.

No. 72–6064. LAYTON *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–6067. MAGEE *v.* CARROW ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 72–6068. WASHINGTON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 72–6069. WOODEN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 31 N. Y. 2d 753, 290 N. E. 2d 436.

No. 72–6070. MOORE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 501 P. 2d 529.

No. 72–6072. GOMEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–6073. RAMIREZ *v.* RODRIGUEZ, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 467 F. 2d 822.

No. 72–6074. GARDNER *v.* DECKER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 72–6079. FREEMAN *v.* LOCKHART, CORRECTION SUPERINTENDENT. C. A. 8th Cir. Certiorari denied.

No. 72–6081. STOKES *v.* HARLAN ET AL. Ct. App. Ky. Certiorari denied.

No. 72–6098. GUTHRIDGE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 164 Conn. 145, 318 A. 2d 87.

No. 72–6103. COONS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 72–6104. GONZALEZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 31 N. Y. 2d 787, 291 N. E. 2d 391.

No. 72–6107. JOHNSON *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied.

No. 72–6111. LOGAN *v.* BUTLER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–6118. BALDWIN *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 471 F. 2d 655.

No. 72–6123. HOWARD *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–6130. COMBS *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 472 F. 2d 1188.

No. 72–6132. SWINICK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 72–6134. SPENCER *v.* TURNER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 468 F. 2d 599.

No. 72–6136. MARTIN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 72–6138. HEWLETT *v.* GEORGIA. Ct. App. Ga. Certiorari denied.

No. 72–6139. COLLAZO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 72–6141. SMITH *v.* KANSAS. C. A. 10th Cir. Certiorari denied.

No. 72–6150. SAUNDERS *v.* JOHNSON, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 72–6157. LOGAN *v.* NEW YORK. Sup. Ct. N. Y., Queens County. Certiorari denied.

No. 72–6161. ECKERT *v.* PAPER MANUFACTURERS Co. C. A. 3d Cir. Certiorari denied.

No. 72–6199. JOHNSON *v.* PARKER. C. A. 6th Cir. Certiorari denied.

No. 71–6687. PAGE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 459 F. 2d 467.

No. 72–837. DE SIMONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 468 F. 2d 1196.

No. 72–860. ROSS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 468 F. 2d 1213.

No. 72–952. WALKER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 469 F. 2d 1377.

No. 72–958. CIRILLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 468 F. 2d 1233.

No. 72–1047. WEATHER WISE CO. *v.* AEROQUIP CORP. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 468 F. 2d 716.

No. 72–5045. NAVARRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 462 F. 2d 1091.

No. 72–5066. ROSS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 464 F. 2d 376.

No. 72–5227. ORTIZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5625. EPPS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 15 N. C. App. 610, 190 S. E. 2d 722.

No. 72–5815. CROVEDI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 467 F. 2d 1032.

No. 72–5978. ANDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 467 F. 2d 210.

No. 72–801. ANDERSON *v.* CITY OF PHOENIX ET AL. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 108 Ariz. 388, 499 P. 2d 103.

No. 72–967. SEABOARD COAST LINE RAILROAD CO. *v.* GRECO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 464 F. 2d 496.

No. 72–923. BRIDGE *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS would deny certiorari on ground of mootness. Reported below: 120 N. J. Super. 460, 295 A. 2d 3.

No. 72–1022. POPOFF *v.* JOHNSTON. Ct. App. Cal., 1st App. Dist. Motion to dispense with printing petition granted. Certiorari denied.

No. 72–1027. IN RE GROSS. Sup. Ct. Mont. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: —— Mont. ——, 503 P. 2d 995.

No. 72–1067. COLUMBIA STANDARD CORP. *v.* RANCHERS EXPLORATION & DEVELOPMENT CORP. C. A. 10th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 468 F. 2d 547.

No. 72–5707. BASSETT *v.* SMITH, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 464 F. 2d 347.

No. 72–6002. CHEANEY, AKA OWENS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied for want of standing of petitioner. *Doremus* v. *Board of Education of the Borough of Hawthorne,* 342 U. S. 429. MR. JUSTICE DOUGLAS would deny certiorari on grounds that petitioner, who was convicted of performing an abortion, is not a doctor and that the decisions of this Court in *Roe* v. *Wade, ante,* p. 113, and *Doe* v. *Bolton, ante,* p. 179, were confined to the condition, *inter alia,* that the abortion, if performed, be based on an appropriately safeguarded medical judgment. Reported below: —— Ind. ——, 285 N. E. 2d 265.

No. 72–5988. EISENBERG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari for the reason stated in his dissent in No. 71–1656, *United States* v. *Achtenberg,* 409 U. S. 932. Reported below: 469 F. 2d 156.

Rehearing Denied

No. 72–5133. BUCHANAN *v.* TEXAS, 409 U. S. 814 and 1029. Motion for leave to file second petition for rehearing denied.

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ABORTIONS. See also **Appeals; Constitutional Law,** I, 1, 5, 7; VIII; **Federal-State Relations; Mootness; Procedure,** 1; **Standing to Sue,** 1–2.

1. *First trimester of pregnancy—Decision to abort.*—For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician; the State may define the term "physician" to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined. Roe v. Wade, p. 113.

2. *Right to abortions.*—A woman's constitutional right to an abortion is not absolute. Doe v. Bolton, p. 179.

3. *Second trimester—Maternal health—Viability—Potentiality of human life.*—For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. For the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. Roe v. Wade, p. 113.

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Commerce Act that "[t]he Commission may, after hearing . . . establish reasonable rules . . . ." did not trigger §§ 556 and 557 of the Administrative Procedure Act requiring a trial-type hearing and the presentation of oral argument by the affected parties; and the ICC's proceeding was governed only by § 553 of the APA requiring notice prior to rulemaking. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U. S. 742. United States v. Florida East Coast R. Co., p. 224.

2. *Rulemaking procedure—Consultation with affected parties—No adversary trial.*—The "after hearing" language of § 1 (14) (a) of the Interstate Commerce Act does not by itself confer upon interested parties either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker. United States v. Florida East Coast R. Co., p. 224.

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ANTITRUST ACTS. See also **Patents.**

1. *Electric utility company—Contracts with other suppliers—Restrictive provisions.*—The record supports the District Court's findings that Otter Tail—solely to prevent the municipal systems from eroding its monopolistic position—refused to sell power at wholesale or to wheel (transmit) it, and that Otter Tail to the same end invoked restrictive provisions in its contracts with the Bureau of Reclamation and other suppliers, the court correctly concluding that such provisions, *per se*, violated the Sherman Act. Otter Tail Power Co. v. United States, p. 366.

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2. *Electric utility company—Court order to transfer power from other source.*—The District Court's decree does not conflict with the regulatory responsibilities of the Federal Power Commission, for the court's order for wheeling power to correct Otter Tail's anticompetitive and monopolistic practices is not counter to the authority of the FPC, which lacks the power to impose such a requirement; and appellant's argument that the decree overrides FPC's power over interconnections is premature, there being no present conflict between the court's decree and any contrary ruling by the FPC. Otter Tail Power Co. v. United States, p. 366.

3. *Electric utility company—Municipal plant—Dilatory litigation.*—The District Court should determine on remand whether the litigation that Otter Tail was found to have instituted for the purpose of maintaining its monopolistic position was "a mere sham" within the meaning of *Eastern Railroad Conference* v. *Noerr Motor Freight,* 365 U. S. 127, so that the litigation would lose its constitutional protection in line with the Court's decision in *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508, which was decided after the District Court had entered its decree. Otter Tail Power Co. v. United States, p. 366.

4. *Electric utility company—Municipal system—Refusal to sell power.*—Otter Tail is not insulated from antitrust regulation by reason of the Federal Power Act, whose legislative history manifests no purpose to make the antitrust laws inapplicable to power companies. The essential thrust of the authority of the Federal Power Commission is to encourage voluntary interconnections. Though the FPC may order interconnections if "necessary or appropriate in the public interest," antitrust considerations, though relevant under that standard, are not determinative. Otter Tail Power Co. v. United States, p. 366.

5. *Pooling of patents—Effect on market.*—In order to "pry open to competition" the market closed by the antitrust violations, an order for mandatory, nondiscriminatory sales to all bona fide applicants is appropriate relief, and where, as in this case, the manufacturer may choose not to make bulk-form sales, and the licensees are not bound by the court's order for mandatory sales, further relief in the form of reasonable-royalty licensing of the patents is also proper. United States v. Glaxo Group Ltd., p. 52.

6. *Pooling of patents—Limited sublicensing.*—Where patents are directly involved in antitrust violations and the Government presents a substantial case for relief in the form of restrictions on the patents, the Government may challenge the validity of the patents regardless

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of whether the owner relies on the patents in defending the antitrust action. United States v. Glaxo Group Ltd., p. 52.

7. *Regional brewer—Penetration of New England market—Acquisition of major local producer—On-the-fringe potential competitor.*—The District Court erred in assuming that, because respondent would not have entered the market *de novo*, it could not be considered a potential competitor. The court should have considered whether respondent was a potential competitor in the sense that its position on the edge of the market exerted a beneficial influence on the market's competitive conditions. United States v. Falstaff Brewing Corp., p. 526.

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APPEALS. See also **Abortions**, 1, 3; **Constitutional Law**, I, 1, 4; III, 3; IV; **Criminal Law**; **Federal-State Relations**; **Grand Juries**, 1–2; **Jurisdiction**, 1; **Mootness**; **Procedure**, 1–2; **Standing to Sue**, 1.

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1. *Border dispute—Ohio River—Long acquiescence.*—Ohio's long acquiescence in the location of the Ohio-Kentucky line at the northern edge of the Ohio River bars Ohio's present claim that the boundary is at the middle of the river. Ohio v. Kentucky, p. 641.

2. *Texas and Louisiana disputed area—Islands—Special Master's Report.*—Special Master's Report, to the extent that it recommends the relevant boundary be the geographic middle of Sabine Pass, Lake and River (collectively Sabine) and not the west bank or the middle of the main channel and that all islands in the east half of the Sabine when Louisiana was admitted as a State in 1812, or thereafter formed, should be awarded to Louisiana, is adopted; decision on the Report with respect to islands in the west half of the Sabine existing in 1812 or thereafter formed, is deferred pending further proceedings. Texas v. Louisiana, p. 702.

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CIVIL RIGHTS.

1. *Community swimming pool—Use by members and guests only—Exclusion of Negroes.*—Respondents' racially discriminatory membership policy violates 42 U. S. C. § 1982. The preferences for membership in Wheaton-Haven gave valuable property rights to white residents in the preference area that were not available to Negro vendees, and this case is therefore not significantly distinguishable from *Sullivan* v. *Little Hunting Park, Inc.,* 396 U. S. 229. Tillman v. Wheaton-Haven Recreation Assn., p. 431.

2. *Membership club—Geographic preference area—Whites-only policy.*—Wheaton-Haven is not a private club within the meaning of 42 U. S. C. § 2000a (e), since membership, until the association reaches its full complement, "is open to every white person within the geographic area, there being no selective element other than race." Wheaton-Haven is thus not even arguably exempt by virtue of § 2000a (e) from 42 U. S. C. § 1981 or § 1982. Tillman v. Wheaton-Haven Recreation Assn., p. 431.

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State court's determination of voluntariness—Federal habeas corpus—Standards.—Trial judge's determination, on totality of circumstances, that respondent's confessions were voluntary, evidences that he correctly applied correct voluntariness standards and, since the District Court could have been reasonably certain that he would have granted relief if he had believed respondent's testimony, courts below erroneously concluded that the opinion of the trial court did not meet the requirements of 28 U. S. C. § 2254 (d) (1). LaVallee v. Delle Rose, p. 690.

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I. Due Process.

1. *Criminal abortion laws—Legitimate state interests.*—State criminal abortion laws that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term. Roe v. Wade, p. 113.

2. *Criminal trial—Denial of right of cross-examination.*—The application of the "voucher" rule, that a party may not impeach his own witness, prevented petitioner through cross-examination of that witness (McDonald) from exploring the circumstances of McDonald's three prior oral confessions and challenging his renunciation of the written confession, and thus deprived petitioner of the right to contradict testimony that was clearly "adverse." Chambers v. Mississippi, p. 284.

3. *Criminal trial—Exclusion of oral confessions of another.*—The trial court erred in excluding hearsay statements of another person (McDonald) which were critical to petitioner's defense and which bore substantial assurances of trustworthiness, including that each was made spontaneously to a close acquaintance, that each was corroborated by other evidence in the case, that each was in a real sense against McDonald's interest, and that McDonald was present and available for cross-examination by the State. Chambers v. Mississippi, p. 284.

4. *Fee for filing appeal—Increased welfare payments.*—Appellants were not deprived of due process by filing fee, which they were allegedly unable to pay, required for review by state appellate court of agency determination resulting in lower welfare payments, since the increase in welfare payments has less constitutional significance than the interest of appellants in *Boddie* v. *Connecticut,* 401 U. S.

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371, and since evidentiary hearings provided a procedure, not conditioned on payment of any fee, through which appellants were able to seek redress. Ortwein v. Schwab, p. 656.

5. *Georgia Criminal Code—Procedural conditions.*—The Joint Committee on Accreditation of Hospitals (JCAH) accreditation requirement is an invalid violation of the Fourteenth Amendment, since the State has not shown that only hospitals (let alone those with JCAH accreditation) meet its interest in fully protecting the patient; and a hospital requirement failing to exclude the first trimester of pregnancy would be invalid on that ground alone, see *Roe* v. *Wade, ante,* p. 113. The interposition of a hospital committee on abortion, a procedure not applicable as a matter of state criminal law to other surgical situations, is unduly restrictive of the patient's rights, which are already safeguarded by her personal physician. Required acquiescence by two co-practitioners also has no rational connection with a patient's needs and unduly infringes on her physician's right to practice. Doe v. Bolton, p. 179.

6. *Incarcerated material witness—Compensation.*—Distinction between compensation for pretrial detention and for trial attendance is not so unreasonable as to violate the Due Process Clause of the Fifth Amendment, since Congress could determine that in view of length of pretrial confinement and costs necessarily borne by the Government, only minimal compensation for pretrial detention is justified, particularly since witness has a public duty to testify. Hurtado v. United States, p. 578.

7. *Vagueness—Best clinical judgment.*—The requirement that a physician's decision to perform an abortion must rest upon "his best clinical judgment" of its necessity is not unconstitutionally vague, since that judgment may be made in the light of *all* the attendant circumstances. *United States* v. *Vuitch,* 402 U. S. 62. Doe v. Bolton, p. 179.

II. Elections.

Primary elections—Enrollment in political party.—New York's delayed enrollment scheme did not violate petitioners' constitutional rights; it did not absolutely prohibit petitioners from voting in the 1972 primary, but merely imposed a time deadline on their enrollment, which they chose to disregard. They were not deprived of their right to associate with the party of their choice or subsequently to change to another party, provided they observed the statutory time limit. The cutoff date for enrollment, which occurs about eight months before a presidential, and 11 months before a non-

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presidential, primary, is not arbitrary when viewed in light of the legitimate state purpose of avoiding disruptive party raiding. Rosario v. Rockefeller, p. 752.

III. Equal Protection of the Laws.

1. *Bicameral state legislature—Apportionment on population basis.*—In the implementation of the basic constitutional principle that both houses of a bicameral state legislature be apportioned substantially on a population basis (*Reynolds* v. *Sims*, 377 U. S. 533), more flexibility is permissible with respect to state legislative reapportionment than with respect to congressional redistricting. Mahan v. Howell, p. 315.

2. *Corporate property—Personal property tax.*—An Illinois constitutional provision subjecting corporations and similar entities, but not individuals, to ad valorem taxes on personalty comports with equal protection requirements, the States being accorded wide latitude in making classifications and drawing lines that in their judgment produce reasonable taxation systems. *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, disapproved. Lehnhausen v. Lake Shore Auto Parts Co., p. 356.

3. *Filing-fee requirement—Rational justification.*—Filing fee required for review by state appellate court of agency determination resulting in lower welfare payments is not violative of equal protection, since the applicable standard in the area of social and economic regulation when a suspect classification is not present is rational justification and here the requirement of rationality is met. Ortwein v. Schwab, p. 656.

4. *Good-time credit toward parole eligibility—Presentence county jail incarceration.*—Under the New York scheme good-time credit takes into account a prisoner's performance under the program of rehabilitation that is fostered under the state prison system, but not in the county jails which serve primarily as detention centers. Since the jails have no significant rehabilitation program, a rational basis exists for declining to give good-time credit for the pretrial jail-detention period; and the statute will be sustained even if fostering rehabilitation was not necessarily the primary legislative objective, cf. *South Carolina* v. *Katzenbach*, 383 U. S. 301, 331; *Dandridge* v. *Williams*, 397 U. S. 471, 486. McGinnis v. Royster, p. 263.

5. *Impending elections—Interim plan by District Court—One senatorial multimember district.*—Legislature's three senatorial electoral districts being impermissibly discriminatory and the fall 1971 elections being at hand, the District Court, which was under severe

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time pressures, did not abuse its discretion in prescribing an interim plan of combining the three districts into one multimember district. Mahan v. Howell, p. 315.

6. *Rational legislative purpose—Voters' voice in local issues.*—The State's objective of preserving the integrity of political subdivision lines is rational since it furthers the legislative purpose of facilitating enactment of statutes of purely local concern and preserves for the voters in the political subdivisions a voice in the state legislature on local matters. Mahan v. Howell, p. 315.

7. *Reapportionment—Election of state officials—Preservation of political boundaries.*—Reapportionment of electoral districts for Virginia's House of Delegates complied with the Equal Protection Clause of the Fourteenth Amendment, since the legislature's maximum population percentage variation, which was not excessive, resulted from the State's rational objective of preserving the integrity of political subdivision lines. Mahan v. Howell, p. 315.

8. *Reapportionment—Equal-population districts.*—Given the wider constitutional latitude in state legislative reapportionment, the population disparities reflected in the legislature's maximum percentage deviation are within tolerable constitutional limits. Mahan v. Howell, p. 315.

9. *Registration to vote—Residence requirements.*—Arizona's 50-day durational voter residency and registration requirements as applied to other than presidential elections are constitutionally permissible in light of Arizona's special problems arising from the State's legitimate needs to correct registrations accomplished by volunteer personnel and to interrupt registration work to take care of activities occasioned by its fall primaries. Marston v. Lewis, p. 679.

10. *Registration to vote—Residence requirements.*—Closure of voter registration 50 days before November general elections for other than presidential elections, although approaching the outer constitutional limits, is permissible to promote the important interests of Georgia in accurate voter lists. Burns v. Fortson, p. 686.

11. *State senatorial districts—Discrimination against military personnel.*—The establishment by the legislature of three numerically ideal senatorial electoral districts by assigning to one of them about 36,700 persons who were "home-ported" at the U. S. Naval Station, Norfolk, regardless of where they actually resided, because that is where they were counted on official census tracts, was constitutionally impermissible discrimination against military personnel, cf. *Davis* v. *Mann,* 377 U. S. 678. Mahan v. Howell, p. 315.

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12. *Watershed improvement districts—Limitation of franchise.*—Limitation of franchise to property owners in the creation and maintenance of a Wyoming watershed improvement district, for which they bear the primary burden and share the benefits, is not violative of equal protection requirements. Associated Enterprises, Inc. v. Toltec District, p. 743.

13. *Water storage districts—Limitation of franchise.*—Restricting the voting for board of directors of water storage district to landowners who may not be residents does not violate the principle enunciated in such cases as *Reynolds* v. *Sims*, 377 U. S. 533, that governing bodies should be selected in a popular election in which every person's vote is equal. Since assessments against landowners are the sole means by which expenses of district are paid, it is not irrational to repose franchise in landowners but not residents. Salyer Land Co. v. Tulare Water District, p. 719.

14. *Water storage districts—Weighted voting.*—Permitting the weighting of votes for board of directors of water storage district according to assessed valuation of land does not evade the principle that wealth has no relation to voter qualifications where, as here, the expense as well as the benefit is proportional to the land's assessed value. Salyer Land Co. v. Tulare Water District, p. 719.

IV. Fifth Amendment.

Voice exemplars—Identification purposes.—The compelled production of the voice exemplars would not violate the Fifth Amendment privilege against compulsory self-incrimination, since they were to be used only for identification purposes, and not for the testimonial or communicative content of the utterances. United States v. Dionisio p. 1.

V. Fourth Amendment.

1. *Appearance of witness—Compulsion to give exemplar.*—Since neither the summons to appear before the grand jury, nor its directive to give a voice exemplar, contravened the Fourth Amendment, the Court of Appeals erred in requiring a preliminary showing of reasonableness before respondent could be compelled to furnish the exemplar. United States v. Dionisio, p. 1.

2. *Compulsion to appear before grand jury—Voice recordings.*—A subpoena to compel a person to appear before a grand jury does not constitute a "seizure" within the meaning of the Fourth Amendment, and the fact that many others besides respondent were ordered to give voice recordings did not render the subpoena unconstitutional. *Davis* v. *Mississippi*, 394 U. S. 721, distinguished. The

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grand jury's directive to make the voice recording infringed no valid Fourth Amendment interest. United States v. Dionisio, p. 1.

3. *Handwriting exemplars—Compelled production.*—The specific and narrowly drawn directive to furnish a handwriting specimen, which, like the compelled speech disclosure upheld in *United States* v. *Dionisio, ante,* p. 1, involved production of physical characteristics, violated no legitimate Fourth Amendment interest. United States v. Mara, p. 19.

VI. Freedom of Speech.

Campus publication—"Indecent speech."—Expulsion of student for distributing on campus a publication assertedly containing "indecent speech" proscribed by a bylaw of university's Board of Curators was an impermissible violation of her First Amendment free speech rights since the mere dissemination of ideas on a state university campus cannot be proscribed in the name of "conventions of decency." Papish v. University of Missouri Curators, p. 667.

VII. Just Compensation Clause.

Incarcerated material witness—Per diem and subsistence.—The $1 statutory per diem plus subsistence in kind for incarcerated witnesses before trial does not violate Just Compensation Clause, as detention of material witness is not a "taking" under the Fifth Amendment. Hurtado v. United States, p. 578.

VIII. Right to Travel.

Residence requirement for medical service—Out-of-state patients.—The Georgia residence requirement violates the Privileges and Immunities Clause by denying protection to persons who enter Georgia for medical services there. Doe v. Bolton, p. 179.

CONSUMPTION OF FUEL. See **Procedure,** 3; **Taxes,** 2–3.

CONTEMPT. See **Constitutional Law,** IV; V, 1–3; **Grand Juries,** 1–3.

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COURT APPEARANCES. See **Constitutional Law,** I, 6; VII; **Witnesses,** 1–2.

COURTS. See also **Confessions; Procedure,** 3; **Taxes,** 2–3.

1. *No trial on state charge—Claim of speedy trial—State remedies on that claim.*—The exhaustion doctrine of *Ex parte Royall,* 117 U. S. 241, does not bar a petition for federal habeas corpus alleging, under *Smith* v. *Hooey,* 393 U. S. 374, a constitutional claim of present denial of a speedy trial, even though the petitioner has not yet been brought to trial on the state charge. The petitioner must, however, have exhausted available state court remedies for consideration of that constitutional claim. Braden v. 30th Judicial Circuit Court of Ky., p. 484.

2. *Petitioner in jail in Alabama—Pending Kentucky detainer—Demand for speedy trial in Kentucky.*—Under *Peyton* v. *Rowe,* 391 U. S. 54, which discarded the "prematurity doctrine" of *McNally* v. *Hill,* 293 U. S. 131, the petitioner was "in custody" within the meaning of 28 U. S. C. § 2241 (c)(3) for purposes of a habeas corpus attack on the Kentucky indictment underlying the detainer, even though he was confined in an Alabama prison; the jurisdiction of a district court considering a habeas corpus petition requires only that the court issuing the writ have jurisdiction over the custodian of the prisoner. Braden v. 30th Judicial Circuit Court of Ky., p. 484.

3. *Speedy trial—Habeas corpus petition—District of prisoner's confinement.—Ahrens* v. *Clark,* 335 U. S. 188, on which respondent relies, can no longer be viewed as requiring that habeas corpus petitions be brought only in the district of the petitioner's confinement. Here, since respondent was properly served with process in the Western District of Kentucky, the Court of Appeals erred in concluding that the District Court should have dismissed the petition for lack of jurisdiction. Braden v. 30th Judicial Circuit Court of Ky., p. 484.

CRIMINAL LAW. See also **Abortions,** 1–3; **Appeals; Confessions; Constitutional Law,** I, 1–3, 5–7; IV; V, 1–3; VII–VIII; **Courts,** 1–3; **Federal-State Relations; Grand Juries,** 1–2; **Jurisdiction,** 1; **Mootness; Parole,** 2; **Procedure,** 1; **Saving Clauses; Standing to Sue,** 1–3; **Unions.**

Double jeopardy—Jury sworn—Defective indictment—Mistrial.—Under the circumstances of this case, the trial judge's action in declaring a mistrial was a rational determination designed to imple-

CRIMINAL LAW—Continued.
ment a legitimate state policy, with no suggestion that the policy was manipulated to respondent's prejudice. The declaration of a mistrial was therefore required by "manifest necessity" and the "ends of public justice," and the Double Jeopardy Clause of the Fifth Amendment as made applicable to the States by the Fourteenth did not bar respondent's retrial. Illinois v. Somerville, p. 458.

CROSS-EXAMINATIONS. See **Constitutional Law**, I, 2–3.

CUSTODIAL WORKERS. See **Fair Labor Standards Act.**

CUSTODIANS. See **Courts**, 1–3.

CUSTODY. See **Courts**, 1–3.

DEADLINES. See **Constitutional Law**, II.

DECEDENTS' ESTATES. See **Taxes**, 5.

DECENCY. See **Constitutional Law**, VI.

DECLARATIONS AGAINST INTEREST. See **Constitutional Law**, I, 2–3.

DECLARATORY JUDGMENTS. See **Abortions**, 1–3; **Appeals; Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations; Mootness; Procedure**, 1; **Standing to Sue**, 1–2.

DECREASED WELFARE PAYMENTS. See **Constitutional Law**, I, 4; **Procedure**, 2.

DEFECTIVE INDICTMENTS. See **Criminal Law.**

DEFERRED TAXATION. See **Taxes**, 4.

DELAYED ENROLLMENT. See **Constitutional Law**, II.

DE NOVO ENTRIES. See **Antitrust Acts**, 7.

DETAINERS. See **Courts**, 1–3.

DETENTION. See **Constitutional Law**, I, 6; VII; **Witnesses**, 1–2.

DETENTION CENTERS. See **Constitutional Law**, III, 4; **Parole**, 1.

DISCLOSURE. See **Freedom of Information Act**, 1–2; **Judicial Review**, 1–2.

DISCRIMINATION. See **Civil Rights**, 1–2.

DISCRIMINATION AGAINST MILITARY PERSONNEL. See **Constitutional Law**, III, 1, 5–8, 11.

DISCRIMINATORY APPLICATION OF STATUTE. See **Standing to Sue**, 3.

DISSEMINATION OF IDEAS. See **Constitutional Law**, VI.

DISTRIBUTION OF WATER. See **Constitutional Law**, III, 12–14.

DISTRIBUTIONS ON CAMPUS. See **Constitutional Law**, VI.

DISTRIBUTIVE SHARES. See **Taxes**, 4.

DOCTORS. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–2; **Taxes**, 4.

DOCUMENTS. See **Freedom of Information Act**, 1–2; **Judicial Review**, 1–2.

DOMINANT MARKET FORCES. See **Antitrust Acts**, 7.

DONATIVE INTENT. See **Taxes**, 5.

DOSAGE-FORM PATENTS. See **Antitrust Acts**, 5–6; **Patents**, 1–2.

DOUBLE JEOPARDY. See **Criminal Law.**

DRIVERS' LICENSES. See **Jurisdiction**, 2.

DRUGS. See **Antitrust Acts**, 5–6; **Parole**, 2; **Patents**, 1–2; **Saving Clauses.**

DUE PROCESS. See **Abortions**, 1–3; **Appeals**; **Confessions**; **Constitutional Law**, I; VII–VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1–2; **Standing to Sue**, 1–2; **Witnesses**, 1–2.

DURATIONAL RESIDENCE REQUIREMENTS. See **Constitutional Law**, III, 9–10.

DUTY TO TESTIFY. See **Constitutional Law**, I, 6; VII; **Witnesses**, 1–2.

ECONOMIC LEVERAGE. See **Antitrust Acts**, 5–6; **Patents**, 1–2.

EDGE OF THE MARKET. See **Antitrust Acts**, 7.

ELECTIONS. See **Constitutional Law**, II; III, 9–10.

ELECTORAL DISTRICTS. See **Constitutional Law**, III, 1, 5–8, 11.

ELECTRIC UTILITIES. See **Antitrust Acts**, 1–4.

EMBRYOS. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–2.

EMPLOYER AND EMPLOYEES. See **Fair Labor Standards Act**; **Unions.**

ENDS OF PUBLIC JUSTICE. See **Criminal Law.**

ENROLLMENT. See **Constitutional Law**, II.

EQUAL-POPULATION DISTRICTS. See **Constitutional Law**, III, 1, 5–8, 11.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, II; **Parole**, 1; **Procedure**, 2; **Taxes**, 1.

ERRORS. See **Criminal Law.**

ESTATES. See **Taxes**, 5.

ESTOPPEL. See **Boundaries**, 1; **Procedure**, 4.

EVIDENCE. See **Confessions**; **Constitutional Law**, IV; V, 1–3; **Grand Juries**, 1–3.

EVIDENTIARY HEARINGS. See **Constitutional Law**, I, 4; III, 3; **Procedure**, 2.

EXECUTIVE ORDERS. See **Freedom of Information Act**, 1–2; **Judicial Review**, 1–2.

EXEMPLARS. See **Constitutional Law**, IV; V, 1–3; **Grand Juries**, 1–3.

EXHAUSTION DOCTRINE. See **Courts**, 1–3.

EXPULSION. See **Constitutional Law**, VI.

EXTORTION. See **Unions.**

EXTRA-MARITAL RELATIONS. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–3.

FAIR LABOR STANDARDS ACT.

Realty management company—Separately owned buildings—Custodial workers.—Company managing commercial properties for a fee whose services include hiring, firing, supervising, and negotiating wages of those employed in the buildings is an "enterprise" within the meaning of § 3 (r) of the Act since it conducts related activities through unified operations or control, for a common business purpose. It is irrelevant, for purposes of defining the enterprise under § 3 (r), that the building owners, who are not defendants in this enforcement action under the Act, have no relationship with one another and no common business purpose, since their activities as employers are not at issue here. Brennan v. Arnheim & Neeley, Inc., p. 512.

FAIR TRIALS. See **Constitutional Law**, I, 2–3.

FEDERAL CRIMES. See **Unions.**

FEDERAL-STATE RELATIONS. See also **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7, VIII; **Courts**, 1–3; **Jurisdiction**, 2; **Mootness**; **Procedure**, 1, 3; **Standing to Sue**, 1–2; **Taxes**, 2–3; **Unions**.

Alleged abortionist—Pending criminal prosecutions—Childless couple—Future complications.—The District Court correctly refused injunctive, but erred in granting declaratory, relief to Dr. Hallford, who alleged no federally protected right not assertable as a defense against the good-faith state prosecutions pending against him, *Samuels* v. *Mackell*, 401 U. S. 66; the Does' complaint, based as it is on contingencies, any one or more of which may not occur, is too speculative to present an actual case or controversy. Roe v. Wade, p. 113.

FEES. See **Constitutional Law**, I, 4; III, 3; **Procedure**, 2.

FETUSES. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–2.

FIFTH AMENDMENT. See **Constitutional Law**, I, 6; IV; V, 1–2; VII; **Criminal Law**; **Grand Juries**, 1–2; **Witnesses**, 1–2.

FILING FEES. See **Constitutional Law**, I, 4; III, 3; **Procedure**, 2.

FIRST AMENDMENT. See **Constitutional Law**, VI.

FLORIDA. See **Administrative Procedure**, 1–2; **Interstate Commerce Commission**, 1–2.

FLOTERIAL DISTRICTS. See **Constitutional Law**, III, 1, 5–8, 11.

FOREIGN RELATIONS. See **Freedom of Information Act**, 1–2; **Judicial Review**, 1–2.

FORUM. See **Courts**, 1–3.

FOUNDATIONS. See **Taxes**, 4.

FOURTEENTH AMENDMENT. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1–5, 7; II–III; VI; **Criminal Law**; **Federal-State Relations**; **Mootness**; **Parole**, 1; **Procedure**, 1–2; **Standing to Sue**, 1–2; **Taxes**, 1.

FOURTH AMENDMENT. See **Constitutional Law**, IV–V; **Grand Juries**, 1–3.

FREEDOM OF INFORMATION ACT. See also **Judicial Review**, 1–2.

1. *Classified documents—Advice to The President—Exemptions to the compelled-disclosure rule.*—Exemption 1 does not permit

FREEDOM OF INFORMATION ACT—Continued.

compelled disclosure of the six classified documents or *in camera* inspection to sift out "non-secret components," and petitioners met their burden of demonstrating that the documents were entitled to protection under that exemption. EPA v. Mink, p. 73.

2. *Classified documents—Exemptions to the compelled-disclosure rule.*—Exemption 5 does not require that otherwise confidential documents be made available for a district court's *in camera* inspection regardless of how little, if any, purely factual material they contain; in implying that such inspection be automatic, the Court of Appeals order was overly rigid; and petitioners should be afforded the opportunity of demonstrating by means short of *in camera* inspection that the documents sought are clearly beyond the range of material that would be available to a private party in litigation with a Government agency. EPA v. Mink, p. 73.

FREEDOM OF SPEECH. See **Constitutional Law**, VI.

FREIGHT CARS. See **Administrative Procedure**, 1–2; **Interstate Commerce Commission**, 1–2.

FUEL STORAGE. See **Procedure**, 3; **Taxes**, 2–3.

FUNDAMENTAL RIGHTS. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–2.

FUNGICIDES. See **Antitrust Acts**, 5–6; **Patents**, 1–2.

GEOGRAPHIC MARKETS. See **Antitrust Acts**, 1–4.

GEOGRAPHIC PREFERENCE AREAS. See **Civil Rights**, 1–2.

GEORGIA. See **Abortions**, 2; **Constitutional Law**, I, 5, 7; VIII; **Standing to Sue**, 2.

GIFTS. See **Taxes**, 5.

GOOD-FAITH PROSECUTIONS. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–2.

GOOD-TIME CREDIT. See **Constitutional Law**, III, 4; **Parole**, 1.

GOVERNMENT BONDS. See **Taxes**, 5.

GRAND JURIES. See also **Constitutional Law**, IV; V, 1–3.

1. *Appearance of witness—Compulsion to give exemplar.*—Since neither the summons to appear before the grand jury, nor its directive to give a voice exemplar, contravened the Fourth Amendment, the Court of Appeals erred in requiring a preliminary show-

GRAND JURIES—Continued.

ing of reasonableness before respondent could be compelled to furnish the exemplar. United States v. Dionisio, p. 1.

2. *Compulsion to appear before grand jury—Voice recordings.*—A subpoena to compel a person to appear before a grand jury does not constitute a "seizure" within the meaning of the Fourth Amendment, and the fact that many others besides respondent were ordered to give voice recordings did not render the subpoena unconstitutional. *Davis* v. *Mississippi*, 394 U. S. 721, distinguished. The grand jury's directive to make the voice recording infringed no valid Fourth Amendment interest. United States v. Dionisio, p. 1.

3. *Handwriting exemplars—Compelled production.*—The specific and narrowly drawn directive to furnish a handwriting specimen, which, like the compelled speech disclosure upheld in *United States* v. *Dionisio*, *ante*, p. 1, involved production of physical characteristics, violated no legitimate Fourth Amendment interest. United States v. Mara, p. 19.

GRISEOFULVIN. See **Antitrust Acts**, 5–6; **Patents**, 1–2.

GROSS ESTATES. See **Taxes**, 5.

GROSS RENTALS. See **Fair Labor Standards Act.**

GUESTS. See **Civil Rights**, 1–2.

HABEAS CORPUS. See **Confessions**; **Courts**, 1–3; **Criminal Law.**

HANDWRITING. See **Constitutional Law**, V, 3; **Grand Juries**, 3.

HEALTH FOUNDATIONS. See **Taxes**, 4.

HEARINGS. See **Administrative Procedure**, 1–2; **Constitutional Law**, I, 4; III, 3; **Interstate Commerce Commission**, 1–2; **Jurisdiction**, 2; **Procedure**, 2.

HEARSAY TESTIMONY. See **Constitutional Law**, I, 2–3.

HOBBS ACT. See **Unions.**

HOMEOWNERS. See **Civil Rights**, 1–2.

HOME-PORTED PERSONNEL. See **Constitutional Law**, III, 1, 5–8, 11.

HOSPITALS. See **Abortions**, 2; **Constitutional Law**, I, 5, 7; VIII; **Standing to Sue**, 2.

HOUSE OF DELEGATES. See **Constitutional Law**, III, 1, 5–8, 11.

IDENTIFICATIONS. See **Constitutional Law**, IV; V, 1–3; **Grand Juries**, 1–3.

ILLEGAL RESTRAINTS OF TRADE. See **Antitrust Acts**, 5–6; **Patents**, 1–2.

ILLEGITIMATE CHILDREN. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–3.

ILLINOIS. See **Constitutional Law**, III, 2; V, 3; **Criminal Law**; **Grand Juries**, 3; **Procedure**, 3; **Taxes**, 1–3.

IMPANELED JURIES. See **Criminal Law.**

IMPEACHMENT OF WITNESSES. See **Constitutional Law**, I, 2–3.

IN CAMERA INSPECTIONS. See **Freedom of Information Act**, 1–2; **Judicial Review**, 1–2.

INCARCERATED WITNESSES. See **Constitutional Law**, I, 6; VII; **Witnesses**, 1–2.

INCENTIVE CHARGES. See **Administrative Procedure**, 1–2; **Interstate Commerce Commission**, 1–2.

INCOME TAXES. See **Taxes**, 4.

INCREASED WELFARE PAYMENTS. See **Constitutional Law**, I, 4; III, 3; **Procedure**, 2.

"INDECENT SPEECH." See **Constitutional Law**, VI.

INDICTMENTS. See **Courts**, 1–3; **Criminal Law.**

INHERITANCES. See **Taxes**, 5.

INJUNCTIONS. See **Civil Rights**, 1–2.

INTEGRATION. See **Civil Rights**, 1–2.

INTEGRITY OF COUNTY LINES. See **Constitutional Law**, III, 1, 5–8, 11.

INTENT. See **Criminal Law.**

INTERAGENCY MEMORANDA. See **Freedom of Information Act**, 1–2; **Judicial Review**, 1–2.

INTERCONNECTIONS. See **Antitrust Acts**, 1–4.

INTERNAL REVENUE CODE. See **Taxes**, 4–5.

INTERSTATE COMMERCE. See **Procedure**, 3; **Taxes**, 2–3; **Unions.**

INTERSTATE COMMERCE COMMISSION. See also **Administrative Procedure**, 1–2.

1. *Freight-car shortages—Commission procedure—Exclusion of oral argument.*—The language of § 1 (14) (a) of the Interstate Commerce

INTERSTATE COMMERCE COMMISSION—Continued.

Act that "[t]he Commission may, after hearing . . . establish reasonable rules . . . ." did not trigger §§ 556 and 557 of the Administrative Procedure Act requiring a trial-type hearing and the presentation of oral argument by the affected parties; and the ICC's proceeding was governed only by § 553 of the APA requiring notice prior to rulemaking. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U. S. 742. United States v. Florida East Coast R. Co., p. 224.

2. *Rulemaking procedure—Consultation with affected parties—No adversary trial.*—The "after hearing" language of § 1 (14) (a) of the Interstate Commerce Act does not by itself confer upon interested parties either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker. United States v. Florida East Coast R. Co., p. 224.

INTERVENTION. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–2.

INTER VIVOS TRANSFERS. See **Taxes**, 5.

INVESTIGATIONS. See **Constitutional Law**, IV; V, 1–3; **Grand Juries**, 1–3.

INVIDIOUS DISCRIMINATION. See **Civil Rights**, 1–2.

INVOLUNTARY CONFESSIONS. See **Confessions.**

ISLANDS. See **Boundaries**, 2.

JAIL TIME. See **Constitutional Law**, III, 4; **Parole**, 1.

JANITORIAL STAFF. See **Fair Labor Standards Act.**

JEOPARDY. See **Criminal Law.**

JUDGMENT OF CONVICTION. See **Parole**, 2; **Saving Clauses.**

JUDICIAL REVIEW. See also **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Freedom of Information Act**, 1–2; **Jurisdiction**, 2; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–2.

1. *Classified documents—Advice to The President—Exemptions to the compelled-disclosure rule.*—Exemption 1 does not permit compelled disclosure of the six classified documents or *in camera* inspection to sift out "non-secret components," and petitioners met their burden of demonstrating that the documents were entitled to protection under that exemption. EPA v. Mink, p. 73.

JUDICIAL REVIEW—Continued.

2. *Classified documents—Exemptions to the compelled-disclosure rule.*—Exemption 5 does not require that otherwise confidential documents be made available for a district court's *in camera* inspection regardless of how little, if any, purely factual material they contain; in implying that such inspection be automatic, the Court of Appeals order was overly rigid; and petitioners should be afforded the opportunity of demonstrating by means short of *in camera* inspection that the documents sought are clearly beyond the range of material that would be available to a private party in litigation with a Government agency. EPA v. Mink, p. 73.

JURIES. See **Criminal Law.**

JURISDICTION.

1. *Conviction in absentia—Appeal to State's Supreme Court—No waiver of confrontation on appeal.*—Where issues presented in petition for certiorari were not raised below or passed upon by the State's highest court, and where the only issue actually litigated does not alone justify exercise of certiorari jurisdiction, the writ of certiorari is dismissed as improvidently granted. Tacon v. Arizona, p. 351.

2. *Drivers' licenses—Revocation—No prior hearing.*—Since it is not clear whether the California Supreme Court judgment reversing the lower court is based on federal or state constitutional grounds, or both, and therefore whether this Court has jurisdiction on review, that judgment is vacated and the case remanded. Dept. of Motor Vehicles v. Rios, p. 425.

JUST COMPENSATION CLAUSE. See **Constitutional Law,** I, 6; VII; **Witnesses,** 1–2.

JUSTICIABILITY. See **Abortions,** 1–3; **Appeals; Constitutional Law,** I, 1, 5, 7; VIII; **Federal-State Relations; Mootness; Procedure,** 1; **Standing to Sue,** 1–2.

KENTUCKY. See **Boundaries,** 1; **Courts,** 1–3; **Procedure,** 4.

LABOR. See **Fair Labor Standards Act.**

LABOR UNIONS. See **Unions.**

LANDOWNERS. See **Constitutional Law,** III, 12–14.

LAWFUL STRIKES. See **Unions.**

LEGISLATIVE OBJECTIVES. See **Constitutional Law,** III, 4; **Parole,** 1.

LEGISLATIVE REAPPORTIONMENT. See **Constitutional Law,** III, 1, 5–8, 11.

LEGITIMATE STATE PURPOSES. See **Constitutional Law,** II.

LENGTH OF RESIDENCE. See **Constitutional Law,** III, 9–10.

LESSEES. See **Constitutional Law,** III, 13–14.

LESSENED COMPETITION. See **Antitrust Acts,** 7.

LICENSED HOSPITALS. See **Abortions,** 2; **Constitutional Law,** I, 5, 7; VIII; **Standing to Sue,** 2.

LICENSES. See **Jurisdiction,** 2.

LICENSING. See **Antitrust Acts,** 5–6; **Patents,** 1–2.

LIMITATION OF FRANCHISE. See **Constitutional Law,** III, 12–14.

LINE-HAUL RAILROADS. See **Administrative Procedure,** 1–2; **Interstate Commerce Commission,** 1–2.

LITIGATION. See **Antitrust Acts,** 1–4.

LITIGATION WITH AGENCIES. See **Freedom of Information Act,** 1–2; **Judicial Review,** 1–2.

LIVE BIRTHS. See **Abortions,** 1–3; **Appeals; Constitutional Law,** I, 1, 5, 7; VIII; **Federal-State Relations; Mootness; Procedure,** 1; **Standing to Sue,** 1–2.

LOCAL ISSUES. See **Constitutional Law,** III, 1, 5–8, 11.

LONG ACQUIESCENCE. See **Boundaries,** 1; **Procedure,** 4.

LOUISIANA. See **Boundaries,** 2; **Unions.**

LOWER WELFARE PAYMENTS. See **Constitutional Law,** I, 4; III, 3; **Procedure,** 2.

MAINTENANCE STAFF. See **Fair Labor Standards Act.**

MANAGEMENT CONTRACTS. See **Fair Labor Standards Act.**

MANDATORY SENTENCES. See **Parole,** 2; **Saving Clauses.**

MANIFEST NECESSITY. See **Criminal Law.**

MANUFACTURING PATENTS. See **Antitrust Acts,** 5–6; **Patents,** 1–2.

MARIHUANA. See **Jurisdiction,** 1.

MARKET-EXTENSION MERGERS. See **Antitrust Acts,** 7.

MARKETS. See **Antitrust Acts,** 7.

MARRIED PARENTS. See **Standing to Sue**, 3.

MARRIED PERSONS. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–3.

MARYLAND. See **Civil Rights**, 1–2.

MATERIAL WITNESSES. See **Constitutional Law**, I, 6; VII; **Witnesses**, 1–2.

MAXIMUM HOURS. See **Fair Labor Standards Act.**

MAXIMUM PAROLE DATES. See **Constitutional Law**, III, 4; **Parole**, 1.

MAXIMUM PERCENTAGE DEVIATION. See **Constitutional Law**, III, 1, 5–8, 11.

MEMBERS. See **Civil Rights**, 1–2.

MERGERS. See **Antitrust Acts**, 7.

MICROSIZE DOSAGES. See **Antitrust Acts**, 5–6; **Patents**, 1–2.

MILITARY PERSONNEL. See **Constitutional Law**, III, 1, 5–8, 11.

MINIMUM WAGES. See **Fair Labor Standards Act.**

MINNESOTA. See **Antitrust Acts**, 1–4.

MISSISSIPPI. See **Constitutional Law**, I, 2–3.

MISSOURI. See **Constitutional Law**, VI.

MISTRIALS. See **Criminal Law.**

MONOPOLIES. See **Antitrust Acts**, 1–4.

MOOTNESS. See also **Abortions**, 1, 3; **Appeals**; **Constitutional Law**, I, 1; **Federal-State Relations**; **Procedure**, 1; **Standing to Sue**, 1.

Suit during pregnancy—Pregnancy to term—Appeals.—Contrary to appellee's contention, the natural termination of Roe's pregnancy did not moot her suit. Litigation involving pregnancy, which is "capable of repetition, yet evading review," is an exception to the usual federal rule that an actual controversy must exist at review stages and not simply when the action is initiated. Roe v. Wade, p. 113.

MOTHERS. See **Standing to Sue**, 3.

MOTIONS. See **Boundaries**, 1; **Procedure**, 4.

MOTOR VEHICLES. See **Jurisdiction**, 2.

MULTIMEMBER DISTRICTS. See **Constitutional Law**, III, 1, 5–8, 11.

MUNICIPAL SYSTEMS. See **Antitrust Acts**, 1–4.

MURDER. See **Confessions.**

NARCOTICS. See **Parole**, 2; **Saving Clauses.**

NATIONAL BREWERS. See **Antitrust Acts**, 7.

NATIONAL DEFENSE. See **Freedom of Information Act**, 1–2; **Judicial Review**, 1–2.

NATURAL PERSONS. See **Constitutional Law**, III, 2; **Taxes**, 1.

NEGROES. See **Civil Rights**, 1–2.

NEW ENGLAND STATES. See **Antitrust Acts**, 7.

NEW YORK. See **Confessions**; **Constitutional Law**, III, 4; **Jurisdiction**, 1; **Parole**, 1.

NONPUBLIC SERVICES. See **Constitutional Law**, III, 12–14.

NONRESIDENT VOTERS. See **Constitutional Law**, III, 12–14.

NONSECRET COMPONENTS. See **Freedom of Information Act**, 1–2; **Judicial Review**, 1–2.

NORFOLK NAVAL STATION. See **Constitutional Law**, III, 1, 5–8, 11.

NORTH DAKOTA See **Antitrust Acts**, 1–4.

NUCLEAR TESTS. See **Freedom of Information Act**, 1–2; **Judicial Review**, 1–2.

OBSTETRICIANS. See **Abortions**, 2; **Constitutional Law**, I, 5, 7; VIII; **Standing to Sue**, 2.

OFFICE BUILDINGS. See **Fair Labor Standards Act.**

OFFICIAL CENSUS TRACTS. See **Constitutional Law**, III, 1, 5–8, 11.

OFFICIAL DOCUMENTS. See **Freedom of Information Act**, 1–2; **Judicial Review**, 1–2.

OHIO. See **Boundaries**, 1; **Procedure**, 4.

OHIO RIVER. See **Boundaries**, 1; **Procedure**, 4.

OLIGOPOLISTIC MARKETS. See **Antitrust Acts**, 7.

ONE PERSON, ONE VOTE. See **Constitutional Law**, III, 1, 5–8, 11.

ON-THE-FRINGE IMPACT. See **Antitrust Acts**, 7.

ORAL ARGUMENTS. See **Administrative Procedure**, 1–2; **Interstate Commerce Commission**, 1–2.

ORAL CONFESSIONS. See **Constitutional Law**, I, 2–3.

ORIGINAL JURISDICTION. See **Boundaries**, 1–2; **Procedure**, 4.

OUT-OF-STATE ACQUISITIONS. See **Antitrust Acts**, 7.

OVERBREADTH. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–2.

OWNERS OF SAVINGS BONDS. See **Taxes**, 5.

PARENTS. See **Standing to Sue**, 3.

PAROLE. See also **Constitutional Law**, III, 4; **Saving Clauses.**

1. *Equal protection—Good-time credit toward parole eligibility—Presentence county jail incarceration.*—Under the New York scheme good-time credit takes into account a prisoner's performance under the program of rehabilitation that is fostered under the state prison system, but not in the county jails which serve primarily as detention centers. Since the jails have no significant rehabilitation program, a rational basis exists for declining to give good-time credit for the pretrial jail-detention period; and the statute will be sustained even if fostering rehabilitation was not necessarily the primary legislative objective, cf. *South Carolina* v. *Katzenbach*, 383 U. S. 301, 331; *Dandrige* v. *Williams*, 397 U. S. 471, 486. McGinnis v. Royster, p. 263.

2. *Mandatory sentence—Repealed statute—Saving clause.*—Under the saving clause in Comprehensive Drug Abuse Prevention and Control Act of 1970, parole under 18 U. S. C. § 4208 (a) is unavailable to petitioners since by its terms that provision is inapplicable to offenses for which mandatory penalties are provided; and in any event, decision to grant early parole under that provision must be made "[u]pon entering a judgment of conviction," which occurs before the end of the prosecution. Bradley v. United States, p. 605.

PARTNERSHIPS. See **Taxes**, 4.

PARTY AFFILIATIONS. See **Constitutional Law**, II.

PARTY-WITNESS RULE. See **Constitutional Law**, I, 2–3.

PATENTS. See also **Antitrust Acts**, 5–6.

1. *Pooling of patents—Effect on market.*—In order to "pry open to competition" the market closed by the antitrust violations, an order for mandatory, nondiscriminatory sales to all bona fide applicants is appropriate relief and where, as in this case, the manu-

PATENTS—Continued.

facturer may choose not to make bulk-form sales, and the licensees are not bound by the court's order for mandatory sales, further relief in the form of reasonable-royalty licensing of the patents is also proper. United States v. Glaxo Group Ltd., p. 52.

2. *Pooling of patents—Limited sublicensing.*—Where patents are directly involved in antitrust violations and the Government presents a substantial case for relief in the form of restrictions on the patents, the Government may challenge the validity of the patents regardless of whether the owner relies on the patents in defending the antitrust action. United States v. Glaxo Group Ltd., p. 52.

PENAL INSTITUTIONS. See **Constitutional Law,** III, 4; **Parole,** 1.

PENALTIES. See **Parole,** 2; **Saving Clauses.**

PENITENTIARIES. See **Constitutional Law,** III, 4; **Parole,** 1.

PENNSYLVANIA. See **Fair Labor Standards Act.**

PER DIEM CHARGES. See **Administrative Procedure,** 1–2; **Interstate Commerce Commission,** 1–2.

PER DIEM COMPENSATION. See **Constitutional Law,** I, 6; VII; **Witnesses,** 1–2.

PERJURED TESTIMONY. See **Constitutional Law,** I, 2–3.

PER SE VIOLATIONS. See **Antitrust Acts,** 5–6; **Patents,** 1–2.

PERSONAL LIBERTY. See **Abortions,** 1–3; **Appeals; Constitutional Law,** I, 1, 5, 7; VIII; **Federal-State Relations; Mootness; Procedure,** 1; **Standing to Sue,** 1–2.

PERSONAL PROPERTY TAXES. See **Constitutional Law,** III, 2; **Taxes,** 1.

PERSONS. See **Abortions,** 1–3; **Appeals; Constitutional Law,** I, 1, 5, 7; VIII; **Federal-State Relations; Mootness; Procedure,** 1; **Standing to Sue,** 1–2.

PHYSICAL PRESENCE. See **Constitutional Law,** I, 6; VII; **Courts; Jurisdiction,** 1; **Witnesses,** 1–2.

PHYSICIANS. See **Abortions,** 1–3; **Appeals; Constitutional Law,** I, 1, 5, 7; VIII; **Federal-State Relations; Mootness; Procedure,** 1; **Standing to Sue,** 1–2; **Taxes,** 4.

POLITICAL PARTIES. See **Constitutional Law,** II.

POLITICAL SUBDIVISION LINES. See **Constitutional Law,** III, 1, 5–8, 11.

POOLING OF PATENTS. See **Antitrust Acts**, 5–6; **Patents**, 1–2.

POOR PERSONS. See **Constitutional Law**, I, 4; **Procedure**, 2.

POPULATION DISPARITIES. See **Constitutional Law**, III, 1, 5–8, 11.

POTENTIAL COMPETITION. See **Antitrust Acts**, 7.

POTENTIALITY OF HUMAN LIFE. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–2.

PREGNANCIES. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–2.

PRENATAL LIFE. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–2.

PRESENCE IN COURTROOM. See **Constitutional Law**, I, 6; VII; **Witnesses**, 1–2.

PRESENTENCE TIME. See **Constitutional Law**, III, 4; **Parole**, 1.

PRESUMPTION OF CORRECTNESS. See **Confessions.**

PRETRIAL DETENTION. See **Constitutional Law**, I, 6; VII; **Witnesses**, 1–2.

PRETRIAL TIME. See **Constitutional Law**, III, 4; **Parole**, 1.

PRIMARY ELECTIONS. See **Constitutional Law**, II; III, 9–10.

PRINTING EXEMPLARS. See **Constitutional Law**, V, 3; **Grand Juries**, 3.

PRISONERS. See **Constitutional Law**, III, 4; **Courts**, 1–3; **Parole**, 1.

PRIVACY. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; IV; V, 1–3; VIII; **Federal-State Relations**; **Grand Juries**, 1–3; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–2.

PRIVATE CLUBS. See **Civil Rights**, 1–2.

PRIVATE DOCUMENTS. See **Freedom of Information Act**, 1–2; **Judicial Review**, 1–2.

PRIVILEGES AND IMMUNITIES. See **Abortions**, 2; **Constitutional Law**, I, 5, 7; VIII; **Standing to Sue**, 2.

PROBATION. See **Parole**, 2; **Saving Clauses.**

PROCEDURE. See also **Abortions**, 1–3; **Administrative Procedure**, 1–2; **Appeals**; **Boundaries**, 1–2; **Confessions**; **Constitutional Law**, I, 1–5, 7; III, 3; VIII; **Criminal Law**; **Federal-State Relations**; **Freedom of Information Act**, 1–2; **Interstate Commerce Commission**, 1–2; **Judicial Review**, 1–2; **Mootness**; **Standing to Sue**, 1–3; **Taxes**, 2–3.

1. *Class action—Direct appeal—Cross-appeals.*—While 28 U. S. C. § 1253 authorizes no direct appeal to this Court from the grant or denial of declaratory relief alone, review is not foreclosed when the case is properly before the Court on appeal from specific denial of injunctive relief and the arguments as to both injunctive and declaratory relief are necessarily identical. Roe v. Wade, p. 113.

2. *Fee for filing appeal—Evidentiary hearings—Increased welfare payments.*—Appellants were not deprived of due process by filing fee, which they were allegedly unable to pay, required for review by state appellate court of agency determination resulting in lower welfare payments, since the increase in welfare payments has less constitutional significance than the interest of appellants in *Boddie* v. *Connecticut*, 401 U. S. 371, and since evidentiary hearings provided a procedure, not conditioned on payment of any fee, through which appellants were able to seek redress. Ortwein v. Schwab, p. 656.

3. *State court interpretation—Use tax on aviation fuel—Mistaken impression.*—The "burn off" rule is not unconstitutional, being distinguishable from a tax imposed on consumption such as was invalidated in *Helson* v. *Kentucky*, 279 U. S. 245. Since some of Illinois Supreme Court majority were under the mistaken impression that *Helson* precluded use of the "burn off" interpretation, case is remanded to enable that court to construe the temporary-storage provision under state law free from any constraint that such interpretation would not be constitutionally permissible. United Air Lines v. Mahin, p. 623.

4. *Supreme Court—Original jurisdiction—Motion for leave to file amended bill of complaint.*—In the exercise of its original jurisdiction, this Court is not invariably bound by common-law precedent or by current rules of civil procedure. Requirement of motion for leave to file a complaint permits the Court to dispose of it at a preliminary stage in an appropriate case, such as where the claim is barred as matter of law and a hearing on the issues presented "would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear." Ohio v. Kentucky, p. 641.

PROCOMPETITIVE EFFECTS. See **Antitrust Acts**, 7.

PROPERTY OWNERS. See **Constitutional Law**, III, 12–14.

PROSECUTING ATTORNEYS. See **Criminal Law.**

PROSECUTIONS. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Parole**, 2; **Procedure**, 1; **Saving Clauses**; **Standing to Sue**, 1–2.

PROSECUTORIAL MANIPULATION. See **Criminal Law.**

PUBLICATIONS. See **Constitutional Law**, VI.

PUBLIC DISCLOSURES. See **Constitutional Law**, IV; V, 1–2; **Grand Juries**, 1.

PUBLIC UTILITIES. See **Antitrust Acts**, 1–4.

QUALIFICATIONS OF VOTERS. See **Constitutional Law**, II; III, 12–14.

RACIAL DISCRIMINATION. See **Civil Rights**, 1–2.

"RAIDING" BY POLITICAL PARTIES. See **Constitutional Law**, II.

RAILROADS. See **Administrative Procedure**, 1–2; **Interstate Commerce Commission**, 1–2.

RATE ORDERS. See **Administrative Procedure**, 1–2; **Interstate Commerce Commission**, 1–2.

RATIONALITY. See **Constitutional Law**, I, 4; III, 3; **Procedure**, 2.

REAL PROPERTY. See **Civil Rights**, 1–2; **Fair Labor Standards Act.**

REAPPORTIONMENT. See **Constitutional Law**, III, 1, 5–8, 11.

REASONABLE ROYALTY LICENSING. See **Antitrust Acts**, 5–6; **Patents**, 1–2.

RECIPIENTS OF WELFARE. See **Constitutional Law**, I, 4; III, 3; **Procedure**, 2.

RECORDINGS. See **Constitutional Law**, IV; V, 1–2; **Grand Juries**, 1.

REGIONAL BREWERS. See **Antitrust Acts**, 7.

REGISTRATION TO VOTE. See **Constitutional Law**, II.

REGULATIONS. See **Taxes**, 5.

REGULATORY AGENCIES. See **Antitrust Acts**, 1–4.

REHABILITATION. See **Constitutional Law**, III, 4; **Parole**, 1.

RELIEF. See **Abortions**, 1–3; **Appeals**; **Confessions**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–3.

REMEDIES. See **Courts**, 1–3.

RENUNCIATIONS. See **Constitutional Law**, I, 2–3.

REPEALED STATUTES. See **Parole**, 2; **Saving Clauses.**

REPORT OF SPECIAL MASTER. See **Boundaries**, 2.

RESALES. See **Antitrust Acts**, 5–6; **Patents**, 1–2.

RESENTENCING. See **Parole**, 2; **Saving Clauses.**

RESIDENCY REQUIREMENTS. See **Abortions**, 2; **Constitutional Law**, I, 5, 7; VIII; **Standing to Sue**, 2.

RESTRAINTS OF TRADE. See **Antitrust Acts**, 5–6; **Patents**, 1–2.

RETAIL FRANCHISES. See **Antitrust Acts**, 1–4.

RETIREMENT PLANS. See **Taxes**, 4.

REVOCATIONS. See **Jurisdiction**, 2.

RIGHT OF ASSOCIATION. See **Constitutional Law**, II.

RIGHT OF CONFRONTATION. See **Jurisdiction**, 1.

RIGHT OF PRIVACY. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–2.

RIGHT TO PRACTICE. See **Abortions**, 2; **Constitutional Law**, I, 5, 7; VIII; **Standing to Sue**, 2.

RIGHT TO TRAVEL. See **Abortions**, 2; **Constitutional Law**, I, 5, 7; VIII; **Standing to Sue**, 2.

RIGHT TO VOTE. See **Constitutional Law**, II.

RULEMAKING. See **Administrative Procedure**, 1–2; **Interstate Commerce Commission**, 1–2.

RULES OF CIVIL PROCEDURE. See **Boundaries**, 1; **Procedure**, 4.

RULES OF EVIDENCE. See **Constitutional Law**, I, 2–3.

RURAL ELECTRIFICATION. See **Antitrust Acts**, 1–4.

SABINE RIVER. See **Boundaries**, 2.

SALES. See **Antitrust Acts**, 5–6; **Patents**, 1–2.

SAVING CLAUSES. See also **Parole**, 2.

Mandatory sentence—Repealed statute—Saving clause for "prosecutions."—Word "prosecutions," in saving clause in Comprehensive Drug Abuse Prevention and Control Act of 1970, is to be accorded its normal legal sense, under which sentencing is part of concept of prosecution. Bradley v. United States, p. 605.

SAVINGS BONDS. See **Taxes**, 5.

SEARCHES AND SEIZURES. See **Constitutional Law**, IV; V, 1–3; **Grand Juries**, 1–3.

SECRETARY OF LABOR. See **Fair Labor Standards Act.**

SECRET DOCUMENTS. See **Freedom of Information Act**, 1–2; **Judicial Review**, 1–2.

SEGREGATION. See **Civil Rights**, 1–2.

SEIZURES. See **Constitutional Law**, IV; V, 1–2; **Grand Juries**, 1–2.

SELF-INCRIMINATION. See **Constitutional Law**, IV; V, 1–3; **Grand Juries**, 1–3.

SENATORIAL ELECTORAL DISTRICTS. See **Constitutional Law**, III, 1, 5–8, 11.

SENTENCES. See **Parole**, 2; **Saving Clauses.**

SERIES "E" BONDS. See **Taxes**, 5.

SHAM LITIGATION. See **Antitrust Acts**, 1–4.

SHERMAN ACT. See **Antitrust Acts**, 1–6; **Patents**, 1–2.

SINGLE WOMEN. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–3.

SIXTH AMENDMENT. See **Courts**, 1–3.

SOCIAL AND ECONOMIC REGULATION. See **Constitutional Law**, I, 4; III, 3; **Procedure**, 2.

SOUTH DAKOTA. See **Antitrust Acts**, 1–4.

SPECIAL MASTER. See **Boundaries**, 1–2; **Procedure**, 4.

SPECIMENS. See **Constitutional Law**, V, 3; **Grand Juries**, 3.

SPEEDY TRIAL. See **Courts**, 1–3.

SPONTANEOUS CONFESSIONS. See **Constitutional Law**, I, 2–3.

STANDARDS. See **Confessions; Constitutional Law,** I, 4; III, 3; **Procedure,** 2.

STANDING TO SUE. See also **Abortions,** 1–3; **Appeals; Constitutional Law,** I, 1, 5, 7; VIII; **Federal-State Relations; Mootness; Procedure,** 1.

1. *Alleged abortionist—Pending criminal prosecutions—Childless couple—Future complications.*—The District Court correctly refused injunctive, but erred in granting declaratory, relief to Dr. Hallford, who alleged no federally protected right not assertable as a defense against the good-faith state prosecutions pending against him, *Samuels* v. *Mackell,* 401 U. S. 66; the Does' complaint, based as it is on contingencies, any one or more of which may not occur, is too speculative to present an actual case or controversy. Roe v. Wade, p. 113.

2. *Case or controversy—Interim termination of pregnancy—Nonprosecuted physicians.*—Doe's case presents a live, justiciable controversy, and she has standing to sue, *Roe* v. *Wade, ante,* p. 113, as do the physician-appellants, and it is therefore unnecessary to resolve the issue of the other appellants' standing. Doe v. Bolton, p. 179.

3. *Class action—Mother of illegitimate child—Discriminatory application of Texas' criminal nonsupport law.*—Although appellant, mother of an illegitimate child, has an interest in her child's support, application of Texas Penal Code Art. 602 would not result in support but only in the father's incarceration, and a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another. Linda R. S. v. Richard D., p. 614.

STATE BOUNDARIES. See **Boundaries,** 1–2; **Procedure,** 4.

STATE COURT REMEDIES. See **Courts,** 1–3.

STATE LEGISLATION. See **Abortions,** 1–3; **Appeals; Constitutional Law,** I, 1, 5, 7; VIII; **Federal-State Relations; Mootness; Procedure,** 1; **Standing to Sue,** 1–3.

STATE LEGISLATURES. See **Constitutional Law,** III, 1, 5–8, 11.

STATE PRISONS. See **Constitutional Law,** III, 4; **Parole,** 1.

STATE PROSECUTIONS. See **Abortions,** 1–3; **Appeals; Constitutional Law,** I, 1, 5, 7; VIII; **Federal-State Relations; Mootness; Procedure,** 1; **Standing to Sue,** 1–2.

STATE STATUTES. See **Standing to Sue,** 3.

STATE TAXES. See **Procedure,** 3; **Taxes,** 2–3.

STATE UNIVERSITIES. See **Constitutional Law,** VI.

STATUTORY CONSTRUCTION. See **Procedure,** 3; **Standing to Sue,** 3; **Taxes,** 2–3.

STATUTORY RELEASE DATES. See **Constitutional Law,** III, 4; **Parole,** 1.

STORAGE OF FUEL. See **Procedure,** 3; **Taxes,** 2–3.

STRIKES. See **Unions.**

STUDENTS. See **Constitutional Law,** VI.

SUBLICENSEES. See **Antitrust Acts,** 5–6; **Patents,** 1–2.

SUBPOENAS. See **Constitutional Law,** IV; V, 1–3; **Grand Juries,** 1–3.

SUBSISTENCE. See **Constitutional Law,** I, 6; VII; **Witnesses, 1–2.**

SUMMONSES. See **Constitutional Law,** IV; V, 1–3; **Grand Juries,** 1–3.

SUPERVISORY STAFF. See **Fair Labor Standards Act.**

SUPPORT. See **Standing to Sue,** 3.

SUPREME COURT. See **Boundaries,** 1–2; **Procedure,** 4.

Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Seventh Circuit, p. 961.

SURVIVORSHIP RIGHTS. See **Taxes,** 5.

SUSPENSION OF SENTENCE. See **Parole,** 2; **Saving Clause.**

SWIMMING POOLS. See **Civil Rights,** 1–2.

TAXES. See also **Constitutional Law,** III, 2; **Procedure,** 3.

1. *Equal protection—Corporate property—Personal property tax.*—An Illinois constitutional provision subjecting corporations and similar entities, but not individuals, to ad valorem taxes on personalty comports with equal protection requirements, the States being accorded wide latitude in making classifications and drawing lines that in their judgment produce reasonable taxation systems. *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, disapproved. Lehnhausen v. Lake Shore Auto Parts Co., p. 356.

2. *Illinois use tax—Aviation fuel—Storage and consumption.*—Illinois use tax statute as authoritatively construed by State's highest court to tax storage of aviation fuel and not consumption does not place unconstitutional burden on interstate commerce. Cases allow-

TAXES—Continued.

ing taxation of storage of fuel before loading have not outlived their usefulness. United Air Lines v. Mahin, p. 623.

3. *Illinois use tax—"Burn off" rule—Aviation fuel—Consumption.*—The "burn off" rule is not unconstitutional, being distinguishable from a tax imposed on consumption such as was invalidated in *Helson* v. *Kentucky,* 279 U. S. 245. Since some of Illinois Supreme Court majority were under the mistaken impression that *Helson* precluded use of the "burn off" interpretation, case is remanded to enable that court to construe the temporary storage provision under state law free from any constraint that such interpretation would not be constitutionally permissible. United Air Lines v. Mahin, p. 623.

4. *Medical services partnership—Payments to retirement fund—Tax assessment against individual members.*—The retirement fund payments, notwithstanding the fact that they were contributed directly to the trust, were compensation for services that the medical partnership (Permanente) rendered under the medical-service agreement and should have been reported as income to Permanente; and the individual partners should have included their shares of that income in their individual returns, since the existence of conditions upon the actual receipt by a partner of income fully earned by the partnership is not a relevant factor in determining its taxability to him. United States v. Basye, p. 441.

5. *Savings bonds—Co-ownership registration—Inter vivos delivery with donative intent.*—United States Savings Bonds are includable for federal estate tax purposes in the gross estate of a decedent registered co-owner who, with donative intent, had delivered the bonds to the other co-owners but who had not complied with applicable Treasury Department regulations for making *inter vivos* transfers of such bonds by having them reissued in the names of the other co-owners alone. United States v. Chandler, p. 257.

TEMPORARY STORAGE. See **Procedure,** 3; **Taxes,** 2–3.

TERMINATION OF PREGNANCY. See **Abortions,** 1–3; **Appeals; Constitutional Law,** I, 1, 5, 7; VIII; **Federal-State Relations; Mootness; Procedure,** 1; **Standing to Sue,** 1–2.

TERRITORIAL CONFINES. See **Courts,** 1–3.

TESTIMONIAL CONTENT. See **Constitutional Law,** IV; V, 1–2; **Grand Juries,** 1–2.

TESTIMONY. See **Confessions; Constitutional Law,** I, 2–3, 6; VII; **Witnesses,** 1–2.

TEXAS. See **Abortions**, 1, 3; **Appeals**; **Boundaries**, 2; **Constitutional Law**, I, 1; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1.

THREE-JUDGE COURTS. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–2.

TIME DEADLINES. See **Constitutional Law**, II.

"TOE-HOLD" ACQUISITIONS. See **Antitrust Acts**, 7.

TOP SECRET DOCUMENTS. See **Freedom of Information Act**, 1–2; **Judicial Review**, 1–2.

TRANSMISSION SYSTEMS. See **Antitrust Acts**, 1–4.

TREASURY DEPARTMENT. See **Taxes**, 5.

TRIAL ATTENDANCE. See **Constitutional Law**, I, 6; VII; **Witnesses**, 1–2.

TRIALS. See **Administrative Procedure**, 1–2; **Constitutional Law**, I, 6; VII; **Criminal Law**; **Interstate Commerce Commission**, 1–2; **Jurisdiction**, 1; **Witnesses**, 1–2.

TRIMESTERS. See **Abortions**, 1, 3; **Appeals**; **Constitutional Law**, I, 1; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1.

TRUSTS. See **Taxes**, 4.

TULARE LAKE. See **Constitutional Law**, III, 13–14.

UNBORN CHILDREN. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–2.

UNIFIED OPERATIONS. See **Fair Labor Standards Act.**

UNIONS.

Strike in progress—Acts of violence against employer's property.—The Hobbs Act, which makes it a federal crime to obstruct interstate commerce by robbery or extortion, does not reach the use of violence (which is readily punishable under state law) to achieve legitimate union objectives, such as higher wages in return for genuine services that the employer seeks. United States v. Enmons, p. 396.

UNITED STATES SAVINGS BONDS. See **Taxes**, 5.

UNIVERSITY OF MISSOURI. See **Constitutional Law**, VI.

UNLAWFUL CUSTODY. See **Courts**, 1–3.

UNMARRIED PARENTS. See **Standing to Sue**, 3.

UNMARRIED PERSONS. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–3.

UNREASONABLE SEARCHES. See **Constitutional Law**, IV; V, 1–3; **Grand Juries**, 1–3.

USE TAXES. See **Procedure**, 3; **Taxes**, 2–3.

UTILITIES. See **Antitrust Acts**, 1–4.

VAGUENESS. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–2.

VALUATION OF LAND. See **Constitutional Law**, III, 12–14.

VIABILITY. See **Abortions**, 1–3; **Appeals**; **Constitutional Law**, I, 1, 5, 7; VIII; **Federal-State Relations**; **Mootness**; **Procedure**, 1; **Standing to Sue**, 1–2.

VIRGINIA GENERAL ASSEMBLY. See **Constitutional Law**, III, 1, 5–8, 11.

VOICE EXEMPLARS. See **Constitutional Law**, IV; V, 1–2; **Grand Juries**, 1–2.

VOLUNTARINESS. See **Confessions.**

VOLUNTARY POWER INTERCONNECTIONS. See **Antitrust Acts**, 1–4.

VOTING. See **Constitutional Law**, II; III, 12–14.

VOUCHER RULE. See **Constitutional Law**, I, 2–3.

WATER DISTRICTS. See **Constitutional Law**, III, 13–14.

WATERSHED IMPROVEMENT DISTRICTS. See **Constitutional Law**, III, 12.

WEALTH. See **Constitutional Law**, III, 13–14.

WEIGHTED VOTING. See **Constitutional Law**, III, 12–14.

WELFARE PAYMENTS. See **Constitutional Law**, I, 4; III, 3; **Procedure**, 2.

"WHEELING" ELECTRICITY. See **Antitrust Acts**, 1–4.

WHOLESALE POWER. See **Antitrust Acts**, 1–4.

WHOLESALERS. See **Antitrust Acts**, 5–6; **Patents**, 1–2.

WITHHOLDING OF INFORMATION. See **Freedom of Information Act**, 1–2; **Judicial Review**, 1–2.

WITNESSES. See also **Constitutional Law,** I, 6; IV; V, 1–2; VII; **Grand Juries,** 1–2.

1. *Incarcerated witness—Per diem and subsistence—Pretrial detention.*—The $1 statutory per diem plus subsistence in kind for incarcerated witnesses before trial does not violate Just Compensation Clause, as detention of material witness is not a "taking" under the Fifth Amendment; and distinction between compensation for pretrial detention and for trial attendance is not so unreasonable as to violate the Due Process Clause of that Amendment. Hurtado v. United States, p. 578.

2. *Material witness—Unable to give bail—Per diem compensation.*—Material witness incarcerated because of inability to give bail is entitled under 28 U. S. C. § 1821 to same $20 per diem compensation as is allowed nonincarcerated witness during trial or other proceeding at which he is in "attendance," *i. e.,* has been summoned and is available to testify in a court in session, regardless of whether he is physically present in the courtroom. Hurtado v. United States, p. 578.

WORDS.

1. *"After hearing."* § 1 (4) (a), Interstate Commerce Act, 49 U. S. C. § 1 (14) (a). United States v. Florida East Coast R. Co., p. 224.

2. *"Enterprise."* 29 U. S. C. § 203 (r). Brennan v. Arnheim & Neely, Inc., p. 512.

3. *"In custody."* 28 U. S. C. § 2241 (c) (3). Braden v. 30th Judicial Circuit Court of Ky., p. 484.

4. *"Prosecutions."* § 1103 (a), Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U. S. C. § 171n. Bradley v. United States, p. 605.

WRITINGS. See **Constitutional Law,** V, 3; **Grand Juries,** 3.

WRITTEN CONFESSIONS. See **Constitutional Law,** I, 2–3.

WYOMING. See **Constitutional Law,** III, 12.

ZONES OF PRIVACY. See **Abortions,** 1–3; **Appeals; Constitutional Law,** I, 1, 5, 7; VIII; **Federal-State Relations; Mootness; Procedure,** 1; **Standing to Sue,** 1–2.