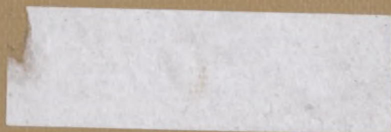

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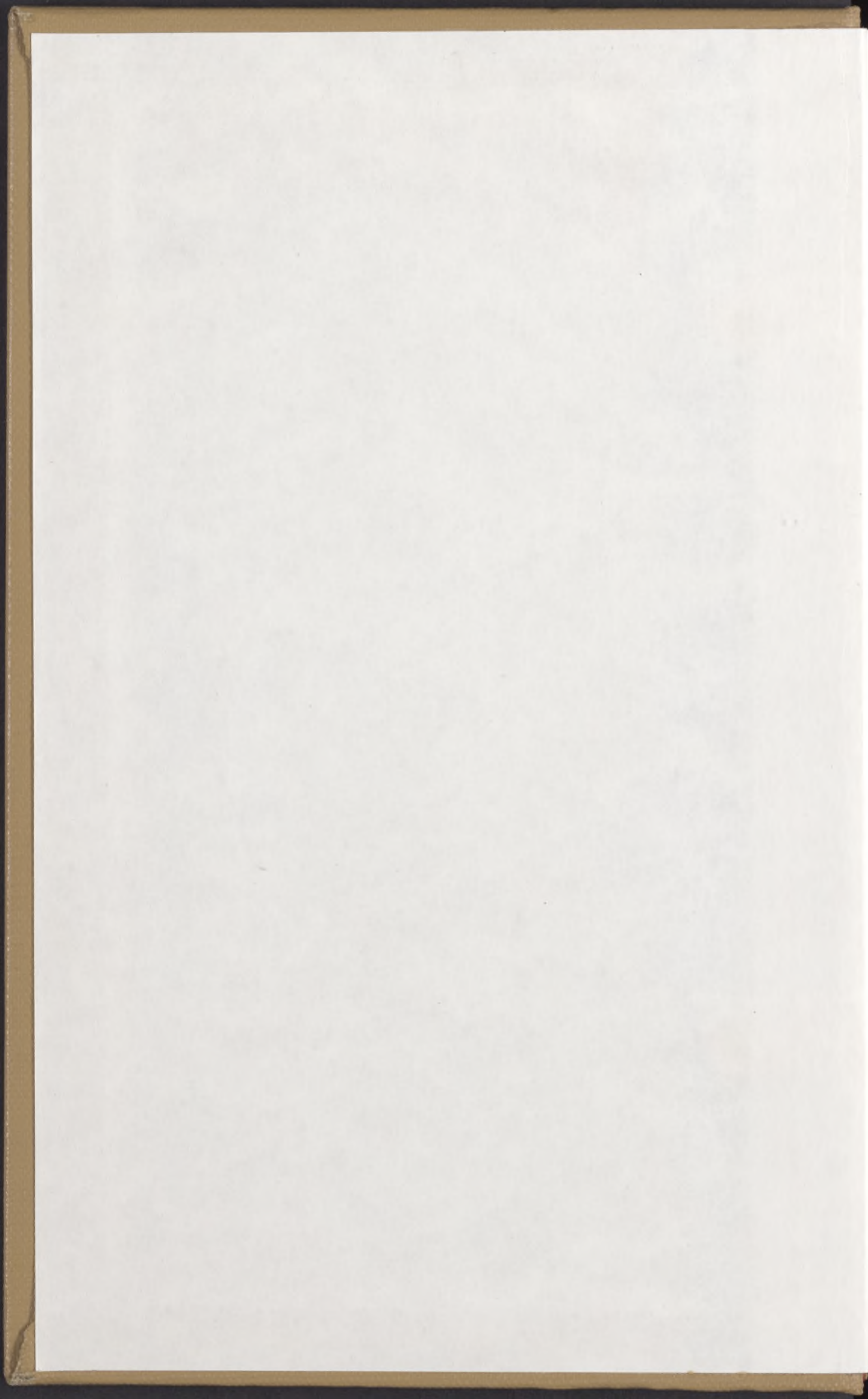

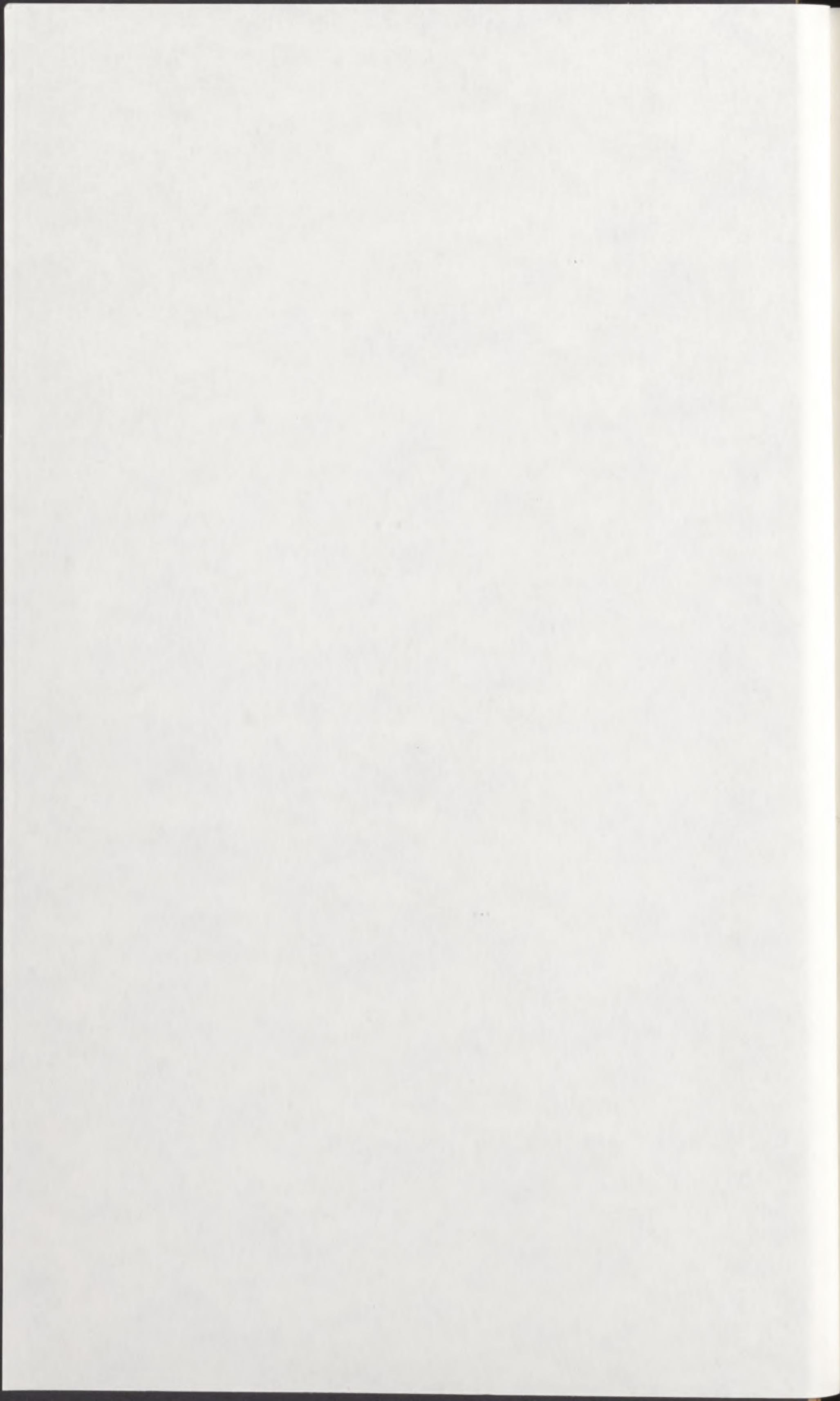

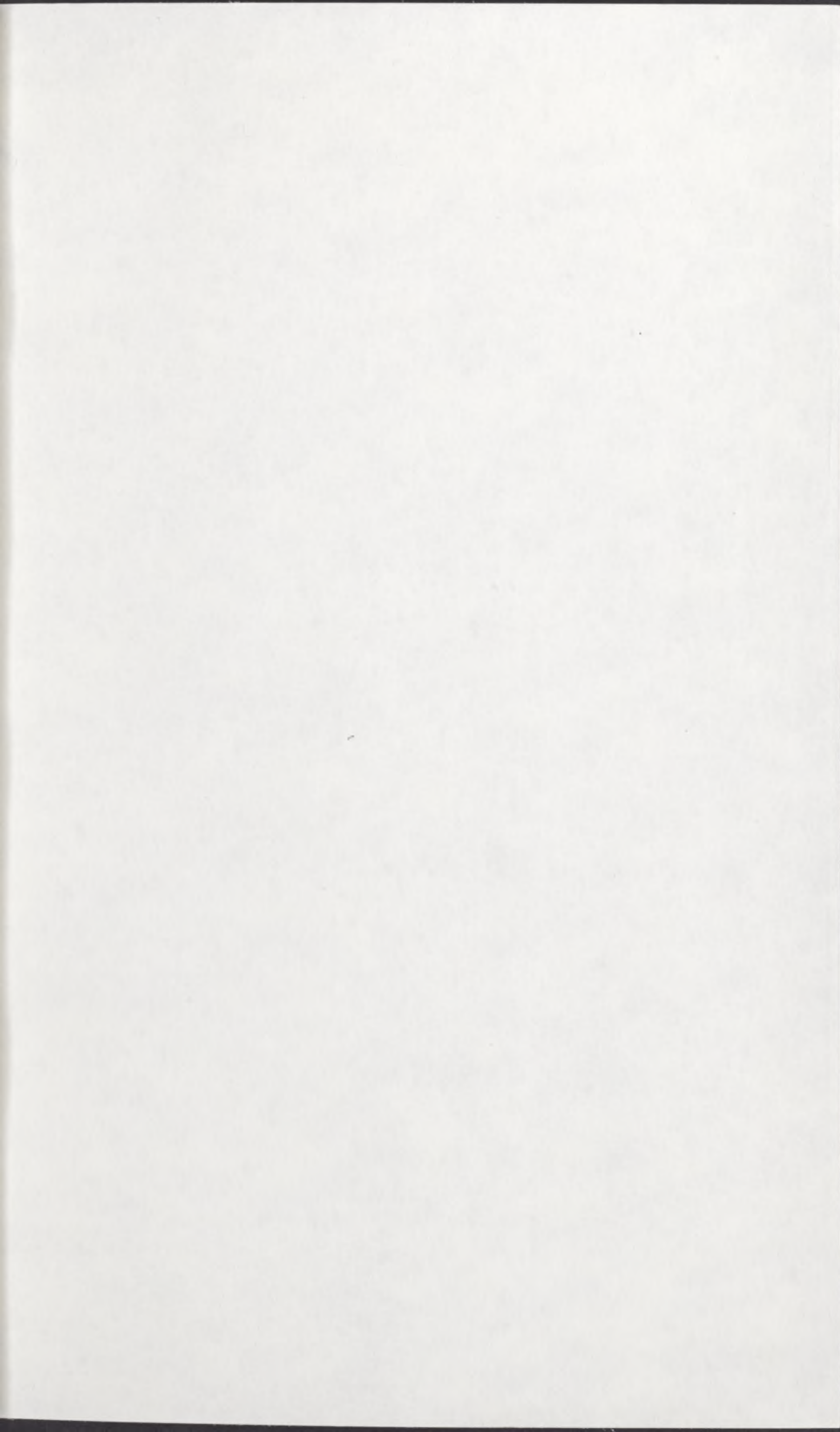

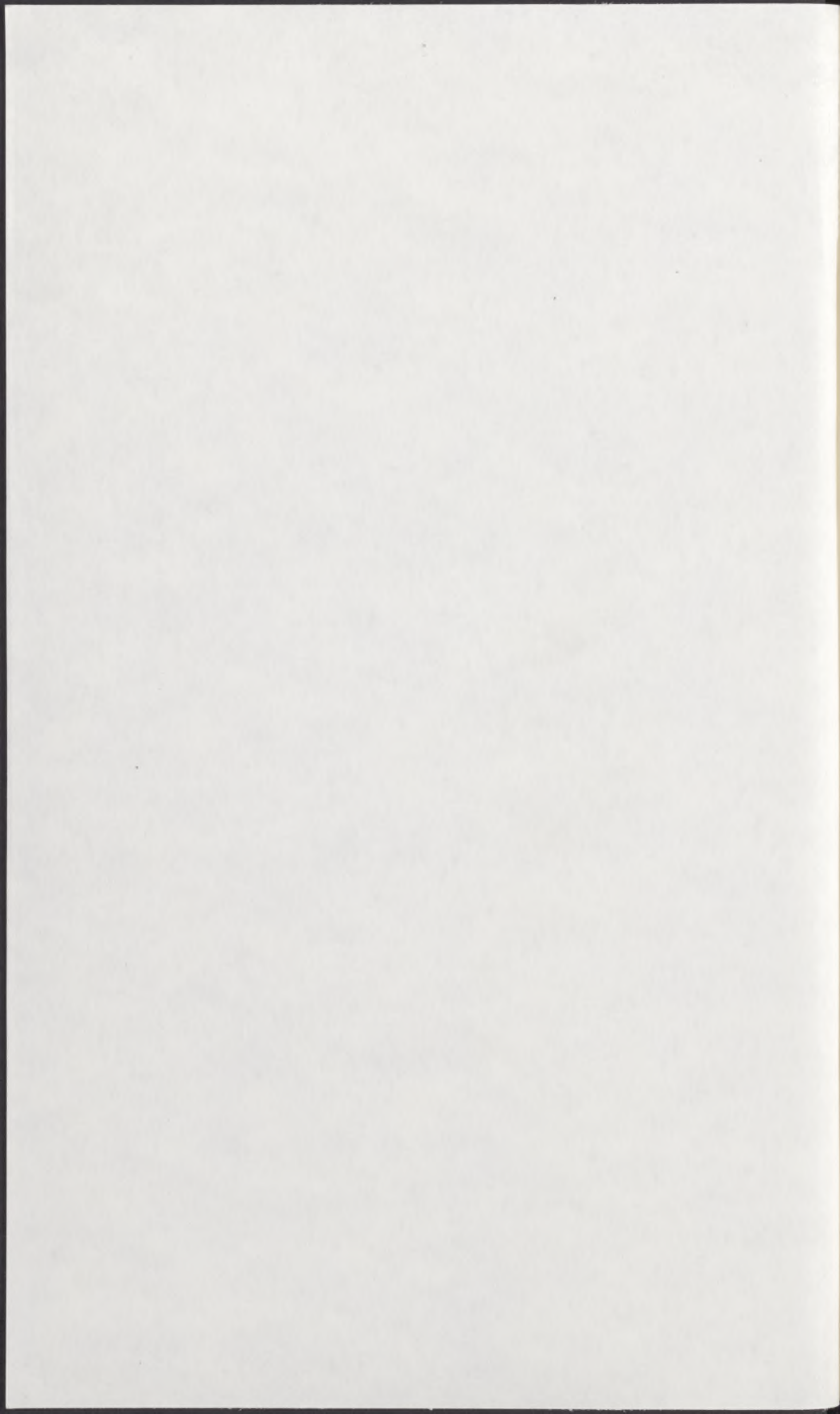

UNITED STATES REPORTS

VOLUME 422

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1974

OPINIONS OF JUNE 16 (CONCLUDED) THROUGH JUNE 30, 1975
ORDERS OF JUNE 16 THROUGH JUNE 30, 1975
END OF TERM

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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ERRATA

416 U. S. 3, line 16: "The Dickmans' " should be "Appellee's".

419 U. S. v, line 17 from bottom: a period should be inserted after "A".

JUSTICES

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

STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

OFFICERS OF THE COURT

EDWARD H. LEVI, Attorney General.
ROBERT H. BORK, Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
FRANK M. HEPLER, Marshal.
EDWARD G. HUDON, Librarian.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

For the District of Columbia Circuit, 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, 1974

INTERCOUNTY CONSTRUCTION CORP. ET AL. *v.* WALTER, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, U.S. DEPARTMENT OF LABOR, ET AL.

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

No. 74-362. Argued April 23, 1975—Decided June 16, 1975

Section 13 of the Longshoremen's and Harbor Workers' Compensation Act provides that the right to compensation for disability under the Act shall be barred unless a claim therefor is filed within one year after the injury. Section 22 provides that, upon his own initiative or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in his determination of fact, the Deputy Commissioner of the Bureau of Employees' Compensation (the agency charged with administering the Act) may, "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim," review a compensation case and issue a "new compensation order" which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. A claimant, who was injured in 1960 while working for petitioner employer, filed a claim for total permanent disability within § 13's one-year statute of limitations. Petitioner insurance carrier, in advance of an award by the Deputy Commissioner, first paid the weekly amount for total disability though denying

the extent of disability, but in 1965 filed notice that it was contesting the extent of disability and was reducing the weekly compensation to the amount for 50% temporary disability, and in 1968 stopped payment of compensation after reaching the maximum of its liability for any condition other than permanent disability or death. In 1970, two years after his last receipt of a voluntary compensation payment, the claimant requested a hearing on his claim for permanent disability, this being the first requested action to adjudicate the merits of the claim by either him or the carrier in the 10 years following the filing of the claim, and no order or award having been entered during this period. Respondent Deputy Commissioner then entered an award for permanent total disability, and petitioners brought suit to enjoin its enforcement. The District Court held that § 22 barred the claim, but the Court of Appeals reversed. *Held:* While the language of § 22 is ambiguous, the section's legislative history, including the history of the amendment inserting the phrase "whether or not a compensation order has been issued," shows that the section's one-year time limit was meant to apply only to the Deputy Commissioner's power to modify previously entered orders, and that therefore the section does not bar consideration of a claim timely filed under § 13, which has not been the subject of prior action by the Deputy Commissioner, and with respect to which the Deputy Commissioner took no action until more than one year after the claimant's last receipt of a voluntary compensation payment. Taken in its historical and statutory context, the phrase "whether or not a compensation order has been issued" is properly interpreted to mean merely that the one-year time limit imposed on the Deputy Commissioner's power to modify existing orders runs from the date of final payment of compensation even if the order sought to be modified is actually entered only after such date. Pp. 6–12.

163 U. S. App. D. C. 147, 500 F. 2d 815, affirmed.

Rehnquist, J., delivered the opinion for a unanimous Court.

John C. Duncan III argued the cause and filed a brief for petitioners.

Frank H. Easterbrook argued the cause for respondent Walter *pro hac vice.* With him on the brief were *Solici-*

tor General Bork and *Marshall H. Harris. Jefferson de R. Capps* filed a brief for respondent Jones.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Section 13 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1432, 33 U. S. C. § 913, provided: "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury." We must decide in this case whether § 22 of the same Act, as amended, 33 U. S. C. § 922, bars consideration of a claim timely filed under § 13, which has not been the subject of an order by the deputy commissioner within one year after the cessation of voluntary compensation payments.

Petitioners in the instant case are Intercounty Construction Corp., an employer, and Hartford Accident and Indemnity Co., its insurance carrier. Respondents are Noah C. A. Walter, a deputy commissioner of the Bureau of Employees' Compensation which was charged with administration of the Act,[1] and Mary Jones, an intervenor below who is the personal representative of Charles Jones, an employee claimant under the Act. Claimant was injured in 1960 while working for the employer in the District of Columbia.[2] Shortly thereafter, well within the one-year statute of limitations established by § 13 of the Act,[3] he filed a claim for total

[1] In 1972, this responsibility was transferred to the Office of Workmen's Compensation Programs of the Department of Labor. See 20 CFR §§ 701.101–701.103 (1973).

[2] The District of Columbia Workmen's Compensation Act incorporates by reference the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.* as amended. See D. C. Code Ann. § 36–501 (1973).

[3] Section 13 of the Act, 33 U. S. C. § 913, provided in part: "The right to compensation for disability under this chapter shall

permanent disability with the Bureau of Employees' Compensation. The insurance carrier, admitting claimant's injury in the course of employment while denying permanent disability to the extent stated in the claim, filed notice that it had begun payment of $54 per week, the amount payable for total disability, in advance of an award by the deputy commissioner.[4]

In 1965, the carrier filed notice that it was controverting the pending claim on the ground, *inter alia,* of extent of disability and that it was reducing claimant's weekly compensation to $27 per week, the rate for 50% temporary disability. In 1966 a claims examiner from the Bureau held a hearing on the pending claim for total permanent disability benefits but the hearing was adjourned without action on the claim. On January 23, 1968, the carrier stopped payment of compensation to the claimant since its payments to claimant totaled $17,280, its maximum liability under the Act at the time for any condition other than permanent total disability

be barred unless a claim therefor is filed within one year after the injury . . . except that if payment of compensation has been made without an award on account of such injury . . . a claim may be filed within one year after the date of the last payment. . . ."

Section 12 of the Act, 33 U. S. C. § 912 (1970 ed. and Supp. III), requires the employee to give notice of injury unless the employer has actual notice of the injury.

[4] Since the Act requires the employer to begin making the payments called for by the Act within 14 days after receiving notice of injury without awaiting resolution of the compensation claim and permits withholding of payments only to the extent of any dispute, voluntary payment in advance of an actual order is common under the Act. See § 14 of the Act, 33 U. S. C. § 914 (1970 ed. and Supp. III). Either party may obtain resolution of a pending claim by request under § 19 (c) of the Act, 33 U. S. C. § 919 (c), but in practice many pending claims are amicably settled through voluntary payments without the necessity of a formal order by the deputy commissioner.

or death. On February 11, 1970, two years after his last receipt of a voluntary payment of compensation from the carrier, claimant requested a hearing on his previously filed claim for total permanent disability. Although the claim had been pending since its timely filing in 1960, neither the carrier nor the claimant had requested action by the Bureau in the intervening 10 years to adjudicate its merits and no order or award had been entered during this period resolving it.[5]

Deputy Commissioner Walter, reversing his own initial determination that the claim was time barred under § 22 of the Act, concluded that § 22 was not applicable to this claim and entered an order awarding claimant compensation for permanent total disability. Petitioners then brought this suit under 33 U. S. C. § 921 (b) against respondent Walter to enjoin enforcement of the award. The United States District Court for the District of Columbia granted summary judgment for the petitioners, holding that § 22 of the Act barred the claim.[6] On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed, holding that § 22 of the Act, applicable only to the power of the deputy commissioner to modify prior orders, erected no barrier to consideration of claims which had not been the subject of a prior order by the deputy commissioner.[7]

Because of the conflict between the holding of the Court of Appeals in this case and that of the United States Court of Appeals for the Fifth Circuit in *Strachan Shipping Co.* v. *Hollis,* 460 F. 2d 1108, cert. denied *sub nom. Lewis* v. *Strachan Shipping Co.,* 409 U. S. 887 (1972), we granted certiorari. 419 U. S. 1119 (1975).

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[5] See n. 4, *supra.*

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

[7] The decision of the Court of Appeals is reported at 163 U. S. App. D. C. 147, 500 F. 2d 815 (1974).

Section 22 of the Act, as amended, provides:

"Modification of awards

"Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary."

Petitioners urge, and the Fifth Circuit in *Strachan Shipping Co.* held, that this provision superimposes on the express statute of limitations contained in § 13 of the Act, providing a time period for the filing of claims, an additional limitations period requiring action by the deputy commissioner on pending claims within one year after the date of the last voluntary payment of compen-

sation where such payments have been made. In their view, since no action was taken on the pending claim in the instant case until more than one year after the claimant's last receipt of a voluntary compensation payment, the claim was time barred under § 22.

In contrast, respondents argue, and the Court of Appeals for the District of Columbia Circuit held, that § 22 is applicable only to the power of the deputy commissioner to modify prior orders and awards issued by him. In their view, it has no application to timely filed claims on which no prior action has been taken by the deputy commissioner. In this case they say that since the timely filed and still-pending 1960 claim had never been the subject of action by the Deputy Commissioner prior to the order here in issue, § 22 has no application to it.

We agree with the Court of Appeals for the District of Columbia Circuit that § 22 speaks ambiguously to the question before us. The statutory references to "new order," "new compensation order," and "the rejection of a claim," and the limitation of the granted authority to "a change in conditions or because of a mistake in a determination of fact by the deputy commissioner" support an interpretation of the section's one-year time limit as applicable only to the power of the deputy commissioner to modify previously entered orders. Such an interpretation would make the section inapplicable to the authority of the deputy commissioner to enter an initial order with respect to a claim timely filed. On the other hand, the language "whether or not a compensation order has been issued" points to the applicability of the section's one-year time limit to all previously filed claims, even though not the subject of any prior order by the deputy commissioner. *Strachan Shipping Co.* v. *Hollis*, 460 F. 2d, at 1116. This phrase might also merely mean, when read in context, that the time limit established by

this provision, applicable only to the modification of previously entered orders, runs from the date of the last voluntary payment even though the order sought to be modified is entered after receipt of the last voluntary payment. 163 U. S. App. D. C., at 150, 500 F. 2d, at 818; *Strachan Shipping Co.* v. *Hollis, supra,* at 1117 (Ainsworth, J., dissenting). These conflicting indicia are not completely reconcilable if the language in the statute is considered alone, and so we must resort to the legislative history of the provision.

Section 22 was first enacted as part of the original Longshoremen's and Harbor Workers' Compensation Act in 1927. 44 Stat. 1424–1446. As petitioners concede, the provision as originally drafted applied only to the modification of orders previously entered by the deputy commissioner:

> "MODIFICATION OF AWARDS
>
> "SEC. 22. Upon his own initiative, or upon application of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time during the term of an award and after the compensation order in respect of such award has become final, review such order in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, increase, or decrease such compensation. Such new order shall not affect any compensation paid under authority of the prior order." *Id.,* at 1437.

As originally adopted, § 22 provided power to the deputy commissioner to modify a prior order only "during the term of an award" and the provision was construed to constrict the power to modify a previous order to the period of payments pursuant to an award. Cf.

F. Jarka Co. v. *Monahan,* 29 F. 2d 741, 742 (Mass. 1928). The United States Employees' Compensation Commission (USECC), then charged with the administration of the Act, repeatedly recommended that § 22 be amended to allow continuing review of previously entered orders. 14th Ann. Rep. USECC 75 (1930); 15th Ann. Rep. USECC 77 (1931); 16th Ann. Rep. USECC 49 (1932); 17th Ann. Rep. USECC 18 (1933). See *Banks* v. *Chicago Grain Trimmers,* 390 U. S. 459, 463–465 (1968). In none of the annual reports of the USECC is there any indication that amendment of this provision was sought for any purpose other than broadening the length of time during which the deputy commissioner could exercise his power to modify previously entered orders.

In 1934 Congress responded by amending this provision to read:

> "MODIFICATION OF COMPENSATION CASES
>
> "SEC. 22. Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, review a compensation case in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due

is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the commission." 48 Stat. 807.

This amendment inserted the phrase "whether or not a compensation order has been issued," the phrase upon which the petitioners' statutory claim rests, and they naturally urge that it was intended to apply the one-year time limit of § 22, formerly applicable only to the modification of previously entered orders, to all pending claims. But the legislative history does not bear out petitioners' contention.

The committee reports of both Houses of Congress accompanying this change explain it in the following language:

"[This bill] amends section 22 of the existing act so as to broaden the grounds on which a deputy commissioner can modify an award and also while strictly limiting the period, extends the time within which such modification may be made. . . .

"The amendment is in line with the recommendation of the [USECC] except that it limits to 1 year after the date of the last payment of compensation the time during which such modification may be made." S. Rep. No. 588, 73d Cong., 2d Sess., 3–4 (1934); H. R. Rep. No. 1244, 73d Cong., 2d Sess., 4 (1934).

As we similarly stated in *Banks* v. *Chicago Grain Trimmers, supra,* at 464: "The purpose of this amendment was to 'broaden the grounds on which a deputy commissioner can modify an award.' " See, *e. g., O'Keeffe* v. *Aerojet-*

General Shipyards, 404 U. S. 254, 255–256 (1971). There is no indication that Congress sought by this amendment to superimpose a new statute of limitations, in addition to the required period for filing provided by § 13, on all claims filed under the Act upon which payments are made. Taken in historical and statutory context, the phrase "whether or not a compensation order has been issued" is properly interpreted to mean merely that the one-year time limit imposed on the power of the deputy commissioner to modify existing orders runs from the date of final payment of compensation even if the order sought to be modified is actually entered only after such date.

Section 22 was amended in 1938 to read as it presently does. 52 Stat. 1167. The chief change was permitting the deputy commissioner to review a case "at any time prior to one year after the rejection of a claim." Such amendment would have been largely superfluous if Congress in 1934 had already extended this provision to cover claims whether or not previously disposed of by the deputy commissioner. And in fact the legislative history surrounding the 1938 amendment reveals a clear congressional understanding that § 22 applied only to modification of prior orders of the deputy commissioner. Thus, for example, the House Report accompanying the 1938 amendment stated that "[t]he purpose of this amendment is to extend to such cases the same provisions which now apply in connection with other cases *finally acted upon by the deputy commissioner.*" H. R. Rep. No. 1945, 75th Cong., 3d Sess., 9 (1938). (Emphasis added.) See also H. R. Rep. No. 1807, 74th Cong., 1st Sess., 5 (1935); S. Rep. No. 1199, 74th Cong., 1st Sess., 4 (1935); H. R. Rep. No. 2237, 74th Cong., 2d Sess., 5 (1936); S. Rep. No. 1988, 75th Cong., 3d Sess., 8–9 (1938). Regulations issued under the Act by the USECC,

contemporaneously with passage of the 1938 amendment, reflect an administrative understanding that § 22 governed "application[s] to the deputy commissioner for review of a compensation case for modification of an award." 20 CFR § 31.15 (1938); 20 CFR § 31.16 (1949).

The Fifth Circuit in *Strachan Shipping Co.* v. *Hollis, supra,* indicated its belief that the absence of a procedure for orderly conclusion of compensation cases was incompatible with a scheme of cooperation and voluntary payments by employers and insurers envisaged by the Act. 460 F. 2d, at 1116. The court below disagreed, indicating its belief that the present procedures giving a carrier the right to compel the deputy commissioner to adjudicate claims eliminate any unfairness which might result from the absence of a fixed conclusion to such cases. 163 U. S. App. D. C., at 152, 500 F. 2d, at 820. Cf. 33 U. S. C. § 919 (c); 5 U. S. C. § 706 (1); *Atlantic & Gulf Stevedores, Inc.* v. *Donovan,* 274 F. 2d 794 (CA5 1960). Whatever the merits of a fixed period for resolution of pending compensation claims not previously the subject of an order, Congress did not in § 22 establish such a period. The decision of the United States Court of Appeals for the District of Columbia Circuit is therefore

Affirmed.

UNITED STATES *v.* LOUISIANA ET AL. (LOUISIANA BOUNDARY CASE)

No. 9, Orig. Decided March 17, 1975—Decree entered March 17, 1975—Supplemental decree entered June 16, 1975

Decree reported: 420 U. S. 529.

SUPPLEMENTAL DECREE

On March 17, 1975, this Court overruled the exceptions of the United States and the State of Louisiana to the Report and recommendations of the Special Master, accepted the Report of the Special Master and directed the parties "to prepare and file a decree for entry by this Court, establishing 'a baseline along the entire coast of the State of Louisiana from which the extent of the territorial waters under the jurisdiction of the State of Louisiana pursuant to the Submerged Lands Act can be measured.'" 420 U. S. 529, 530. The parties have agreed on a proposed decree establishing the coastline (baseline) of Louisiana in accordance with the Court's decision of March 17, 1975. That baseline is described in Exhibit A below. Accordingly, the joint motion for entry of supplemental decree is granted.

IT IS ORDERED, ADJUDGED, AND DECREED:

1. As against the defendant State of Louisiana and all persons claiming under it, the United States has exclusive rights to explore the area of the Continental Shelf lying more than three geographical miles seaward of the line described in Exhibit A hereof, and to exploit the natural resources of said area and the State of Louisiana is not entitled to any interest in such lands, minerals, and resources, and said State, its privies, assigns, lessees,

and other persons claiming under it are hereby enjoined from interfering with the rights of the United States in such lands, minerals and resources.

2. All sums now held impounded by the United States under the Interim Agreement of October 12, 1956, as amended, and derived from leases of lands lying wholly within the area referred to in paragraph 1 hereof are hereby released to the United States absolutely, and in accordance with the terms of the Interim Agreement, as amended, and the United States is hereby relieved of any obligation under said Agreement to impound any sums hereafter received by it from leases of lands lying wholly within said area.

3. As against the plaintiff United States and all persons claiming under it, the State of Louisiana has exclusive rights to explore the area lying within three geographical miles seaward of its coastline described in Exhibit A hereof, and to exploit the natural resources of said area, with the exceptions provided by Section 5 of the Submerged Lands Act, 67 Stat. 32, 43 U. S. C. § 1313. The United States is not entitled to any interest in such lands, minerals, and resources and said United States, its privies, assigns, lessees and other persons claiming under it are hereby enjoined from interfering with the rights of the State of Louisiana in such lands, minerals and resources.

4. All sums now held impounded by the State of Louisiana under the Interim Agreement of October 12, 1956, as amended, derived from leases of lands lying wholly within the area referred to in paragraph 3 hereof are hereby released to Louisiana in accordance with the Interim Agreement of 1956, as amended, and Louisiana is hereby relieved of any obligation under said Agreement to impound any sums hereafter received by it from leases of lands lying wholly within said area.

5. Within 90 days after the entry of the Decree—

(a) The State of Louisiana shall pay to the United States or other persons entitled thereto under the Interim Agreement of October 12, 1956, as amended, all sums, if any, now held impounded by the State of Louisiana under said Agreement, derived from or attributable to the lands, minerals or resources described in paragraph 1 hereof;

(b) The United States shall pay to the State of Louisiana or other persons entitled thereto under the Interim Agreement, as amended, all sums, if any, now held impounded by the United States under said Agreement, derived from or attributable to the lands, minerals or resources described in paragraph 3 hereof;

(c) Failure of either party to agree on correctness of the sums due the other shall in no way be reason to retard payment of sums which are admittedly due by the paying party's own calculations.

6. Within 60 days after the entry of this Decree—

(a) The State of Louisiana shall render to the United States and file with the Court a true, full, accurate and appropriate account of any and all other sums of money derived by the State of Louisiana since June 5, 1950, either by sale, leasing, licensing, exploitation or otherwise from or on account of any of the lands, minerals or resources described in paragraph 1 hereof;

(b) The United States shall render to the State of Louisiana and file with the Court a true, full, accurate and appropriate account of any and all other sums of money derived by the United States either by sale, leasing, licensing, exploitation or otherwise from or on account of the lands, minerals or resources described in paragraph 3 hereof;

(c) Within 60 days after receiving the account provided for by paragraph 6 (a) or 6 (b) hereof, a party

may serve on the other and file with the Court its objections thereto. Thereafter either party may file such motion or motions at such time as may be appropriate to have the account settled in conjunction with the issues concerning the areas still in dispute. If neither party files such an objection within 60 days, then each party shall forthwith pay to any third person any amount shown by such accounts to be payable by it to such person, and the party whose obligation to the other party is shown by such accounts to be greater shall forthwith pay to the other party the net balance so shown to be due. If objections are filed but any undisputed net balance is shown which will be due from one party to the other party or to any third person regardless of what may be the ultimate ruling on the objections, the party so shown to be under any such obligation shall forthwith pay each such undisputed balance to the other party or other person so shown to be entitled thereto. The payments directed by paragraphs 5 (a) and 5 (b) hereof shall be made irrespective of the accountings provided for by paragraphs 6 (a) and 6 (b).

7. All sums heretofore impounded pursuant to the Interim Agreement of 1956, as amended, shall be fully accounted for and paid within the 90 days provided in paragraph 5, except as to split leases that accounting and payment may be deferred on royalty revenue from (a) non-unitized wells with completion points at unidentified locations or locations controverted by the parties; and (b) units partially shoreward of the three-mile boundary as to which there is no present agreement that participation is on a surface acreage basis.

Funds from split leases not accounted for and paid pursuant to the preceding sentence shall be the subject of the accounting to follow the next decree of this

Court in this case, unless the parties agree on a prior distribution.

Except as provided above for accountings and payment, pending further order of the Court, leases of land lying partly within three miles of the line described in paragraph 9 hereof shall be in no way affected by anything contained in this Decree.

8. The parties may by agreement modify the time for accounting and payment in whole or part as the progress of technical work may indicate is necessary. It is understood that the parties may be unable to agree on whether offsets are permitted or whether interest may be due on funds impounded pursuant to the Interim Agreement of October 12, 1956, or upon calculations or audits, and these issues, as well as others not expressly treated herein, shall in no way be affected by this Decree.

9. The coastline or baseline referred to in paragraphs 1 and 3, *supra,* is described by coordinates in the Louisiana plane coordinate system, south zone, as set forth in Exhibit A, appended to this Decree. This coastline supersedes all prior coastline descriptions of former decrees in this case and is the past and present coastline and shall constitute the coastline as of the date of the final decree in this case.

10. Notwithstanding the provisions of paragraph 9, for limited time periods relevant to this Decree, certain of the points or lines contained in the above baseline description were not part of the Louisiana coastline, and for other periods additional points or lines must be added to that coastline. These variations are described in Exhibit B, which for the sectors and times given, describes portions of the baseline. Otherwise, the Louisiana coastline is to be taken as the same as the present coastline for all relevant times and purposes.

11. The parties are directed to establish lines three geographical miles seaward of the coastlines described in Exhibits A and B to be employed in accountings and submitted in the proposed final decree hereafter, delimiting the seaward limit of the State of Louisiana's rights under the Submerged Lands Act.

The parties are directed to prepare a final decree for entry by this Court in the near future resolving the additional issues required to be dealt with that this litigation may be terminated, to include, but not necessarily be limited to, matters related to unresolved issues, if any, concerning accountings and payments, offset claims, payments to others, ambulatory boundary complexities or administrative problems.

12. The Court retains jurisdiction to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to its previous orders or decrees herein or to this Decree or to effectuate the rights of the parties in the premises.

13. Nothing in this Decree or in the proceedings leading to it shall prejudice any rights, claims or defenses of the State of Louisiana as to its maritime lateral boundaries with the States of Mississippi and Texas, which boundaries are not at issue in this litigation. Nor shall the United States in any way be prejudiced hereby as to such matters. Nor shall anything in this Decree prejudice or modify the rights and obligations under any contracts or agreements, not inconsistent with this Decree, between the parties or between a party and a third party, especially, but not limited to, the Interim Agreement of October 12, 1956, as amended, which Agreement remains in effect except as explicitly modified hereby.

EXHIBIT A

	X	Y
A LINE FROM	2752565	568525
THROUGH	2775787	513796
THROUGH	2777512	513071
THROUGH	2779032	512013
THROUGH	2780766	510417
THROUGH	2782059	508914
THROUGH	2784689	505455
THROUGH	2788518	498898
THROUGH	2790051	496115
THROUGH	2791690	491970
THROUGH	2794789	481712
THROUGH	2796202	475864
THROUGH	2797209	468763
THROUGH	2797456	463898
THROUGH	2797455	458119
THROUGH	2797067	452190
THROUGH	2795853	442333
THROUGH	2794722	436006
THROUGH	2793260	430155
THROUGH	2790415	420878
THROUGH	2788165	414646
THROUGH	2786724	410834
THROUGH	2783250	403219
THROUGH	2779673	397140
THROUGH	2777922	394224
THROUGH	2776487	392403
THROUGH	2775343	391771
THROUGH	2774819	390716
THROUGH	2774670	390293
THROUGH	2773972	389724
THROUGH	2772541	387391
THROUGH	2770599	383887
THROUGH	2768775	381521
THROUGH	2768031	380244

	X	Y
THROUGH	2767052	379676
THROUGH	2766408	378524
THROUGH	2761138	371491
THROUGH	2758093	367862
THROUGH	2757465	366796
THROUGH	2755709	364596
THROUGH	2755015	363480
THROUGH	2749221	357797
THROUGH	2746309	355438
THROUGH	2744222	354125
THROUGH	2743352	353794
THROUGH	2742583	353754
THROUGH	2727653	334120
THROUGH	2726852	333103
THROUGH	2723975	330868
THROUGH	2722321	329172
THROUGH	2720696	326779
THROUGH	2717012	320677
THROUGH	2715236	318391
THROUGH	2714633	317731
THROUGH	2713324	316801
THROUGH	2711772	316107
THROUGH	2710380	315995
THROUGH	2689683	308890
THROUGH	2689514	307841
THROUGH	2688390	304545
THROUGH	2687610	301648
THROUGH	2687014	300054
THROUGH	2685058	297573
THROUGH	2683264	296069
THROUGH	2680880	294918
THROUGH	2678009	294303
TO	2681915	257755
A POINT AT	2688235	252215
A POINT AT	2689305	250395
A POINT AT	2700735	234640
A POINT AT	2701500	232820
A POINT AT	2707635	223640

	X	Y
A LINE FROM	2709100	220995
TO	2734900	209275
A POINT AT	2737065	210155
A POINT AT	2738320	210230
A POINT AT	2738938	209975
A POINT AT	2750755	206535
A POINT AT	2755325	204680
A POINT AT	2755178	203815
A POINT AT	2754100	186915
A POINT AT	2754263	186316
A POINT AT	2753885	183460
A POINT AT	2752470	182170
A POINT AT	2751045	181305
A POINT AT	2750586	181270
A POINT AT	2736662	175902
A LINE FROM	2734720	174030
TO	2733040	172295
A LINE FROM	2728153	162005
TO	2727215	156890
A POINT AT	2726951	150846
A POINT AT	2726105	148530
A POINT AT	2724850	148150
A LINE FROM	2725550	153430
TO	2724419	152060
A LINE FROM	2724314	151595
THROUGH	2702461	124148
TO	2701735	123905
A POINT AT	2699435	118600
A POINT AT	2699815	116800
A POINT AT	2699695	116700
A LINE FROM	2697850	117200
THROUGH	2697510	117648
TO	2697300	118500
A POINT AT	2685325	133800
A LINE FROM	2682605	136895
THROUGH	2678500	139250
TO	2673482	141245
A LINE FROM	2672315	141745

	X	Y
THROUGH	2644940	134910
THROUGH	2641835	129725
THROUGH	2639545	126825
THROUGH	2638945	126780
THROUGH	2635800	123995
THROUGH	2633755	121760
THROUGH	2630660	116450
THROUGH	2628680	113190
THROUGH	2625550	109560
THROUGH	2624995	108700
THROUGH	2624760	108445
THROUGH	2624045	107660
THROUGH	2621925	105355
THROUGH	2620655	104065
THROUGH	2618380	102265
THROUGH	2615885	99131
THROUGH	2615196	98279
THROUGH	2611843	94130
THROUGH	2610160	92050
THROUGH	2609785	91750
THROUGH	2609180	91445
THROUGH	2607290	93040
THROUGH	2607400	93175
THROUGH	2607455	93710
THROUGH	2608665	95870
THROUGH	2610650	98640
TO	2614224	105206
A POINT AT	2614270	110615
A POINT AT	2614553	111404
A LINE FROM	2615475	113900
THROUGH	2615450	157770
THROUGH	2615135	159890
THROUGH	2614790	160765
THROUGH	2614865	161005
THROUGH	2613550	164745
THROUGH	2613585	166700
THROUGH	2613485	167600

	X	Y
THROUGH	2613960	170145
THROUGH	2614070	171910
TO	2611490	176505
A POINT AT	2610755	176310
A POINT AT	2609880	177025
A LINE FROM	2608270	178325
THROUGH	2607710	178665
THROUGH	2606370	180190
THROUGH	2605125	182710
TO	2605025	183315
A LINE FROM	2604220	184790
THROUGH	2603355	186915
THROUGH	2602860	188615
THROUGH	2602425	189395
THROUGH	2601940	190595
THROUGH	2600780	192900
THROUGH	2598335	196450
THROUGH	2594900	199935
THROUGH	2593875	201260
THROUGH	2593340	201660
THROUGH	2590100	203860
THROUGH	2589100	204125
TO	2587400	205250
A LINE FROM	2585000	206975
THROUGH	2583790	207010
THROUGH	2576450	210023
THROUGH	2576174	209790
THROUGH	2575992	210090
THROUGH	2574890	210450
THROUGH	2574712	210767
THROUGH	2571725	211744
THROUGH	2568736	212548
THROUGH	2566991	212986
TO	2565940	212988

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	X	Y
A LINE FROM	2563010	214045
THROUGH	2562149	214046
THROUGH	2561385	214258
TO	2556172	215383
A LINE FROM	2550402	216158
THROUGH	2406890	189733
THROUGH	2398175	182359
THROUGH	2393610	178130
THROUGH	2385833	171938
THROUGH	2381527	168671
THROUGH	2376521	164696
TO	2374875	163200
A POINT AT	2376485	164409
A LINE FROM	2374875	163200
THROUGH	2373613	162597
THROUGH	2369709	160120
TO	2367695	158943
A LINE FROM	2366789	158537
THROUGH	2365337	157918
TO	2364392	157349
A LINE FROM	2362830	157339
TO	2356733	154323
A LINE FROM	2354070	152599
TO	2353875	152659
A LINE FROM	2347871	153564
THROUGH	2342108	151526
TO	2339651	150598
A LINE FROM	2337450	149987
THROUGH	2335471	149301
THROUGH	2327933	146251
THROUGH	2322466	144396
TO	2320164	143811

	X	Y
A LINE FROM	2319608	143421
THROUGH	2317663	142869
THROUGH	2313902	141865
THROUGH	2312204	141813
THROUGH	2310546	141903
THROUGH	2308552	142401
THROUGH	2307414	143059
THROUGH	2306697	143789
THROUGH	2300326	139954
THROUGH	2298538	139073
THROUGH	2296041	138519
THROUGH	2295144	138550
THROUGH	2294383	138846
THROUGH	2293148	139498
THROUGH	2291503	139861
THROUGH	2286402	140499
THROUGH	2281202	141484
THROUGH	2274749	143161
THROUGH	2270205	145091
THROUGH	2264450	147674
THROUGH	2260236	150105
THROUGH	2256191	151946
THROUGH	2254031	153153
THROUGH	2253306	154102
THROUGH	2222957	146695
THROUGH	2221937	146004
THROUGH	2219935	144971
THROUGH	2218146	144160
THROUGH	2215009	143380
THROUGH	2207126	141266
THROUGH	2198296	138515
THROUGH	2192330	136944
THROUGH	2186596	135997
THROUGH	2184788	135611
THROUGH	2183331	135655
THROUGH	2182166	135368
THROUGH	2180645	135457
THROUGH	2179937	135695
THROUGH	2170035	135500

	X	Y
THROUGH	2169680	135315
THROUGH	2167836	134922
TO	2164477	134753
A LINE FROM	2162430	135112
TO	2157920	135521
A POINT AT	2155349	135847
A LINE FROM	2148929	136962
THROUGH	2147751	136599
THROUGH	2143589	136276
THROUGH	2139529	136276
TO	2138231	136387
A LINE FROM	2134210	136726
THROUGH	2133089	136940
THROUGH	2128819	138694
THROUGH	2126697	139353
THROUGH	2122523	140238
THROUGH	2118829	141971
THROUGH	2118065	142532
THROUGH	2117317	143491
TO	2117632	143583
A POINT AT	2131078	175500
A POINT AT	2128430	178049
A POINT AT	2127239	179020
A POINT AT	2124878	180545
A POINT AT	2111697	183677
A POINT AT	2106412	183216
A LINE FROM	2103313	183605
THROUGH	2102167	184610
THROUGH	2100222	185315
THROUGH	2099609	185125
THROUGH	2098954	185105
THROUGH	2087767	187497
THROUGH	2087027	187342
THROUGH	2086261	187177
TO	2085370	187372

	X	Y
A LINE FROM	2077417	189409
THROUGH	2076201	189799
TO	2075295	190530
A POINT AT	2071131	195080
A LINE FROM	2062055	199555
THROUGH	2058700	200495
THROUGH	2057430	200980
THROUGH	2055610	201415
THROUGH	2054750	201215
THROUGH	2053190	201320
THROUGH	2051090	201230
THROUGH	2049230	201255
THROUGH	2045960	201470
THROUGH	2042475	201660
THROUGH	2037075	203200
THROUGH	2035775	203405
THROUGH	2033385	204235
THROUGH	2029630	205680
THROUGH	2026640	206660
THROUGH	2023042	208270
THROUGH	2021155	208850
THROUGH	2017453	210475
THROUGH	2016243	211245
THROUGH	2014384	213268
THROUGH	2010960	216566
THROUGH	2008873	218388
THROUGH	2008058	219434
THROUGH	2006991	221401
THROUGH	2006256	222432
THROUGH	2004384	224474
THROUGH	2000030	228573
THROUGH	1998568	230370
THROUGH	1996506	233983
TO	1995220	235805
A POINT AT	1987818	240892
A POINT AT	1987371	241272

	X	Y
A LINE FROM	1993420	241930
TO	1863474	298772
A POINT AT	1933172	264238
A POINT AT	1924399	268936
A POINT AT	1914373	270380
A POINT AT	1896827	275747
A POINT AT	1882306	270590
A POINT AT	1872418	277460
A POINT AT	1843467	275912
A POINT AT	1835344	270839
A POINT AT	1834019	270301
A POINT AT	1833527	271423
A POINT AT	1820994	291804
A POINT AT	1809845	296285
A POINT AT	1791584	307545
A POINT AT	1783067	321331
A POINT AT	1782391	321876
A POINT AT	1778769	324757
A LINE FROM	1763190	333540
TO	1762420	333590
A POINT AT	1758630	333490
A LINE FROM	1755535	335045
THROUGH	1748380	334810
THROUGH	1743691	334373
THROUGH	1738236	333686
THROUGH	1735850	333066
THROUGH	1730831	330886
THROUGH	1726542	329268
THROUGH	1724713	328326
THROUGH	1722884	327774
THROUGH	1721682	327214
THROUGH	1720140	326402
THROUGH	1717114	324303
THROUGH	1711532	320881
THROUGH	1709968	319818
THROUGH	1708756	318661

	X	Y
THROUGH	1706790	317870
THROUGH	1703080	316885
THROUGH	1700680	316390
THROUGH	1696359	315965
THROUGH	1692568	315990
THROUGH	1689980	316170
THROUGH	1687270	316510
THROUGH	1678545	318408
THROUGH	1675346	319196
THROUGH	1671018	320396
THROUGH	1669012	321069
THROUGH	1667091	321595
THROUGH	1665833	321916
THROUGH	1663290	322457
THROUGH	1659960	323169
THROUGH	1658887	323134
THROUGH	1657050	323540
THROUGH	1655896	323305
THROUGH	1653430	323751
THROUGH	1651294	324333
THROUGH	1650220	324644
THROUGH	1649308	324684
THROUGH	1648656	324985
THROUGH	1639027	326645
THROUGH	1629147	327939
THROUGH	1622420	328555
THROUGH	1617090	329300
THROUGH	1616760	329510
THROUGH	1613190	329780
THROUGH	1609300	330480
THROUGH	1608080	330835
THROUGH	1605965	331030
THROUGH	1605565	331280
THROUGH	1603140	331540
THROUGH	1600765	332140
THROUGH	1599740	332390
THROUGH	1595210	333090
THROUGH	1594770	333270
THROUGH	1594075	333290

	X	Y
THROUGH	1593910	333645
THROUGH	1593010	333520
THROUGH	1591685	333785
THROUGH	1589460	334525
THROUGH	1586780	335220
THROUGH	1581450	336800
THROUGH	1576170	338670
THROUGH	1571630	340335
THROUGH	1570480	340905
THROUGH	1567695	341990
THROUGH	1566890	342490
THROUGH	1566375	342810
THROUGH	1564160	343480
THROUGH	1562680	344195
THROUGH	1558720	345375
THROUGH	1555105	346865
THROUGH	1553840	347150
THROUGH	1551670	348170
THROUGH	1550645	349050
THROUGH	1546740	350600
THROUGH	1546195	350910
THROUGH	1539270	354040
THROUGH	1536505	355610
THROUGH	1536245	356080
THROUGH	1535690	356465
THROUGH	1532515	357575
THROUGH	1531970	358030
THROUGH	1531240	358190
THROUGH	1524550	361675
THROUGH	1513280	366930
THROUGH	1502470	372625
THROUGH	1496700	375770
THROUGH	1492040	378110
THROUGH	1489725	379370
THROUGH	1479730	384090
THROUGH	1471240	387390
THROUGH	1467685	388820
THROUGH	1460435	391260
THROUGH	1454105	393050

	X	Y
THROUGH	1449935	394700
THROUGH	1444715	396930
THROUGH	1441485	398150
TO	1436899	399820
A LINE FROM	1431526	400742
THROUGH	1431465	400740
TO	1429020	401485
A LINE FROM	1429035	401760
THROUGH	1425600	402610
THROUGH	1424630	403175
THROUGH	1416365	405700
THROUGH	1410175	407090
THROUGH	1402525	408365
THROUGH	1397220	408870
THROUGH	1392000	409180
THROUGH	1391954	409243
THROUGH	1386636	409216
THROUGH	1383990	409136
THROUGH	1380235	408500
THROUGH	1376515	407966
TO	1372945	406862
A LINE FROM	1363392	397870
TO	1362416	397822
A LINE FROM	1354310	403875
THROUGH	1351162	404620
THROUGH	1341917	405967
THROUGH	1333745	406888
THROUGH	1328473	407126
THROUGH	1323205	407138
THROUGH	1317944	407045
THROUGH	1312617	406742
THROUGH	1307312	406260
THROUGH	1296747	405049
THROUGH	1291413	404205
THROUGH	1286154	403467
THROUGH	1280760	402836

	X	Y
THROUGH	1275467	402375
THROUGH	1264910	401500
THROUGH	1259600	400971
THROUGH	1254211	400226
THROUGH	1248971	399421
THROUGH	1243670	398400
THROUGH	1240260	397840
THROUGH	1235668	396741
THROUGH	1233256	395989
THROUGH	1228846	394497
THROUGH	1228772	394775
THROUGH	1226444	393922
THROUGH	1225768	393281
THROUGH	1225421	393370
THROUGH	1219698	390746
THROUGH	1219065	390227
THROUGH	1217536	389445
THROUGH	1217089	389513
THROUGH	1216582	389216
TO	1215615	388263
A LINE FROM	1206795	378672
THROUGH	1209227	364245
TO	1208456	363990

EXHIBIT B

From January 1961 to December 1969, the baseline in the East Bay vicinity from point X=2699435, Y=118600 to point X=2644940, Y=134910 deviates from the present baseline and may be described as follows:

A point at	X=2699815	Y=116800
A point at	X=2699695	Y=116700
A line from	X=2697850	Y=117200
Through	X=2697510	Y=117648
To	X=2697300	Y=118500
A line from	X=2687638	Y=130705
Through	X=2685250	Y=131590
Through	X=2684417	Y=131957
Through	X=2683850	Y=132390
Through	X=2682580	Y=133325
Through	X=2681624	Y=134128
Through	X=2677650	Y=138050
Through	X=2644940	Y=134910

Prior to January 1961, the baseline in the East Bay vicinity from point X=2699435, Y=118600 to point X=2644940, Y=134910 deviates from the present baseline and may be described as follows:

A point at	X=2699435	Y=118600
A line from	X=2697850	Y=117200
Through	X=2697510	Y=117648
To	X=2697300	Y=118500
A line from	X=2687638	Y=130705
Through	X=2685250	Y=131590
Through	X=2684417	Y=131957
Through	X=2683850	Y=132390
Through	X=2682580	Y=133325
Through	X=2681624	Y=134128
Through	X=2677650	Y=138050
Through	X=2644940	Y=134910

Prior to December 6, 1969, the baseline in the Pass du Bois vicinity from point X=2615450, Y=157770 to

point X=2613550, Y=164745 deviates from the present baseline and may be described as follows:

A point at..........................	X=2615151	Y=158006
A point at..........................	X=2612771	Y=162310
A point at..........................	X=2612120	Y=164118

From November 19, 1959, to February 1, 1960, the baseline in the Pass Tante Phine vicinity from point X=2606370, Y=180190 to point X=2598335, Y=196450 deviates from the present baseline and may be described as follows:

A point at..........................	X=2602000	Y=183535

From January 1, 1959, through March 31, 1959, and from March 1, 1964, through July 31, 1964, the baseline North of Pass Tante Phine from point X=2605025, Y=183315 to point X=2600780, Y=192900 deviates from the present baseline and may be described as follows:

A point at..........................	X=2602763	Y=186885

MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

ROGERS *v.* UNITED STATES

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

No. 73-6336. Argued April 14, 1975—Decided June 17, 1975

Two hours after retiring for deliberation in petitioner's trial for having allegedly violated 18 U. S. C. § 871 (a) by threatening the life of the President, the jury by note asked the trial judge whether he would accept a verdict of "Guilty as charged with extreme mercy of the Court." The judge through the marshal answered affirmatively without notifying petitioner or his counsel. Five minutes later the jury returned a verdict of guilty with the indicated recommendation, which was upheld on appeal. *Held:* "[T]he orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties . . . to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict," *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 81, and, as *Shields* v. *United States,* 273 U. S. 583, and Fed. Rule Crim. Proc. 43 make clear, a criminal defendant has the right to be present "at every stage of the trial including the impaneling of the jury and the return of the verdict." Although a violation of Rule 43 may in some circumstances be harmless error, that conclusion cannot be reached in this case. At the very least, the trial court should have reminded the jury that its recommendation would not in any way be binding and should have admonished the jury to reach its verdict without regard to what sentence might be imposed. In the circumstances of this case, the trial court's errors were such as to warrant this Court's taking cognizance of them regardless of petitioner's failure to raise the issue in the Court of Appeals or in this Court. Pp. 38-41.

488 F. 2d 512, reversed and remanded.

Burger, C. J., delivered the opinion for a unanimous Court. Marshall, J., filed a concurring opinion, in which Douglas, J., joined, *post,* p. 41.

Ralph W. Parnell, Jr., by appointment of the Court,

420 U. S. 943, argued the cause and filed briefs for petitioner.

Allan A. Tuttle argued the cause for the United States. On the brief were *Solicitor General Bork, Acting Assistant Attorney General Keeney, Deputy Solicitor General Randolph, William L. Patton,* and *Marshall Tamor Golding.**

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

Petitioner was convicted by a jury on five counts of an indictment charging him with knowingly and willfully making oral threats "to take the life of or to inflict bodily harm upon the President of the United States," in violation of 18 U. S. C. § 871 (a). The Court of Appeals affirmed, 488 F. 2d 512 (CA5 1974), and we granted certiorari to resolve an apparent conflict among the Courts of Appeals concerning the elements of the offense proscribed by § 871 (a). 419 U. S. 824 (1974). After full briefing and argument, however, we find it unnecessary to reach that question, since certain circumstances of petitioner's trial satisfy us that the conviction must be reversed.

The record reveals that the jury retired for deliberation at 3 p. m. on the second day of petitioner's trial. Approximately two hours later, at 4:55 p. m., the jury sent a note, signed by the foreman, to the trial judge, inquiring whether the court would "accept the Verdict—'Guilty as charged with extreme mercy of the Court.'" Without notifying petitioner or his counsel, the court instructed the marshal who delivered the note "to advise the jury that the Court's answer was in the affirmative."

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

Five minutes later, at 5 p. m., the jury returned, and the record contains the following account of the acceptance of its verdict:

"THE COURT: We understand from a note you sent to the Court the verdict finds him guilty on all five counts but that you wish to recommend extreme mercy; is that correct?

"THE FOREMAN: Yes, Your Honor.

"THE COURT: Will you please poll the jury. (Whereupon the jury was polled and all jurors answered in the affirmative.)

"THE COURT: Let the verdict be entered as the judgment of the Court. Certainly the Court will take into consideration your recommendation of mercy, but before we can act upon the case, we will have the Probation Officer make a pre-sentence investigation report. We do not know whether the man has a prior criminal record or not and we will certainly take into account what you have recommended." 2 Tr. 192–193.[1]

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[1] Petitioner was originally sentenced to five years' imprisonment on each count, subject to the early parole eligibility provisions of 18 U. S. C. § 4208 (a)(2), to be followed by five years' supervised probation on the condition that he join Alcoholics Anonymous. The sentence on the last four counts was to run concurrently and to be suspended during good behavior. Cf. *United States* v. *Davidson,* 367 F. 2d 60, 63 (CA6 1966). It appears from the record that the District Judge sought to use the confinement to afford petitioner an opportunity to be cured of his alcoholism.

At the suggestion of the Court of Appeals, petitioner moved for, and the Government did not oppose, "a reduction of the stringent sentences imposed in the District Court" under Fed. Rule Crim. Proc. 35. The motion was granted, and petitioner's sentence was reduced to three years' imprisonment on each count. Petitioner was released from confinement on December 24, 1974. He remains subject to five years' supervised probation. After argument we were advised by the Solicitor General that on April 7, 1975, peti-

Generally, a recommendation of leniency made by a jury without statutory authorization does not affect the validity of the verdict and may be disregarded by the sentencing judge. See *Cook* v. *United States,* 379 F. 2d 966, 970 (CA5 1967), and cases cited. However, in *Cook,* the Court of Appeals held that an exception to this general rule, requiring further inquiry by the trial court, arises where the circumstances of the recommendation cast doubt upon the unqualified nature of the verdict. Assuming the validity of the exception, we need not decide whether either the factual differences between the recommendation in *Cook* and that in the instant case, or petitioner's failure to request further inquiry prior to the recording of the verdict, see Fed. Rule Crim. Proc. 31 (d), would suffice to distinguish the cases for purposes of appropriate appellate relief. See 8 J. Moore, Federal Practice ¶ 31.07 (2d ed. 1975). We deal here not merely with a potential defect in the verdict.

In *Fillippon* v. *Albion Vein Slate Co.,* 250 U. S. 76 (1919), the Court observed "that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict." *Id.,* at 81. In applying that principle, the Court held that the trial judge in a civil case had "erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction." *Ibid.*

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tioner was arrested on a mandatory release violation warrant (18 U. S. C. § 4164) and was incarcerated pending a revocation hearing.

In *Shields* v. *United States,* 273 U. S. 583 (1927), the Court had occasion to consider the implications of the "orderly conduct of a trial by jury" in a criminal case. The trial judge had replied to a written communication from the jury, indicating its inability to agree as to the guilt or innocence of the defendant, by sending a written direction that it must find the defendant "guilty or not guilty." The communications were not made in open court while the defendant and his counsel were present nor were they advised of them. The jury thereupon found Shields guilty of one count with a recommendation of mercy. This Court held that a previous request by counsel for Shields and the Government that the trial judge hold the jury in deliberation until they had agreed upon a verdict "did not justify exception to the rule of orderly conduct of jury trial entitling the defendant, especially in a criminal case, to be present from the time the jury is impaneled until its discharge after rendering the verdict." *Id.,* at 588–589.

As in *Shields,* the communication from the jury in this case was tantamount to a request for further instructions. However, we need not look solely to our prior decisions for guidance as to the appropriate procedure in such a situation. Federal Rule Crim. Proc. 43 guarantees to a defendant in a criminal trial the right to be present "at every stage of the trial including the impaneling of the jury and the return of the verdict." Cases interpreting the Rule make it clear, if our decisions prior to the promulgation of the Rule left any doubt, that the jury's message should have been answered in open court and that petitioner's counsel should have been given an opportunity to be heard before the trial judge responded. See, *e. g., United States* v. *Schor,* 418 F. 2d 26, 29–30 (CA2 1969); *United States* v. *Glick,* 463 F. 2d 491, 493 (CA2 1972).

Although a violation of Rule 43 may in some circumstances be harmless error, see Fed. Rule Crim. Proc. 52 (a); *United States* v. *Schor, supra,* the nature of the information conveyed to the jury, in addition to the manner in which it was conveyed, does not permit that conclusion in this case. The trial judge should not have confined his response to the jury's inquiry to an indication of willingness to accept a verdict with a recommendation of "extreme mercy." At the very least, the court should have reminded the jury that the recommendation would not be binding in any way. But see *United States* v. *Davidson,* 367 F. 2d 60 (CA6 1966).[2] In addition, the response should have included the admonition that the jury had no sentencing function and should reach its verdict without regard to what sentence might be imposed. See *United States* v. *Louie Gim Hall,* 245 F. 2d 338 (CA2 1957); *United States* v. *Glick, supra,* at 494. Cf. *United States* v. *Patrick,* 161 U. S. App. D. C. 231, 494 F. 2d 1150 (1974).

The fact that the jury, which had been deliberating for almost two hours without reaching a verdict, returned a verdict of "guilty with extreme mercy" within five minutes "after being told unconditionally and unequivocally that it could recommend leniency," *United States* v. *Glick, supra,* at 495, strongly suggests that the trial judge's response may have induced unanimity by giving members of the jury who had previously hesitated about reaching a guilty verdict the impression that the recommendation might be an acceptable compromise. We acknowledge that the comments of the trial judge

[2] As in *Davidson,* 367 F. 2d, at 63, the trial court's response was inconsistent with the instruction in the general charge that "punishment . . . is a matter exclusively within the province of the Court and is not to be considered by the jury in arriving at an impartial verdict . . . ." 2 Tr. 190.

upon receiving the verdict may be said to have put petitioner's counsel on notice that the jury had communicated with the court, but the only indication that the court had unilaterally communicated with the jury comes from the note itself, which the court correctly ordered to be filed in the record, with a notation as to the time of receipt and the court's response. It appears, however, that petitioner's counsel was not aware of the court's communication until after we granted the petition for certiorari. In such circumstances, and particularly in light of the difficult task of the factfinder in a prosecution under § 871 (a), see *Watts* v. *United States,* 394 U. S. 705 (1969), we conclude that the combined effect of the District Court's errors was so fraught with potential prejudice as to require us to notice them notwithstanding petitioner's failure to raise the issue in the Court of Appeals or in this Court. *Silber* v. *United States,* 370 U. S. 717 (1962); *Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 411–412 (1947). Cf. *United States* v. *Davidson,* 367 F. 2d, at 63.

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

Reversed and remanded.

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

George Rogers, a 34-year-old unemployed carpenter with a 10-year history of alcoholism, wandered into the coffee shop of a Holiday Inn in Shreveport, La., early one morning, behaving in a loud and obstreperous manner. He accosted several customers and waitresses, telling them, among other things, that he was Jesus Christ and that he was opposed to President Nixon's visiting China because the Chinese had a bomb that only

he knew about, which might be used against the people of this country. In the course of his various outbursts, Rogers announced that he was going to go to Washington to "whip Nixon's ass," or to "kill him in order to save the United States."

The local police were soon called to remove Rogers from the Holiday Inn. When the arresting officer arrived, he asked Rogers whether he had threatened the President. Rogers replied that he didn't like the idea of the President's going to China and making friends with the Chinese, our enemies. He told the officer, "I'm going to Washington and I'm going to beat his ass off. Better yet, I will go kill him." Rogers added that he intended to "walk" to Washington because he didn't like cars. Rogers was not charged with any state-law crimes, but the police reported the incident to a local Secret Service agent, who subsequently had petitioner arrested on a federal warrant.

This sad set of circumstances resulted in a five-count indictment under the "threats against the President" statute, 18 U. S. C. § 871 (a). After a jury trial, petitioner was convicted under that statute and sentenced to five years' imprisonment, to be followed by five years of supervised probation. The Court of Appeals for the Fifth Circuit affirmed petitioner's conviction in a brief *per curiam* opinion, holding that the District Court had properly instructed the jury under § 871, and that the evidence against petitioner was sufficient to sustain a conviction under that statute as properly construed.

After we granted certiorari, and after the petitioner's brief was filed here, the Solicitor General confessed error, but on a point that had not been raised either here, in the Court of Appeals, or at trial. The Court today seizes on that point to reverse the conviction, leaving unresolved the issue that we granted certiorari to consider. Al-

though I do not disagree with the Court's treatment of the question on which it bases its reversal today, I would reach the merits and reverse petitioner's conviction on the grounds pressed in the Court of Appeals and in the petition for certiorari.

I

The District Court and the Court of Appeals adopted what has been termed the "objective" construction of the statute. This interpretation of § 871 originated with the early case of *Ragansky* v. *United States,* 253 F. 643 (CA7 1918), and it has been adopted by a majority of the Courts of Appeals,[1] even though this Court has expressed "grave doubts" as to its correctness. *Watts* v. *United States,* 394 U. S. 705, 707 (1969). As applied in *Ragansky* and later cases, this construction would support the conviction of anyone making a statement that would reasonably be understood as a threat, see *Roy* v. *United States,* 416 F. 2d 874, 877 (CA9 1969), as long as the defendant intended to make the statement and knew the meaning of the words used, see *Ragansky* v. *United States, supra,* at 645.

The District Court charged the jury in accordance with the "objective construction." The jury was instructed in effect that it was not required to find that the petitioner actually intended to kill or injure the President, or even that he made a statement that he thought might be taken as a serious threat. Instead, the jury was permitted to convict on a showing merely that

[1] See *United States* v. *Lincoln,* 462 F. 2d 1368 (CA6), cert. denied, 409 U. S. 952 (1972); *United States* v. *Hart,* 457 F. 2d 1087 (CA10), cert. denied, 409 U. S. 861 (1972); *United States* v. *Compton,* 428 F. 2d 18 (CA2 1970), cert. denied, 401 U. S. 1014 (1971); *Roy* v. *United States,* 416 F. 2d 874 (CA9 1969); *Watts* v. *United States,* 131 U. S. App. D. C. 125, 402 F. 2d 676 (1968), rev'd on other grounds, 394 U. S. 705 (1969). Contra: *United States* v. *Patillo,* 438 F. 2d 13 (CA4 1971) (en banc).

a reasonable man in petitioner's place would have foreseen that the statements he made would be understood as indicating a serious intention to commit the act.[2] In addition, the court charged that the jury could find petitioner guilty if his statements evinced "an apparent determination to carry out the threat." 2 Tr. 177. In my view, this construction of § 871 is too broad.

In *Watts,* we observed that giving § 871 an expansive construction would create a substantial risk that crude, but constitutionally protected, speech might be criminalized. The petitioner there had been convicted for telling a small group at a political rally: "If they ever make me carry a rifle the first man I want to get in my sights is L. B. J." We held that the statement, even if "willfully and knowingly" made, was not a true "threat" but merely a form of political hyperbole. Applying the statute with an eye to the danger of encroaching on constitutionally protected speech, we held that the comment in *Watts* fell outside the reach of the statute as a matter of law. Although the petitioner in the present case was not at a political rally or engaged in formal political discussion, the same concern counsels against permitting the statute such a broad construction that there is a substantial risk of conviction for a merely crude or careless expression of political enmity.

II

Both the legislative history and the purposes of the statute are inconsistent with the "objective" construction of § 871 and suggest that a narrower view of the statute is proper.

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[2] The District Court drew its definitions of "knowingly," and "willfully" from *Ragansky* v. *United States,* 253 F. 643 (CA7 1918), and supplemented that definition with language taken directly from *Roy* v. *United States, supra.*

A

The statute was enacted in 1917 without extensive discussion. Only in the House debates is there any hint of the scope that the sponsors intended for the Act. When it was suggested that the word "willfully" be removed from the bill, Representative Volstead objected, stating that in his view, "[t]he word 'willfully' adds an intention to threaten, and distinguishes a case [in which the defendant does not intend to convey any threat]." Without the requirement of willfulness, he said, "a person might send innocently, without any intention to convey a threat at all, an instrument to a friend that contained a threat, and he would be guilty . . . ." 53 Cong. Rec. 9378 (1916). Arguing—successfully, as it turned out—that the word "willfully" should be left in the statute, the Congressman emphasized the importance of the subjective intention to threaten:

> "[I]f this statute is to be saved at all, it seems to me it must be upon the theory that the act is willful. There is not anything in the language outside of that word to convey the idea that a threat must be an intentional threat against the President. The word 'willful' conveys, as ordinarily used, the idea of wrongful as well as intentional. That idea ought to be preserved so as not to make innocent acts punishable." *Id.*, at 9379.

Representative Webb, the only other Congressman to comment about this issue on the House floor, also understood it to require specific intent. He read it at least as restrictively as did Representative Volstead:

> "If you make it a mere technical offense, you do not give him much of a chance when he comes to answer before a court and jury. I do not think we ought to be too anxious to convict a man who does

a thing thoughtlessly. I think it ought to be a willful expression of an intent to carry out a threat against the Executive . . . ." *Id.*, at 9378.[3]

The sponsors thus rather plainly intended the bill to require a showing that the defendant appreciated the threatening nature of his statement and intended at least to convey the impression that the threat was a serious one. The danger of making § 871 a mere "technical offense" or making "innocent acts punishable" was clear to the sponsors of the Act; their concerns should continue to inform the application of the statute today.

B

The Government argues that only the objective construction of § 871 is consistent with the purposes the statute was intended to serve. In *Watts*, the Government notes, we identified the interests advanced by the statute as being both "protecting the safety of [the] Chief Executive and . . . allowing him to perform his duties without interference from threats of physical violence." 394 U. S., at 707. I adhere to that statement of the purpose of the statute; I simply do not agree that the objective construction is the necessary or even the natural means of achieving that purpose.

Plainly, threats may be costly and dangerous to society in a variety of ways, even when their authors have no

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[3] Representative Webb may have intended an even narrower construction of the statute, as he began his remarks by commenting, "I think it must be a willful intent to do serious injury to the President." 53 Cong. Rec., at 9378. His subsequent comments made it somewhat unclear whether he meant that the threat must be accompanied by a present intention to injure the President, or simply that the threat must be intended to convey an apparent intention to do so. In any event, he clearly agreed with Representative Volstead that the statute was not to reach statements not intended to be threatening in character.

intention whatever of carrying them out. Like a threat to blow up a building, a serious threat on the President's life is enormously disruptive and involves substantial costs to the Government. A threat made with no present intention of carrying it out may still restrict the President's movements and require a reaction from those charged with protecting the President. Because § 871 was intended to prevent not simply attempts on the President's life, but also the harm associated with the threat itself, I believe that the statute should be construed to proscribe all threats that the speaker intends to be interpreted as expressions of an intent to kill or injure the President. This construction requires proof that the defendant intended to make a threatening statement, and that the statement he made was in fact threatening in nature. Under the objective construction by contrast, the defendant is subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker's intention. In essence, the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners. We have long been reluctant to infer that a negligence standard was intended in criminal statutes, see *Morissette* v. *United States,* 342 U. S. 246 (1952); we should be particularly wary of adopting such a standard for a statute that regulates pure speech. See *Abrams* v. *United States,* 250 U. S. 616, 626–627 (1919) (Holmes, J., dissenting).

If § 871 has any deterrent effect, that effect is likely to work only as to statements intended to convey a threat. Statements deemed threatening in nature only upon "objective" consideration will be deterred only if persons criticizing the President are careful to give a wide berth to any comment that might be construed as threatening in nature. And that degree of deterrence

would have substantial costs in discouraging the "uninhibited, robust, and wide-open" debate that the First Amendment is intended to protect. *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964).

I would therefore interpret § 871 to require proof that the speaker intended his statement to be taken as a threat, even if he had no intention of actually carrying it out. The proof of intention would, of course, almost certainly turn on the circumstances under which the statement was made: if a call were made to the White House threatening an attempt on the President's life within an hour, for example, the caller might well be subject to punishment under the statute, even though he was calling from Los Angeles at the time and had neither the purpose nor the means to carry out the threat. But to permit the jury to convict on no more than a showing that a reasonably prudent man would expect his hearers to take his threat seriously is to impose an unduly stringent standard in this sensitive area.

Under the narrower construction of § 871, the jury in this case might well have acquitted, concluding that it was unlikely that Rogers actually intended or expected that his listeners would take his threat as a serious one. Because I think that the District Court's misconstruction of the statute prejudiced petitioner in this case and may continue to do mischief in future prosecutions brought under § 871, I would reverse on this ground rather than on the Solicitor General's confession of error.

RONDEAU v. MOSINEE PAPER CORP.

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

No. 74-415. Argued April 15, 1975—Decided June 17, 1975

Respondent corporation brought this action against petitioner to enjoin him from voting or pledging his stock in respondent and from acquiring additional shares, and to require him to divest himself of the stock that he already owned. Respondent claimed that the failure of petitioner, who had acquired more than 5% of respondent's stock, to make timely disclosure as required by § 13 (d) of the Securities Exchange Act of 1934, as added by the Williams Act, was a scheme to defraud respondent and its stockholders. Petitioner, who had filed the disclosure schedule about three months after the statutory filing time, contended that the Williams Act violation, which he readily conceded, resulted from his lack of familiarity with the securities laws, and that neither respondent nor its shareholders had been harmed. The District Court granted petitioner's motion for summary judgment, having found no material issues of fact regarding petitioner's lack of willfulness in failing to make a timely filing and no basis in the record for disputing petitioner's claim that he first considered the possibility of obtaining control of respondent sometime after he discovered his filing obligation. It concluded that respondent had suffered no cognizable harm from the late filing and that this was not an appropriate case in which to grant injunctive relief. The Court of Appeals reversed, concluding that respondent was harmed by having been delayed in its efforts to respond to petitioner's potential to obtain control of the company but that, in any event, respondent was not required to show irreparable harm as a prerequisite to obtaining permanent injunctive relief since, as the securities' issuer, respondent was in the best position to assure that § 13 (d)'s filing requirements were being timely and fully complied with. *Held:* A showing of irreparable harm, in accordance with traditional principles of equity, is necessary before a private litigant can obtain injunctive relief based upon § 13 (d) of the Securities Exchange Act. Pp. 57-65.

(a) The Court of Appeals erred in concluding that respondent suffered "harm" because of petitioner's technical default, since

petitioner has not attempted to obtain control of respondent, has now made proper disclosure, and has given no indication that he will not report any material changes in his disclosure schedule. Pp. 58–59.

(b) Persons who allegedly sold their stock to petitioner at unfairly depressed predisclosure prices have adequate remedies by an action for damages, and those who would not have invested, had they thought a takeover bid was imminent, are not threatened with injury. Pp. 59–60.

(c) The District Court was entirely correct in insisting that respondent satisfy the traditional prerequisites of extraordinary equitable relief by establishing irreparable harm, and its conclusions that petitioner acted in good faith and promptly filed a disclosure schedule when he became aware of his obligation to do so support the exercise of that court's sound judicial discretion to deny the application for an injunction, relief that is historically "designed to deter, not to punish." *Hecht Co.* v. *Bowles,* 321 U. S. 321, 329. Pp. 60–62.

(d) Respondent is not relieved of the burden of establishing those prerequisites simply because it is asserting a so-called implied private right of action under § 13 (d). Pp. 62–65.

500 F. 2d 1011, reversed and remanded.

Burger, C. J., delivered the opinion of the Court, in which Stewart, White, Blackmun, Powell, and Rehnquist, JJ., joined. Brennan, J., filed a dissenting opinion, in which Douglas, J., joined, *post,* p. 65. Marshall, J., dissented.

David E. Beckwith argued the cause for petitioner. With him on the briefs were *Maurice J. McSweeney* and *Richard H. Porter.*

Laurence C. Hammond, Jr., argued the cause for respondent. With him on the brief was *James A. Urdan.*

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

We granted certiorari in this case to determine whether a showing of irreparable harm is necessary for a private litigant to obtain injunctive relief in a suit

under § 13 (d) of the Securities Exchange Act of 1934, 48 Stat. 894, as added by § 2 of the Williams Act, 82 Stat. 454, as amended, 84 Stat. 1497, 15 U. S. C. § 78m (d). 419 U. S. 1067 (1974). The Court of Appeals held that it was not. 500 F. 2d 1011 (CA7 1974). We reverse.

I

Respondent Mosinee Paper Corp. is a Wisconsin company engaged in the manufacture and sale of paper, paper products, and plastics. Its principal place of business is located in Mosinee, Wis., and its only class of equity security is common stock which is registered under § 12 of the Securities Exchange Act of 1934, 15 U. S. C. § 78*l*. At all times relevant to this litigation there were slightly more than 800,000 shares of such stock outstanding.

In April 1971 petitioner Francis A. Rondeau, a Mosinee businessman, began making large purchases of respondent's common stock in the over-the-counter market. Some of the purchases were in his own name; others were in the name of businesses and a foundation known to be controlled by him. By May 17, 1971, petitioner had acquired 40,413 shares of respondent's stock, which constituted more than 5% of those outstanding. He was therefore required to comply with the disclosure provisions of the Williams Act,[1] by filing a Schedule 13D

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[1] The Williams Act added § 13 (d) to the Securities Exchange Act of 1934, which has been further amended to provide in relevant part:

"(d) (1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l* (g) (2) (G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum

with respondent and the Securities and Exchange Commission within 10 days. That form would have disclosed, among other things, the number of shares bene-

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of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors—

"(A) the background and identity of all persons by whom or on whose behalf the purchases have been or are to be effected;

"(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c (a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

"(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

"(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the name and address of each such associate; and

"(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings

ficially owned by petitioner, the source of the funds used to purchase them, and petitioner's purpose in making the purchases.

Petitioner did not file a Schedule 13D but continued to purchase substantial blocks of respondent's stock. By July 30, 1971, he had acquired more than 60,000 shares. On that date the chairman of respondent's board of directors informed him by letter that his activity had "given rise to numerous rumors" and "seems to have created some problems under the Federal Securities Laws . . . ." Upon receiving the letter petitioner immediately stopped placing orders for respondent's stock and consulted his attorney.[2] On August 25, 1971, he filed a Schedule 13D which, in addition to the other required disclosures, described the "Purpose of Transaction" as follows:

> "Francis A. Rondeau determined during early part of 1971 that the common stock of the Issuer [respondent] was undervalued in the over-the-counter market and represented a good investment vehicle for future income and appreciation. Francis A. Rondeau and his associates presently propose to seek to acquire additional common stock of the Issuer in order to obtain effective control of the Issuer, but such investments as originally determined were and are not necessarily made with this objective in mind. Consideration is currently being given to making a

have been entered into, and giving the details thereof." 82 Stat. 454, as amended, 15 U. S. C. § 78m (d) (1).

The Commission requires the purpose of the transaction to be disclosed in every Schedule 13D, regardless of an intention to acquire control and make major changes in its structure. See 17 CFR §§ 240.13d-1, 240.13d-101 (1974).

[2] Although some outstanding orders were filled after July 30, 1971, petitioner placed no new orders for respondent's stock after that date.

public cash tender offer to the shareholders of the Issuer at a price which will reflect current quoted prices for such stock with some premium added."

Petitioner also stated that, in the event that he did obtain control of respondent, he would consider making changes in management "in an effort to provide a Board of Directors which is more representative of all of the shareholders, particularly those outside of present management . . . ." One month later petitioner amended the form to reflect more accurately the allocation of shares between himself and his companies.

On August 27 respondent sent a letter to its shareholders informing them of the disclosures in petitioner's Schedule 13D.[3] The letter stated that by his "tardy filing" petitioner had "withheld the information to which you [the shareholders] were entitled for more than two months, in violation of federal law." In addition, while agreeing that "recent market prices have not reflected the real value of your Mosinee stock," respondent's management could "see little in Mr. Rondeau's background that would qualify him to offer any meaningful guidance to a Company in the highly technical and competitive paper industry."

Six days later respondent initiated this suit in the United States District Court for the Western District of Wisconsin. Its complaint named petitioner, his companies, and two banks which had financed some of petitioner's purchases as defendants and alleged that they were engaged in a scheme to defraud respondent and its shareholders in violation of the securities laws. It alleged further that shareholders who had "sold shares without

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[3] Respondent simultaneously issued a press release containing the same information. Almost immediately the price of its stock jumped to $19–$21 per share. A few days later it dropped back to the prevailing price of $12.50–$14 per share, where it remained.

the information which defendants were required to disclose lacked information material to their decision whether to sell or hold," and that respondent "was unable to communicate such information to its stockholders, and to take such actions as their interest required." Respondent prayed for an injunction prohibiting petitioner and his codefendants from voting or pledging their stock and from acquiring additional shares, requiring them to divest themselves of stock which they already owned, and for damages. A motion for a preliminary injunction was filed with the complaint but later withdrawn.

After three months of pretrial proceedings petitioner moved for summary judgment. He readily conceded that he had violated the Williams Act, but contended that the violation was due to a lack of familiarity with the securities laws and that neither respondent nor its shareholders had been harmed. The District Court agreed. It found no material issues of fact to exist regarding petitioner's lack of willfulness in failing to timely file a Schedule 13D, concluding that he discovered his obligation to do so on July 30, 1971,[4] and that there was no basis in the record for disputing his claim that he first considered the possibility of obtaining control of respondent some time after that date. The District Court therefore held that petitioner and his codefendants "did not engage in intentional covert, and conspiratorial conduct in failing to timely file the 13D Schedule." [5]

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[4] The District Court pointed out that prior to December 10, 1970, a Schedule 13D was not required until a person's holdings exceeded 10% of a corporation's outstanding equity securities, see Pub. L. 91-567, 84 Stat. 1497, and credited petitioner's testimony that he believed the 10% requirement was still in effect at the time he made his purchases. Indeed, the chairman of respondent's board of directors was not familiar with the Williams Act's filing requirement until shortly before he sent the July 30, 1971, letter.

[5] The District Court also concluded that respondent's management was not unaware of petitioner's activities with respect to its

Similarly, although accepting respondent's contention that its management and shareholders suffered anxiety as a result of petitioner's activities and that this anxiety was exacerbated by his failure to disclose his intentions until August 1971, the District Court concluded that similar anxiety "could be expected to accompany any change in management," and was "a predictable consequence of shareholder democracy." It fell far short of the irreparable harm necessary to support an injunction and no other harm was revealed by the record; as amended, petitioner's Schedule 13D disclosed all of the information to which respondent was entitled, and he had not proceeded with a tender offer. Moreover, in the view of the District Court even if a showing of irreparable harm were not required in all cases under the securities laws, petitioner's lack of bad faith and the absence of damage to respondent made this "a particularly inappropriate occasion to fashion equitable relief . . . ." Thus, although petitioner had committed a technical violation of the Williams Act, the District Court held that respondent was entitled to no relief and entered summary judgment against it.[6]

The Court of Appeals reversed, with one judge dissenting. The majority stated that it was "giving effect" to the District Court's findings regarding the circumstances of petitioner's violation of the Williams Act,[7] but

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stock. It found that by July 1971, there was considerable "street talk" among brokers, bankers, and businessmen regarding his purchases and that the chairman of respondent's board had been monitoring them.

[6] The District Court also dismissed respondent's claims that petitioner had violated other provisions of the securities laws. Review of these rulings was not sought in the Court of Appeals, and they are not now before us.

[7] The Court of Appeals also agreed with the District Court that the disclosures in petitioner's amended Schedule 13D were adequate.

concluded that those findings showed harm to respondent because it "was delayed in its efforts to make any necessary response to" petitioner's potential to take control of the company. In any event, the majority was of the view that respondent "need not show irreparable harm as a prerequisite to obtaining permanent injunctive relief in view of the fact that as issuer of the securities it is in the best position to assure that the filing requirements of the Williams Act are being timely and fully complied with and to obtain speedy and forceful remedial action when necessary." 500 F. 2d, at 1016–1017. The Court of Appeals remanded the case to the District Court with instructions that it enjoin petitioner and his codefendants from further violations of the Williams Act and from voting the shares purchased between the due date of the Schedule 13D and the date of its filing for a period of five years. It considered "such an injunctive decree appropriate to neutralize [petitioner's] violation of the Act and to deny him the benefit of his wrongdoing." *Id.,* at 1017.

We granted certiorari to resolve an apparent conflict among the Courts of Appeals and because of the importance of the question presented to private actions under the federal securities laws. We disagree with the Court of Appeals' conclusion that the traditional standards for extraordinary equitable relief do not apply in these circumstances, and reverse.

II

As in the District Court and the Court of Appeals, it is conceded here that petitioner's delay in filing the Schedule 13D constituted a violation of the Williams Act. The narrow issue before us is whether this record supports the grant of injunctive relief, a remedy whose basis "in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres, Inc.* v. *Westover,* 359 U. S. 500, 506–507 (1959).

The Court of Appeals' conclusion that respondent suffered "harm" sufficient to require sterilization of petitioner's stock need not long detain us. The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party.[8] By requiring disclosure of information to the target corporation as well as the Securities and Exchange Commission, Congress intended to do no more than give incumbent management an opportunity to express and explain its position. The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts. Indeed, the Act's draftsmen commented upon the "extreme care" which was taken "to avoid tipping the balance of regulation either in favor

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[8] The Senate Report describes the dilemma facing such a shareholder as follows:

"He has many alternatives. He can tender all of his shares immediately and hope they are all purchased. However, if the offer is for less than all the outstanding shares, perhaps only a part of them will be taken. In these instances, he will remain a shareholder in the company, under a new management which he has helped to install without knowing whether it will be good or bad for the company.

"The shareholder, as another alternative, may wait to see if a better offer develops, but if he tenders late, he runs the risk that none of his shares will be taken. He may also sell his shares in the market or hold them and hope for the best. Without knowledge of who the bidder is and what he plans to do, the shareholder cannot reach an informed decision." S. Rep. No. 550, 90th Cong., 1st Sess., 2 (1967).

However, the Report also recognized "that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management." *Id.*, at 3.

of management or in favor of the person making the takeover bid." S. Rep. No. 550, 90th Cong., 1st Sess., 3 (1967); H. R. Rep. No. 1711, 90th Cong., 2d Sess., 4 (1968). See also *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F. 2d 937, 947 (CA2 1969).

The short of the matter is that none of the evils to which the Williams Act was directed has occurred or is threatened in this case. Petitioner has not attempted to obtain control of respondent, either by a cash tender offer or any other device. Moreover, he has now filed a proper Schedule 13D, and there has been no suggestion that he will fail to comply with the Act's requirement of reporting any material changes in the information contained therein.[9] 15 U. S. C. § 78m (d)(2); 17 CFR § 240.13d-2 (1974). On this record there is no likelihood that respondent's shareholders will be disadvantaged should petitioner make a tender offer, or that respondent will be unable to adequately place its case before them should a contest for control develop. Thus, the usual basis for injunctive relief, "that there exists some cognizable danger of recurrent violation," is not present here. *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953). See also *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82 (1902).

Nor are we impressed by respondent's argument that an injunction is necessary to protect the interests of its shareholders who either sold their stock to petitioner at predisclosure prices or would not have invested had they known that a takeover bid was imminent. Brief for

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[9] Because this case involves only the availability of injunctive relief to remedy a § 13 (d) violation following compliance with the reporting requirements, it does not require us to decide whether or under what circumstances a corporation could obtain a decree enjoining a shareholder who is currently in violation of § 13 (d) from acquiring further shares, exercising voting rights, or launching a takeover bid, pending compliance with the reporting requirements.

Respondent 13, 20–21. As observed, the principal object of the Williams Act is to solve the dilemma of shareholders desiring to respond to a cash tender offer, and it is not at all clear that the type of "harm" identified by respondent is redressable under its provisions. In any event, those persons who allegedly sold at an unfairly depressed price have an adequate remedy by way of an action for damages, thus negating the basis for equitable relief.[10] See *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 595 (1952) (Frankfurter, J., concurring). Similarly, the fact that the second group of shareholders for whom respondent expresses concern have retained the benefits of their stock and the lack of an imminent contest for control make the possibility of damage to them remote at best. See *Truly* v. *Wanzer,* 5 How. 141, 142–143 (1847).

We turn, therefore, to the Court of Appeals' conclusion that respondent's claim was not to be judged according to traditional equitable principles, and that the bare fact that petitioner violated the Williams Act justified entry of an injunction against him. This position would seem to be foreclosed by *Hecht Co.* v. *Bowles,* 321 U. S. 321 (1944). There, the administrator of the Emergency Price Control Act of 1942 brought suit to redress violations of that statute. The fact of the violations was admitted, but the District Court declined to enter an injunction because they were inadvertent and the defendant had taken immediate steps to rectify them. This Court held that such an exercise of equitable discretion was proper despite § 205 (a) of the Act, 56 Stat. 23, 50

[10] The Court was advised by respondent that such a suit is now pending in the District Court and class action certification has been sought. Although we intimate no views regarding the merits of that case, it provides a potential sanction for petitioner's violation of the Williams Act.

U. S. C. App. § 925 (a) (1940 ed., Supp. II), which provided that an injunction or other order "shall be granted" upon a showing of violation, observing:

> "We are dealing here with the requirements of equity practice with a background of several hundred years of history. . . . *The historic injunctive process was designed to deter, not to punish.* The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied." 321 U. S., at 329–330. (Emphasis added.)

This reasoning applies *a fortiori* to actions involving only "competing private claims," and suggests that the District Court here was entirely correct in insisting that respondent satisfy the traditional prerequisites of extraordinary equitable relief by establishing irreparable harm. Moreover, the District Judge's conclusions that petitioner acted in good faith and that he promptly filed a Schedule 13D when his attention was called to this obligation [11] support the exercise of the court's sound judicial

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[11] In its brief on the merits respondent argues that "genuine issues of material fact exist as to the knowledge, motives, purposes and plans in [petitioner's] rapid acquisition of" its stock and that, at the very least, the case should be remanded for trial on these issues. This point was not raised in the petition for certiorari or respondent's opposition thereto, nor was it made the subject of a cross-petition. Because it would alter the judgment of the Court of Appeals, which like that of the District Court had effectively put

discretion to deny an application for an injunction, relief which is historically "designed to deter, not to punish" and to permit the court "to mould each decree to the necessities of the particular case." *Id.*, at 329. As MR. JUSTICE DOUGLAS aptly pointed out in *Hecht Co.*, the "grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances." *Ibid.* (emphasis in original).

Respondent urges, however, that the "public interest" must be taken into account in considering its claim for relief and relies upon the Court of Appeals' conclusion that it is entitled to an injunction because it "is in the best position" to insure that the Williams Act is complied with by purchasers of its stock. This argument misconceives, we think, the nature of the litigation. Although neither the availability of a private suit under the Williams Act nor respondent's standing to bring it has been questioned here, this cause of action is not expressly authorized by the statute or its legislative history. Rather, respondent is asserting a so-called implied private right of action established by cases such as *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964). Of course, we have not hesitated to recognize the power of federal courts to fashion private remedies for securities laws violations when to do so is consistent with the legislative scheme and necessary for the protection of investors as a supplement to enforcement by the Securities and Exchange Commission. Compare *J. I. Case Co.* v. *Borak*, *supra*, with *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412

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an end to the litigation, rather than providing an alternative ground for affirming it, we will not consider the argument when raised in this manner. See *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 381 n. 4 (1970); *Morley Constr. Co.* v. *Maryland Cas. Co.*, 300 U. S. 185, 191–192 (1937). Cf. *Wiener* v. *United States*, 357 U. S. 349, 351 n. (1958).

(1975). However, it by no means follows that the plaintiff in such an action is relieved of the burden of establishing the traditional prerequisites of relief. Indeed, our cases hold that quite the contrary is true.

In *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282 (1940), this Court was called upon to decide whether the Securities Act of 1933 authorized purchasers of securities to bring an action to rescind an allegedly fraudulent sale. The question was answered affirmatively on the basis of the statute's grant of federal jurisdiction to "enforce any liability or duty" created by it. The Court's reasoning is instructive:

> "The power *to enforce* implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case. If petitioners' bill states a cause of action when tested by the customary rules governing suits of such character, the Securities Act authorizes maintenance of the suit . . . ." 311 U. S., at 288.

In other words, the conclusion that a private litigant could maintain an action for violation of the 1933 Act meant no more than that traditional remedies were available to redress any harm which he may have suffered; it provided no basis for dispensing with the showing required to obtain relief. Significantly, this passage was relied upon in *Borak* with respect to actions under the Securities Exchange Act of 1934. See 377 U. S., at 433–434.

Any remaining uncertainty regarding the nature of relief available to a person asserting an implied private right of action under the securities laws was resolved in *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970).

There we held that complaining shareholders proved their case under § 14 (a) of the 1934 Act by showing that misleading statements in a proxy solicitation were material and that the solicitation itself "was an essential link in the accomplishment of" a merger. We concluded that any stricter standard would frustrate private enforcement of the proxy rules, but Mr. Justice Harlan took pains to point out:

> "Our conclusion that petitioners have established their case by showing that proxies necessary to approval of the merger were obtained by means of a materially misleading solicitation implies nothing about the form of relief to which they may be entitled. . . . In devising retrospective relief for violation of the proxy rules, the federal courts should consider the same factors that would govern the relief granted for any similar illegality or fraud. . . . In selecting a remedy the lower courts should exercise " 'the sound discretion which guides the determinations of courts of equity,' " keeping in mind the role of equity as 'the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' " 396 U. S., at 386, quoting *Hecht Co.* v. *Bowles,* 321 U. S., at 329.

Considering further the remedies which might be ordered, we observed that "the merger should be set aside only if a court of equity concludes, from all the circumstances, that it would be equitable to do so," and that "damages should be recoverable only to the extent that they can be shown." 396 U. S., at 388, 389.

Mills could not be plainer in holding that the questions of liability and relief are separate in private actions under the securities laws, and that the latter is to be determined according to traditional principles. Thus, the fact

that respondent is pursuing a cause of action which has been generally recognized to serve the public interest provides no basis for concluding that it is relieved of showing irreparable harm and other usual prerequisites for injunctive relief. Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to it with directions to reinstate the judgment of the District Court.

So ordered.

MR. JUSTICE MARSHALL dissents.

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

I dissent. Judge Pell, dissenting below, correctly in my view, read the decision of the Court of Appeals to construe the Williams Act, as I also construe it, to authorize injunctive relief upon the application of the management interests "irrespective of motivation, irrespective of irreparable harm to the corporation, and irrespective of whether the purchases were detrimental to investors in the company's stock. The violation timewise is . . . all that is needed to trigger this result." 500 F. 2d 1011, 1018 (CA7 1974). In other words, the Williams Act is a prophylactic measure conceived by Congress as necessary to effect the congressional objective "that investors and management be notified at the earliest possible moment of the potential for a shift in corporate control." *Id.*, at 1016. The violation itself establishes the actionable harm and no showing of other harm is necessary to secure injunctive relief. Today's holding completely undermines the congressional purpose to preclude inquiry into the results of the violation.

CORT ET AL. v. ASH

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

No. 73-1908. Argued March 18, 1975—Decided June 17, 1975

Respondent stockholder brought this action seeking damages in favor of petitioner Bethlehem Steel Corp., a Delaware corporation, and injunctive relief because of advertisements in connection with the 1972 Presidential election that petitioner corporate directors had authorized from general corporate funds in alleged violation of 18 U. S. C. § 610, which prohibits corporations from making contributions or expenditures in connection with specified federal elections. Respondent alleged jurisdiction under 28 U. S. C. § 1331 and sought to state a private claim for relief under 18 U. S. C. § 610, and also invoked pendent jurisdiction for an *ultra vires* claim under Delaware law. The District Court's denial of a preliminary injunction was upheld on appeal, following which respondent dropped the pendent claim rather than post security for expenses under state law before proceeding with that claim. The District Court then granted petitioners' motion for summary judgment. The Court of Appeals reversed, holding that the passage of the election had not mooted the case since damages were sought and that "a private cause of action, whether brought by a citizen to secure injunctive relief or by a stockholder to secure injunctive or derivative damage relief [is] proper to remedy violation of § 610." After the Court of Appeals decision Congress enacted the Federal Election Campaign Act Amendments of 1974 (hereinafter the Amendments), under which, *inter alia,* the Federal Election Commission can receive citizen complaints of statutory violations and where warranted request the Attorney General to seek injunctive action. *Held:*

1. The Amendments constitute an intervening law that relegates to the Commission's cognizance respondent's complaint as citizen or stockholder for injunctive relief against any alleged violations of § 610 in future elections, since this Court must examine this case according to the law existing at the time of its decision. *United States* v. *Schooner Peggy,* 1 Cranch 103, 110; *Bradley* v. *Richmond School Board,* 416 U. S. 696, 711. Pp. 74-77.

2. Respondent stockholder's derivative suit with regard to the alleged 1972 violation cannot be implied under 18 U. S. C. § 610, and respondent's remedy, if any, must be under Delaware's corporation law. Pp. 77–85.

(a) Section 610 was primarily concerned, not with the internal relations between corporations and stockholders, but with corporations as a source of aggregated wealth and therefore of potential corrupting influence; thus this statute differs from other criminal statutes in which private causes of action have been inferred because of a clearly articulated federal right in the plaintiff, *e. g., Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U. S. 388, or a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard, *e. g., J. I. Case Co.* v. *Borak,* 377 U. S. 426. Pp. 78–82.

(b) The legislative history of § 610 suggests no congressional intention to vest in corporate shareholders a federal right to damages for a violation of the statute. Pp. 82–84.

(c) A private remedy would not further the statutory purpose of dulling corporate influence on federal elections since any compelled repayment to the corporation might well not deter the initial violation. P. 84.

(d) The cause of action is one traditionally relegated to state law in an area of primarily state concern. In addition to the *ultra vires* claim urged by respondent the alleged misuse of corporate funds might, under the law of some States, give rise to a cause of action for breach of a fiduciary duty. Pp. 84–85.

496 F. 2d 416, reversed.

BRENNAN, J., delivered the opinion for a unanimous Court.

Edwin P. Rome argued the cause for petitioners. With him on the briefs were *Jerome R. Richter, Richard P. McElroy, William H. Roberts,* and *Curtis H. Barnette.*

David Berger argued the cause for respondent. With him on the brief were *Cletus P. Lyman* and *Paul J. McMahon.**

**Solicitor General Bork, Acting Assistant Attorney General Keeney,*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

There are other questions, but the principal issue presented for decision is whether a private cause of action for damages against corporate directors is to be implied in favor of a corporate stockholder under 18 U. S. C. § 610, a criminal statute prohibiting corporations from making "a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors . . . are to be voted for."[1] We con-

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and *Jerome M. Feit* filed a brief for the United States as *amicus curiae*.

James F. Rill, Thomas F. Shannon, John Hardin Young, Milton A. Smith, and *Lawrence B. Kraus* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

Alan B. Morrison and *Reuben B. Robertson III* filed a brief for Judith Bonderman et al. as *amici curiae* urging affirmance.

[1] Title 18 U. S. C. § 610 (1970 ed. and Supp. III) provided in part as follows when this suit was filed:

"Contributions or expenditures by national banks, corporations or labor organizations.

"It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

"Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution

clude that implication of such a federal cause of action is not suggested by the legislative context of § 610 or required to accomplish Congress' purposes in enacting the statute. We therefore have no occasion to address

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or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

. . . . .

"As used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: *Provided,* That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction."

Definitions of various terms in § 610 are included in 18 U. S. C. § 591 (1970 ed., Supp. III).

The Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263, §§ 101 (e), 102, increased substantially the fines for violation of § 610 and changed many of the definitions in § 591 of the terms used in § 610.

the questions whether § 610, properly construed, proscribes the expenditures alleged in this case, or whether the statute is unconstitutional as violative of the First Amendment or of the equal protection component of the Due Process Clause of the Fifth Amendment.

I

In August and September 1972, an advertisement with the caption "I say let's keep the campaign honest. Mobilize 'truth squads' " appeared in various national publications, including Time, Newsweek, and U. S. News and World Report, and in 19 local newspapers in communities where Bethlehem Steel Corp. (Bethlehem), a Delaware corporation, has plants. Reprints of the advertisement, which consisted mainly of quotations from a speech by petitioner Stewart S. Cort, chairman of the board of directors of Bethlehem, were included with the September 11, 1972, quarterly dividend checks mailed to the stockholders of the corporation. The main text of the advertisement appealed to the electorate to "encourage responsible, honest, and truthful campaigning." It alleged that vigilance was needed because "careless rhetoric and accusations . . . are being thrown around these days—their main target being the business community." In italics, under a picture of Mr. Cort, the advertisement quoted "the following statement made by a political candidate: 'The time has come for a tax system that says to big business—you must pay your fair share.' " It then printed Mr. Cort's rejoinder to this in his speech, including his opinion that to say "large corporations [are] not carrying their fair share of the tax burden" is "baloney." The advertisement concluded with an offer to send, on request, copies of Mr. Cort's entire speech [2] and a folder "telling how to

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[2] The speech was a general defense of "big business" and the

go about activating *Truth Squads.*"[3] These publications could be obtained free from the Public Affairs Department of Bethlehem. It is stipulated that the entire costs of the advertisements and various mailings were paid from Bethlehem's general corporate funds. App. A29–A30; 350 F. Supp. 227, 229 (ED Pa. 1972).

Respondent owns 50 shares of Bethlehem stock and was qualified to vote in the 1972 Presidential election. He filed this suit in the United States District Court for the Eastern District of Pennsylvania on September 28, 1972, on behalf of himself and, derivatively, on behalf of Bethlehem. The complaint specified two separate and distinct bases for jurisdiction and relief. Count I alleged jurisdiction under 28 U. S. C. § 1331 and sought to state a private claim for relief under 18 U. S. C. § 610, which, as mentioned, in terms provides only for a criminal penalty. Count II invoked pendent jurisdiction for a claim under Delaware law, alleging that the corporate campaign expenditures were "*ultra vires,* unlawful and [a] willful, wanton and gross breach of [defendants'] duty owed to [Bethlehem]." Immediate injunctive relief against further corporate expenditures in connection with the 1972 Presidential election or any

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current tax system. Although it named no political candidate or party, it was in large part devoted to refuting statements, which were quoted, by "a prominent presidential candidate." The complaint in this case alleged that the "candidate" referred to was quite clearly the Democratic candidate for President at the time (George McGovern), App. A13. The speech concluded with the suggestion that listeners "[m]obilize 'truth squads' "—organize to refute "false or deceptive" statements and "outrageous accusations."

[3] The folder was entitled: "How you can help to keep the campaign honest." It included suggestions for informing oneself about the election, using research tools, refuting "a statement you know to be wrong," and organizing friends and neighbors to do the same. Unlike the speech and advertisement, the folder contained no quotations from any political candidate, nor any discussion of issues.

future campaign was sought, as well as compensatory and punitive damages in favor of the corporation.

The District Court denied a preliminary injunction on October 25, 1972. 350 F. Supp. 227. While the denial was supported on three grounds,[4] it was upheld on appeal to the Court of Appeals for the Third Circuit only on the narrow ground that irreparable harm was not shown. 471 F. 2d 811 (1973).[5]

After the affirmance on appeal, petitioners sought an order requiring respondent to post security for expenses as required by Pennsylvania law. The court declined to order such security with regard to the federal cause of action alleged in Count I, but did order respondent to post $35,000 before proceeding with the pendent claim under Count II. Rather than post security, respondent filed an amended complaint, which dropped Count II, the separate state cause of action, from the case.[6]

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[4] First, the District Court held that the penal sanctions provided in § 610 are exclusive, and no private cause of action is to be implied. 350 F. Supp., at 231. Second, the District Court held that "the purpose of the advertisement was not to influence the election of a specific candidate," and therefore that "the payment for the advertisement did not constitute an 'expenditure' within the meaning of . . . Section 610." *Id.,* at 231–232. Third, the court found that "[i]n failing to prove a likelihood of success on the merits, plaintiff has failed to prove that irreparable harm would result if an injunction is not granted." *Id.,* at 232.

[5] In affirming, the Court of Appeals observed that while the District Court's opinion seemed to preclude respondent from any ultimate relief, the opinion addressed only a request for preliminary relief and therefore had to be considered only tentative, leaving respondent free to renew his contentions on final hearing. 471 F. 2d, at 812.

[6] Respondent seems to invite the Court, in effect, to reinstate Count II. We decline to do so. He argues, somewhat cryptically, that the order to post security "was a nullity" since "[a] court

The District Court then granted petitioners' motion for summary judgment without opinion. The Court of Appeals reversed, 496 F. 2d 416 (1974). The Court of

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may not dismiss a theory of relief." Brief for Respondent 11 and n. 2. But the District Court did not dismiss the pendent state-law claim; respondent deliberately dropped it from his amended complaint. Therefore, whatever the merits of the order for security as applied only to the pendent claim, see *Sargent* v. *Genesco, Inc.*, 337 F. Supp. 1244 (MD Fla. 1972), cf. *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (1949), respondent has foreclosed himself from consideration of a state claim not now raised by his operative pleading. *Wheeldin* v. *Wheeler*, 373 U. S. 647, 652 (1963). We do not think that the pendent state-law claim was preserved in these circumstances by the verbatim repetition in the amended complaint of a general allegation from the original complaint that petitioners' conduct was "in violation of state and federal law."

Therefore, there is not properly before us respondent's argument that the acts of a Delaware corporation violative of United States criminal statutes are *ultra vires* acts under Delaware corporation law, Del. Code Ann., Tit. 8, § 101; 6 W. Fletcher, Cyclopedia Corporations 335 (1968 ed.), and that his *ultra vires* cause of action therefore "arises under" federal law, that is, § 610, within the meaning of 28 U. S. C. § 1331. He relies upon *Smith* v. *Kansas City Title Co.*, 255 U. S. 180 (1921); see also *Wheeldin* v. *Wheeler*, *supra*, at 659–660 (BRENNAN, J., dissenting). Not only was Count II dropped from the case by respondent, and no argument addressed to it made by him in the District Court or the Court of Appeals, but he neither cross-petitioned nor raised the contention in his Opposition to the Petition for Certiorari. Moreover, this Court must necessarily depend upon the district courts and courts of appeals for initial determinations of questions of state law; indeed, our practice of deference to such determinations should generally render unnecessary review of their decisions in this respect. *Commissioner* v. *Estate of Bosch*, 387 U. S. 456, 462 (1967); *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530, 534 (1949). Obviously, then, we should not undertake to decide such questions, inherent in respondent's theory, in the first instance.

In sum, in this case "we see no cause for deviating from our normal policy of not considering issues which have not been pre-

Appeals held that, since the amended complaint sought damages for the corporation for violation of § 610, the controversy was not moot, although the election which occasioned it was past. The Court of Appeals held further that "a private cause of action, whether brought by a citizen to secure injunctive relief or by a stockholder to secure injunctive or derivative damage relief [is] proper to remedy violation of § 610." *Id.*, at 424. We granted certiorari, 419 U. S. 992 (1974). We reverse.

II

We consider first the holding of the Court of Appeals that respondent has "a private cause of action . . . [as] a citizen [or as a stockholder] to secure injunctive relief." The 1972 Presidential election is history, and respondent as citizen or stockholder seeks injunctive relief only as to future elections. In that circumstance, a statute enacted after the decision of the Court of Appeals, the Federal Election Campaign Act Amendments of 1974, Pub. L. 93–443, 88 Stat. 1263 (Amendments) (amending the Federal Election Campaign Act of 1971, 86 Stat. 3), requires reversal of the holding of the Court of Appeals.

In terms, § 610 is only a criminal statute, providing a fine or imprisonment for its violation. At the time this suit was filed, there was no statutory provision for civil enforcement of § 610, whether by private parties or by a Government agency. But the Amendments created a Federal Election Commission, 2 U. S. C. § 437c (a)(1) (1970 ed., Supp. IV); [7] established an administrative

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sented to the Court of Appeals and which are not properly presented for review here." *Neely* v. *Eby Constr. Co.*, 386 U. S. 317, 330 (1967); cf. *Wiener* v. *United States*, 357 U. S. 349, 351 n. (1958).

[7] A Federal Election Commission was included in the Senate-passed bill in 1971, but was eliminated in conference. See Berry &

procedure for processing complaints of alleged violations of § 610 after January 1, 1975, 2 U. S. C. § 437g (1970 ed., Supp. IV), and § 410, note following 2 U. S. C. § 431 (1970 ed., Supp. IV); and provided that "[a]ny person who believes a violation . . . [of § 610] has occurred may file a complaint with the Commission." 2 U. S. C. § 437g (a)(1)(A) (1970 ed., Supp. IV). The Commission must either investigate the complaint or refer the complaint to the Attorney General, 2 U. S. C. §§ 437g (a)(2)(A) and (B) (1970 ed., Supp. IV).[8] If the Commission chooses to investigate the complaint, and after investigation determines that "any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation" of § 610, the Commission may request the Attorney General to "institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order . . . ." 2 U. S. C. § 437g (a)(7) (1970 ed., Supp. IV). And 2 U. S. C. § 437c (b) (1970 ed., Supp. IV), expressly vests the Commission with "primary jurisdiction" over any claimed violation of § 610 within its

Goldman, Congress and Public Policy: A Study of the Federal Election Campaign Act of 1971, 10 Harv. J. Legis. 331, 343, 354 (1973); S. Conf. Rep. No. 92–580, pp. 34–35 (1971); H. R. Conf. Rep. No. 92–752, pp. 34–35 (1971). The Commission in the Senate version was given no explicit authority with regard to violations of § 610. See S. 382, § 308 (b), as passed Aug. 5, 1971 (3 Leg. Hist. of Federal Election Campaign Act of 1971).

[8] Other provisions of the Amendments which may have relevance to private parties' complaints of violations of § 610 include 2 U. S. C. § 437g (a)(9) (1970 ed., Supp. IV), providing for judicial review at the behest of "[a]ny party aggrieved" by any order granted in a civil action filed by the Attorney General, and 2 U. S. C. § 437h (a) (1970 ed., Supp. IV), permitting "any individual eligible to vote in any election for the office of President of the United States" to file "such actions . . . as may be appropriate to construe the constitutionality of . . . [§ 610]."

purview.[9] Consequently, a complainant seeking as citizen or stockholder to enjoin alleged violations of § 610 in future elections must henceforth pursue the statutory remedy of a complaint to the Commission, and invoke its authority to request the Attorney General to seek the injunctive relief. H. R. Conf. Rep. No. 93-1438, p. 94 (1974). Thus, the Amendments constitute an intervening law that relegates to the Commission's cognizance respondent's complaint as citizen or stockholder for injunctive relief against any alleged violations of § 610 in future elections. In that circumstance, the holding of the Court of Appeals must be reversed, for our duty is to decide this case according to the law existing at the time of our decision.

The governing rule was announced by Mr. Chief Justice Marshall in *United States* v. *Schooner Peggy,* 1 Cranch 103, 110 (1801):

"It is in the general true that the province of an

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[9] The parties disagree upon whether this reference to "primary jurisdiction" suggests that a complainant, after filing a complaint with the Commission, may file a civil suit for injunctive relief if the Commission fails to cause one to be filed. They also dispute whether the exhaustion requirement applies to a suit for damages. Compare 120 Cong. Rec. 35134 (1974) (remarks of Mr. Hays) (suggesting that the statutory remedies are exclusive) with *id.,* at 35132 (remarks of Mr. Brademas) ("individuals or organizations who may have complaints about possible violations [must] *first* exhaust their administrative remedies with the Commission . . ." (emphasis supplied)); see also H. R. Conf. Rep. No. 93-1438, p. 94 (1974). However, these issues are not here relevant; it suffices for the purposes of this case to hold that the statute requires that a private complainant desiring injunctive relief against alleged future violations of § 610 must at least exhaust his statutory remedy under the Amendments when and if such violations occur. We note that the question of the availability of a private cause of action by respondent for injunctive relief may not arise at all if the Attorney General seeks and obtains injunctive relief for any claimed violations by Bethlehem. Cf. *Richardson* v. *Wright,* 405 U. S. 208, 209 (1972).

> appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

We most recently reaffirmed the principle of *Schooner Peggy* in *Bradley* v. *Richmond School Board,* 416 U. S. 696, 711 (1974), where we said: "We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." There is no "statutory direction or legislative history to the contrary" in or respecting the Amendments, nor is there any possible "manifest injustice" in requiring respondent to pursue with respect to alleged violations which have yet to occur the statutory remedy for injunctive relief created by the Amendments.

III

Our conclusion in Part II pretermits any occasion for addressing the question of respondent's standing as a citizen and voter to maintain this action, for respondent seeks damages only derivatively as stockholder. Therefore, we turn next to the holding of the Court of Appeals that "a private cause of action . . . by a stockholder to secure . . . derivative damage relief [is] proper to remedy violation of § 610." We hold that such relief

is not available with regard to a 1972 violation under § 610 itself, but rather is available, if at all, under Delaware law governing corporations.[10]

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," *Texas & Pacific R. Co.* v. *Rigsby,* 241 U. S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, *e. g., National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers,* 414 U. S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e. g., Amtrak, supra; Securities Investor Protection Corp.* v. *Barbour,* 421 U. S. 412, 423 (1975); *Calhoon* v. *Harvey,* 379 U. S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? See *Wheeldin* v. *Wheeler,* 373 U. S. 647, 652 (1963); cf. *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 434 (1964); *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U. S. 388, 394–395 (1971); *id.,* at 400 (Harlan, J., concurring in judgment).

The dissenting judge in the Court of Appeals and petitioners here suggest that where a statute provides a penal remedy alone, it cannot be regarded as creating a

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[10] Although the considerations upon which we base our present decision have relevance to a similar determination under the Amendments, we imply no view whether the same result would obtain under the Amendments. See n. 9, *supra,* and n. 14, *infra.*

right in any particular class of people. "Every criminal statute is designed to protect some individual, public, or social interest. . . . To find an implied civil cause of action for the plaintiff in this case is to find an implied civil right of action for every individual, social, or public interest which might be invaded by violation of any criminal statute. To do this is to conclude that Congress intended to enact a civil code companion to the criminal code." 496 F. 2d, at 428–429 (Aldisert, J., dissenting). Cf. *Nashville Milk Co.* v. *Carnation Co.,* 355 U. S. 373, 377 (1958).

Clearly, provision of a criminal penalty does not necessarily *preclude* implication of a private cause of action for damages. *Wyandotte Transportation Co.* v. *United States,* 389 U. S. 191, 201–202 (1967); see also *J. I. Case Co.* v. *Borak, supra; Texas & Pacific R. Co.* v. *Rigsby, supra.* However, in *Wyandotte, Borak,* and *Rigsby,* there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone.[11] Here, there was nothing more than

[11] In *Wyandotte,* it was conceded that the United States had a civil *in rem* action against the ship obstructing navigation under § 19 of the Rivers and Harbors Act of 1899, and could retain the proceeds of the sale of the vessel and its cargo. 389 U. S., at 200 n. 12. The only question was whether it also had other judicial remedies for violation of § 15 of the Act, aside from the criminal penalties provided in § 16.

In *Borak,* § 27 of the Securities Exchange Act of 1934 specifically granted jurisdiction to the district courts over civil actions to "enforce any liability or duty created by this title or the rules and regulations thereunder," and there seemed to be no dispute over the fact that at least a private suit for declaratory relief was authorized; the question was whether a derivative suit for rescission and damages was also available. 377 U. S., at 340–431. Further it was clear that the Securities and Exchange Commission could sue to

a bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone.

We need not, however, go so far as to say that in this circumstance a bare criminal statute can *never* be deemed sufficiently protective of some special group so as to give rise to a private cause of action by a member of that group. For the intent to protect corporate shareholders particularly was at best a subsidiary purpose of § 610, and the other relevant factors all either are not helpful or militate against implying a private cause of action.

First, § 610 is derived from the Act of January 26, 1907,[12] which "seems to have been motivated by two considerations. First, the necessity for destroying the influence over elections which corporations exercised through financial contribution. Second, the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders." *United States* v. *CIO,* 335 U. S. 106, 113 (1948). See 40 Cong. Rec. 96 (1905)

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enjoin violations of § 14 (a) of the Act, the section involved in *Borak.* See § 21 of the Act, 15 U. S. C. § 78u.

Finally, in *Rigsby,* the Court noted that the statutes involved included language pertinent only to a private right of action for damages, although such a right of action was not expressly provided, thus rendering "[t]he inference of a private right of action . . . irresistible." 241 U. S., at 40. See also *United States* v. *Republic Steel Corp.,* 362 U. S. 482, 491 (1960).

[12] The Act provided:

"[It] shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator. . . ." 34 Stat. 864.

(Annual Message of President Theodore Roosevelt). Respondent bases his derivative action on the second purpose, claiming that the intent to protect stockholders from use of their invested funds for political purposes demonstrates that the statute set up a federal right in shareholders not to have corporate funds used for this purpose.

However, the legislative history of the 1907 Act, recited at length in *United States* v. *Auto Workers,* 352 U. S. 567 (1957), demonstrates that the protection of ordinary stockholders was at best a secondary concern.[13] Rather, the primary purpose of the 1907 Act, and of the 1925 Federal Corrupt Practices Act, 43 Stat. 1070, which

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[13] Section 610 was later expanded to include labor unions within its prohibition. The history of this expansion has been recounted before. *United States* v. *CIO,* 335 U. S. 106, 114–116 (1948); *United States* v. *Auto Workers,* 352 U. S. 567, 578–584 (1957); *Pipefitters* v. *United States,* 407 U. S. 385, 402–409 (1972). We note that Congress did show concern, in permanently expanding § 610 to unions, for protecting union members from use of their funds for political purposes. See *United States* v. *CIO, supra,* at 135, 142 (Rutledge, J., concurring). This difference in emphasis may reflect a recognition that, while a stockholder acquires his stock voluntarily and is free to dispose of it, union membership and the payment of union dues is often involuntary because of union security and check-off provisions. Cf. *Machinists* v. *Street,* 367 U. S. 740 (1961). It is therefore arguable that the federal interest in the relationship between members and their unions is much greater than the parallel interest in the relationship between stockholders and state-created corporations. In fact, the permanent expansion of § 610 to include labor unions was part of comprehensive labor legislation, the Taft-Hartley Act of 1947, while the 1907 Act dealt with corporations only with regard to their impact on federal elections. We intimate no view whether our conclusion that § 610 did not give rise directly to a cause of action for damages in favor of stockholders in state-created corporations necessarily would imply that union members, despite the much stronger federal interest in unions, are also relegated to state remedies.

re-enacted the 1907 provision with some changes as § 313 of that Act, see *United States* v. *Auto Workers, supra,* at 577, was to assure that federal elections are " 'free from the power of money,' " 352 U. S., at 574, to eliminate " 'the apparent hold on political parties which business interests . . . seek and sometimes obtain by reason of liberal campaign contributions.' " *Id.,* at 576, quoting 65 Cong. Rec. 9507 (1924) (remarks of Sen. Robinson). See also 352 U. S., at 571–577. Thus, the legislation was primarily concerned with corporations as a source of aggregated wealth and therefore of possible corrupting influence, and not directly with the internal relations between the corporations and their stockholders. In contrast, in those situations in which we have inferred a federal private cause of action not expressly provided, there has generally been a clearly articulated federal right in the plaintiff, *e. g., Bivens* v. *Six Unknown Federal Narcotics Agents, supra,* or a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard, *e. g., J. I. Case Co.* v. *Borak, supra.*

Second, there is no indication whatever in the legislative history of § 610 which suggests a congressional intention to vest in corporate shareholders a federal right to damages for violation of § 610. True, in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling.[14] But where, as here, it is at least dubious

[14] Petitioners point out that the Federal Election Campaign Act of 1971 did create a private complaint procedure with regard to the disclosure provisions there enacted, § 308 (d), 86 Stat. 18, and yet, while the Act, § 205, did amend § 610, it did not provide a parallel remedy for private parties for violations of § 610. Relying on *Amtrak,* 414 U. S. 453 (1974), and *T. I. M. E., Inc.* v. *United*

whether Congress intended to vest in the plaintiff class rights broader than those provided by state regulation of corporations, the fact that there is no suggestion at all that § 610 may give rise to a suit for damages or, indeed, to any civil cause of action, reinforces the conclusion that the expectation, if any, was that the relation-

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States, 359 U. S. 464 (1959), they ask us to infer from the fact that some private remedy was provided with regard to Title III of the 1971 Act an intention to deny any such remedy with regard to the criminal statutes amended in Title II.

We find this excursion into extrapolation of legislative intent entirely unilluminating. In *Amtrak,* there was a private cause of action provided in favor of certain plaintiffs concerning the particular provision at issue. It was in this context that we referred to "[a] frequently stated principle of statutory construction . . . that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." 414 U. S., at 458. In addition, there was specific support in the legislative history of the Amtrak Act for the proposition that the statutory remedies were to be exclusive. *Id.,* at 458–461.

In *T. I. M. E., supra,* the Court did rely in part upon the fact that a particular remedy was provided with regard to certain parts of the Interstate Commerce Act to infer that none was intended with regard to others. But again, there was specific support in the legislative history for this inference. 359 U. S., at 471–472, 477, and n. 18.

Here, there was, as far as the parties have been able to point out and as far as we have been able independently to determine, no discussion whatever in Congress concerning private enforcement of § 610. Further, while § 610 was amended in ways not pertinent here in 1971, it was, as we have seen, of much earlier origin, and it would be odd to infer from Congress' actions concerning the newly created provisions of Title III any intention regarding the enforcement of a long-existing statute.

Petitioners also suggest that the legislative history of the Amendments throw a "cross-light," *Pipefitters* v. *United States,* 407 U. S., at 427, upon Congress' understanding concerning private enforcement of § 610. Any such light cast is, in our view, exceedingly dim and of little help here.

ship between corporations and their stockholders would continue to be entrusted entirely to state law.

Third, while "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose," *J. I. Case Co.* v. *Borak,* 377 U. S., at 433, in this instance the remedy sought would not aid the primary congressional goal. Recovery of derivative damages by the corporation for violation of § 610 would not cure the influence which the use of corporate funds in the first instance may have had on a federal election. Rather, such a remedy would only permit directors in effect to "borrow" corporate funds for a time; the later compelled repayment might well not deter the initial violation, and would certainly not decrease the impact of the use of such funds upon an election already past.

Fourth, and finally, for reasons already intimated, it is entirely appropriate in this instance to relegate respondent and others in his situation to whatever remedy is created by state law. In addition to the *ultra vires* action pressed here, see n. 6, *supra,* the use of corporate funds in violation of federal law may, under the law of some States, give rise to a cause of action for breach of fiduciary duty. See, *e. g., Miller* v. *American Telephone & Telegraph Co.,* 507 F. 2d 759 (CA3 1974). Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation. If, for example, state law permits corporations to use corporate funds as contributions in state elections, see *Miller, supra,* at 763 n. 4, shareholders are on notice that their funds may be so used and have no recourse under any federal statute. We are

necessarily reluctant to imply a federal right to recover funds used in violation of a federal statute where the laws governing the corporation may put a shareholder on notice that there may be no such recovery.

In *Borak, supra,* we said: "[If] the law of the State happened to attach no responsibility to the use of misleading proxy statements, the whole purpose of [§ 14 (a) of the Securities Exchange Act of 1934] might be frustrated." 377 U. S., at 434–435. Here, committing respondent to state-provided remedies would have no such effect. In *Borak,* the statute involved was clearly an intrusion of federal law into the internal affairs of corporations; to the extent that state law differed or impeded suit, the congressional intent could be compromised in state-created causes of action. In this case, Congress was concerned, not with regulating corporations as such, but with dulling their impact upon federal elections. As we have seen, the existence or nonexistence of a derivative cause of action for damages would not aid or hinder this primary goal.

Because injunctive relief is not presently available in light of the Amendments, and because implication of a federal right of damages on behalf of a corporation under § 610 would intrude into an area traditionally committed to state law without aiding the main purpose of § 610, we reverse.

It is so ordered.

UNITED STATES *v.* CITIZENS & SOUTHERN NATIONAL BANK ET AL.

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

No. 73-1933. Argued March 19, 1975—Decided June 17, 1975

To circumvent Georgia's longstanding stringent restrictions on city banks' opening branches in suburban areas, appellee Citizens & Southern National Bank (C&S National) formed a holding company, which then embarked on a program of forming *de facto* branch banks in Atlanta's suburbs. This program included the holding company's ownership of 5 percent of the stock of each of the suburban banks, ownership of much of the remaining stock by parties friendly to the C&S system of banking entities (hereafter C&S), the suburban banks' use of the C&S logogram and of all C&S's banking services, and close C&S oversight of the suburban banks' operation and governance. In 1970, Georgia amended its banking statutes so as to allow *de jure* branching upon a countywide basis. This meant that C&S could now absorb the 5-percent banks as true branches, because Atlanta is contained within the two counties encompassing the suburbs in which the 5-percent banks operated. Consequently C&S applied to the Federal Deposit Insurance Corporation (FDIC) under the Bank Merger Act of 1966 for permission to acquire all the stock of six of the 5-percent banks historically operated as *de facto* branches or "correspondent associate" banks within the C&S system. The FDIC authorized five of the proposed acquisitions. The Government then brought suit in District Court for injunctive relief, alleging that the five acquisitions would lessen competition in relevant banking markets in violation of § 7 of the Clayton Act, and that the historic, *de facto* branch relations between C&S and the six 5-percent banks constituted unreasonable restraints of trade in violation of § 1 of the Sherman Act. The court rendered judgment for C&S. Three of the 5-percent banks were formed prior to, and three after, July 1, 1966. The "grandfather" provision of the Bank Holding Company Act, 12 U. S. C. § 1849 (d), as added by the 1966 amendments, provides that "[a]ny acquisition, merger, or consolidation of the kind described

in [12 U. S. C. §] 1842 (a) . . . which was consummated at any time prior or subsequent to May 9, 1956, and as to which no litigation was initiated by the Attorney General prior to July 1, 1966, shall be conclusively presumed not to have been in violation of any antitrust laws other than" § 2 of the Sherman Act. Title 12 U. S. C. § 1842 (a) makes it unlawful, absent the Federal Reserve Board's prior approval, for bank holding companies to engage in certain transactions, including those tending to create or enlarge holding company control of independent banks. *Held:*

1. Since the Attorney General took no action by July 1966 against the three 5-percent banks that were formed prior to that date, the transactions by which these banks became 5-percent banks fall within the terms of the grandfather provision of the Bank Holding Company Act, and therefore the correspondent associate programs in force at these banks are immune from attack under § 1 of the Sherman Act. While C&S's formation of a *de facto* branch was a unique type of transaction, it may fairly be characterized as an "acquisition, merger, or consolidation of the kind described in [12 U. S. C. §] 1842 (a)," and clearly falls within the class of dealings by bank holding companies that Congress intended, in the grandfather provision, to shield from retroactive challenge under the antitrust laws. Pp. 102–111.

2. In the face of the stringent state restrictions on branching, C&S's program of founding new *de facto* branches, and maintaining them as such, did not infringe § 1 of the Sherman Act. Pp. 111–120.

(a) Though the Government contends that the correspondent associate programs encompassed at least a tacit agreement to fix interest rates and service charges so as to make the interrelationships—to that extent at least—illegal *per se,* it cannot be held, in view of the mixed evidence in the record, and of the fact that such programs, as such, were permissible under the Sherman Act, that the District Court clearly erred in finding that the lack of significant price competition flowed, not from a tacit agreement, but as an indirect, unintentional, and formally discouraged result of the sharing of expertise and information that was at the heart of the correspondent associate program. Pp. 112–114.

(b) The Government's alternative contention that the correspondent associate programs transcending conventional "correspondent" relationships "unreasonably" restrained competition

among the 5-percent banks and between these banks and C&S National, is not persuasive, since even if the Government had proved that such programs restrained competition among the defendant banks more thoroughly or effectively than would have a conventional correspondent program (which the District Court found not to be the case), that alone would not make out a Sherman Act violation. Pp. 114–116.

(c) Where C&S has operated the 5-percent banks as *de facto* branches in direct response to Georgia's historic restrictions on *de jure* branching, restraints of trade integral to this particular, unusual function are not unreasonable. To characterize the relationships at issue as an unreasonable restraint of trade is to forget that their whole purpose and effect were to *defeat* a restraint of trade, and by providing new banking options to suburban Atlanta customers, while eliminating no existing options, C&S's *de facto* branching program has plainly been procompetitive. Pp. 116–120.

3. The proposed acquisitions will not violate § 7 of the Clayton Act. Pp. 120–122.

(a) Since C&S's program of founding and maintaining new *de facto* branches in the face of Georgia's antibranching law did not violate the Sherman Act, and since the *de facto* branches that C&S proposes to acquire were all founded *ab initio* with C&S sponsorship, it follows that the proposed acquisitions will extinguish no present competitive conduct or relationships. P. 121.

(b) As for future competition, there is no evidence of any realistic prospect that denial of the acquisitions would lead the defendant banks to compete against each other, the Clayton Act being concerned with "probable" effects on competition, not with "ephemeral possibilities." Pp. 121–122.

372 F. Supp. 616, affirmed.

Stewart, J., delivered the opinion of the Court, in which Burger, C. J., and Marshall, Blackmun, Powell, and Rehnquist, JJ., joined. Brennan, J., filed a dissenting opinion, in which Douglas and White, JJ., joined, *post*, p. 130.

Deputy Solicitor General Friedman argued the cause for the United States. On the briefs were *Solicitor Gen-*

eral Bork, Assistant Attorney General Kauper, Gerald P. Norton, Howard E. Shapiro, and *George Edelstein.*

Daniel B. Hodgson argued the cause for appellees. With him on the briefs were *Michael A. Doyle, Walter M. Grant, Richard A. Posner,* and *Philip L. Roache, Jr.**

MR. JUSTICE STEWART delivered the opinion of the Court.

For many years the State of Georgia restricted banks located in cities from opening branches in suburban areas. To circumvent these restrictions in the Atlanta area, the Citizens & Southern National Bank (C&S National) formed the Citizens & Southern Holding Company (C&S Holding), and the latter company embarked on a program of forming *de facto* branch banks in the suburbs of Atlanta. This program involved, among other features, ownership by C&S Holding of 5 percent of the stock of each of the suburban banks (the maximum allowed by state law), ownership of much of the remaining stock by parties friendly to C&S,[1] use by the suburban banks of the C&S logogram and of all of C&S's banking services, and close C&S oversight of the operation and governance of the suburban banks. The expectation on all sides—by C&S, by the suburban banks, and by state and federal bank regulators—was that C&S would acquire these "5-percent banks" outright, and convert them into *de jure* branches, as soon as state law, or the Atlanta city limits,

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**Cubbedge Snow* and *Charles M. Stapleton* filed a brief for the Independent Bankers Association of Georgia, Inc., as *amicus curiae.*

[1] Unless otherwise indicated, the term "C&S" refers generically to the C&S system of banking entities, including C&S National and its majority owned affiliates and C&S Holding, but excluding the 5-percent banks. The defendants in this suit—appellees here—are C&S National, C&S Holding, six of the 5-percent banks, and two banks in the Atlanta area, C&S Emory and C&S East Point, which are subsidiaries of C&S Holding. Taken together, these will sometimes be called the "defendant banks."

were altered so as to permit the accomplishment of this end.

In 1970, Georgia amended its banking statutes to allow *de jure* branching on a countywide basis. Because the city of Atlanta is contained within two counties, DeKalb and Fulton, which encompass the Atlanta suburbs in which the 5-percent banks operated, this change in the law meant that C&S National could now absorb the 5-percent banks as true branches. C&S consequently applied to the Federal Deposit Insurance Corporation (FDIC), under the Bank Merger Act of 1966, 80 Stat. 7, 12 U. S. C. § 1828, for permission to acquire all of the stock of six of the 5-percent banks historically operated by C&S as *de facto* branches. The FDIC authorized all but one of the proposed acquisitions.

The Justice Department immediately commenced this litigation in a Federal District Court for injunctive relief, alleging that the five acquisitions authorized by the FDIC would lessen competition in relevant banking markets, and thus violate § 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U. S. C. § 18, and that the historic "*de facto* branch" relations between C&S and the six 5-percent banks constituted unreasonable restraints of trade in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. After a trial, the court rendered judgment for C&S on all the issues. 372 F. Supp. 616. The Government appealed under § 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29, and we noted probable jurisdiction.[2]

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[2] 419 U. S. 893. Notice of appeal was filed prior to the effective date of the Antitrust Procedures and Penalties Act, Pub. L. 93-528, § 7, 88 Stat. 1710. The proposed acquisitions were stayed automatically by the filing of the suit, 12 U. S. C. § 1828 (c)(7)(A). The District Court continued the stay, and it has remained in force pending this decision.

I. *The Background of This Litigation*

In applying the antitrust laws to banking, careful account must be taken of the pervasive federal and state regulation characteristic of the industry, "particularly the legal restraints on entry unique to this line of commerce." *United States* v. *Marine Bancorporation,* 418 U. S. 602, 606. This admonition has special force in the present case, for the *de facto* branch arrangements and the proposed acquisitions involved here were a direct response to Georgia's historic restrictions on branch banking.

Before 1927 Georgia permitted statewide branching, and C&S National, then as now headquartered in Savannah, established three branches in the city of Atlanta. In 1927, state law was changed to prohibit all branching.[3] C&S therefore decided to expand through the formation of a bank holding company. C&S Holding was founded in 1928, and between 1946 and 1954 this company purchased two banks, and founded a third, in the Atlanta area. But in 1956 Georgia again altered its statutes to prohibit a bank holding company from acquiring more than 15 percent of a bank's stock. Georgia Bank Holding Company Act, 1 Ga. Laws 1956, pp. 309–312. A 1960 amendment, still in force, reduced the maximum ownership level to 5 percent. Ga. Code Ann. 13–207 (a)(2) (1967 ed. and Supp. 1974).

By the 1950's, C&S National was interested primarily in suburban expansion. The Atlanta city limits had been frozen since 1952, and the area's economic and population growth consequently occurred primarily outside the city's boundaries. Between 1959 and 1969, C&S Holding accordingly established in the Atlanta suburbs (in DeKalb and Fulton Counties) the six 5-per-

[3] A 1929 amendment allowed branching within the home-office city of a bank, but this was of no aid to the ambitions of C&S National outside Savannah.

cent banks at issue in this case. Five of these banks were founded under the sponsorship of C&S; the sixth, the Tucker Bank, had long been an independent suburban bank when, in 1965, C&S converted it into a 5-percent bank.[4]

Each of these six banks was made a "correspondent associate" bank within the C&S system. This status involved many different relationships between the 5-percent bank and C&S: In addition to the 5-percent stock held by C&S Holding, substantial shares were also held by officers, shareholders, and friendly customers of other C&S banks, and by their family members. It was understood from the outset that the 5-percent banks would be acquired outright by C&S as soon as the law permitted. From at least 1965 on, the 5-percent banks used the C&S logogram on their buildings, papers, and correspondence. C&S filed the charter applications of the 5-percent banks

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[4] Founded with C&S sponsorship were: (1) The Sandy Springs Bank, Fulton County (two offices). Founded in 1959 and operational in 1960 as the Citizens National Bank of Sandy Springs, it was converted in 1969 from a national to a state-chartered bank and adopted the name Citizens and Southern Bank of Sandy Springs. (2) The Chamblee Bank, DeKalb County. Founded in 1960 as the Chamblee National Bank, it was converted to a state-chartered bank in 1969 and adopted the name Citizens and Southern Bank of Chamblee. (3) The North Fulton Bank, Fulton County and North Fulton County. It was founded in 1967 as the Citizens and Southern Bank of North Fulton, a state-chartered institution. (4) The Park National Bank, DeKalb County. It was founded in 1967 as the Citizens and Southern Park National Bank. (5) The South DeKalb Bank, DeKalb County (two offices). It was founded as the Citizens and Southern South DeKalb Bank, a state-chartered institution, in 1969.

The Citizens and Southern Bank of Tucker (two offices), in DeKalb County, was independently founded in 1919, as the Bank of Tucker. C&S Holding acquired 5-percent ownership in 1965, and the bank then adopted its present name. This bank is involved in only the Sherman Act phase of this case. Its proposed acquisition by C&S was forbidden by the FDIC.

and openly assured the banks of full financial support, assurances which were often instrumental in securing regulatory approval of their creation. C&S chose the principal executive officer for each 5-percent bank. The employees of these banks were accorded the same pension and promotion rights in the C&S system as possessed by their colleagues at C&S National and its *de jure* affiliates. C&S selected the location of, and oversaw the selection of directors for, the suburban banks. A C&S executive served as an "advisory director" to each suburban bank. C&S conducted surprise audits and credit checks at the suburban banks. Each of the suburban banks provided the full panoply of C&S banking services, and customers of any 5-percent bank could avail themselves of these services at any of the other 5-percent banks, or at C&S National and its *de jure* branches. C&S supplied to each 5-percent bank, through manuals and memoranda, a large quantity of information concerning every conceivable banking procedure and problem. Included were data—stamped "for information only"—concerning interest rates and service charges employed by C&S National and its *de jure* branches, but each 5-percent bank was cautioned to use its own judgment in setting interest rates and service charges. In sum, it is fair to say—and the parties agree—that in almost every respect save corporate form, each of the 5-percent banks was a *de facto* branch of C&S National.

Between 1966 and 1968, the Federal Reserve Board investigated C&S's network of correspondent associate banks. The purpose of the investigation was to determine whether C&S was exerting such control over the 5-percent banks as to require special "approval" of the Federal Reserve Board pursuant to § 3 of the Bank Holding Company Act of 1956, as amended. 12 U. S. C. § 1842. The investigation ended in an "understanding" between the Board's staff and C&S that the "correspond-

ent associate" program, as the staff understood it, did not require formal approval.[5] The Justice Department participated in this investigation, and took no action of any kind inconsistent with this "understanding."

In 1970 Georgia amended its banking statutes to permit *de jure* branching within any county in which a bank already had an office. Ga. Code Ann. 13-203.1 (a) (Supp. 1974). This allowed C&S National to branch into those Atlanta suburbs which—like the city of Atlanta—are within the confines of DeKalb and Fulton Counties. C&S decided to convert the six 5-percent banks at issue here into *de jure* branches. C&S applied to the FDIC for permission to acquire all of the assets, and to assume all of the liabilities, of the 5-percent banks.[6] On October 4, 1971, after reviewing reports on the proposed acquisitions from the Federal Reserve Board, the Comptroller of the Currency, and the Justice Department, the FDIC approved C&S's acquisition of the five suburban banks which C&S had helped to found, but disapproved acquisition of the Tucker Bank. Because the Tucker Bank had enjoyed an independent existence before being converted into a 5-percent bank, the FDIC concluded that the correspondent associate affiliation there had been "anticompetitive in its origins" and should not be "ratified" by approval of out-

[5] See n. 17, *infra*. The investigation was concerned with § 3 of the Bank Holding Company Act of 1956, 70 Stat. 134, as amended on July 1, 1966, by Pub. L. 89-485, § 7, 80 Stat. 237, and on Dec. 31, 1970, by Pub. L. 91-607, Tit. I, § 102, 84 Stat. 1763. 12 U. S. C. § 1842.

[6] The acquisitions were to be made by bank subsidiaries of C&S Holding: C&S East Point, which proposed to acquire the Sandy Springs and North Fulton Banks, and C&S Emory, which proposed to acquire the Chamblee, Park National, South DeKalb, and Tucker Banks. The FDIC was the responsible federal agency because each of the acquiring banks is a "nonmember [of the Federal Reserve System] insured bank." 12 U. S. C. § 1828 (c)(2)(C).

right acquisition.[7] As for the five banks which C&S had helped to found, however, the FDIC stated:

> "[T]he opening of these . . . *de novo* banks served the convenience and needs of their respective communities and enhanced competition . . . ."

The FDIC noted that the C&S system was the largest commercial banking institution in Fulton County and in DeKalb County.[8] For this reason, it observed, "new acquisitions of nonaffiliated banks in the same market [by C&S] would raise the most serious competitive problems under the Bank Merger Act as amended and under Section 7 of the Clayton Act." But the FDIC reasoned that the acquisitions proposed by C&S did not raise such problems because the banks involved in the proposed mergers "do not compete today and never have competed"; further, there existed "no reasonable probability" that any of the 5-percent banks would break their ties with the C&S system even if the proposed acquisitions were disapproved. Thus, "[s]uch mergers would not alter the existing competitive structure . . . in any way or add to the concentration of banking resources now held by the C&S system."

II. *The Suit in the District Court*

On November 2, 1971, within the 30-day period prescribed for such suits, 12 U. S. C. §§ 1828 (c)(6) and (7),

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[7] The FDIC noted that the independent Tucker Bank had not been in unsound financial condition when C&S assumed *de facto* control in 1965, and that it would have been better for competition if C&S had instead sponsored a new bank in the community "just as it did in other growing sections of DeKalb County prior to the recent change in Georgia's branching laws."

[8] See the Appendix to this opinion for the District Court's statistical summary of the Atlanta area's banking markets, C&S's place in these markets, and the effect of the proposed acquisitions on the market-share statistics.

the United States filed a complaint in the District Court for the Northern District of Georgia, alleging that the five acquisitions approved by the FDIC would violate § 7 of the Clayton Act and that the ongoing correspondent associate relationships between C&S and the six 5-percent banks which it had originally sought to acquire constituted unreasonable restraints of trade, in violation of § 1 of the Sherman Act. The Government sought injunctive relief prohibiting the proposed acquisitions and terminating the alleged violations of the Sherman Act. On January 24, 1974, after an extensive trial, the District Court entered a judgment for the defendants. 372 F. Supp. 616, 643.

As to the Sherman Act allegations, the District Court based its judgment upon two separate and independent grounds. First, it held that the 1968 "understanding" between the staff of the Federal Reserve Board and C&S insulated the correspondent associate relationship between C&S and the 5-percent banks from attack under the antitrust laws. *Id.*, at 627. The court based this conclusion on the following statement in *Whitney Bank* v. *New Orleans Bank*, 379 U. S. 411, 419:

> "We believe Congress intended the statutory proceedings before the [Federal Reserve] Board to be the sole means by which questions as to the organization or operation of a new bank by a bank holding company may be tested."

Alternatively, assuming the Sherman Act applied, the District Court found that the United States had failed to prove that the correspondent associate relationships involved "collusive price fixing" or "any agreements not to compete or for market division." [9] The court held

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[9] The court stated:

"The Government contends that the following aspects of the re-

"that the matters complained of are subject to the 'rule of reason,' [and] . . . the Government has not sustained its burden of proof as to the unreasonableness of the practices involved or with respect to any adverse impact upon competition." 372 F. Supp., at 627–628.

The Government had conceded that it was no violation of the Sherman Act for a large city bank to arrange a traditional "correspondent" relationship with a smaller,

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lationships between the defendants have restrained interstate trade and commerce:

"1. The routine and systematic practice of furnishing to one another comprehensive information as to past, present and future competitive practices and policies with a purpose of achieving uniformity among the defendants;

"2. The provision by C&S National to the five percent defendants of various manuals and memoranda;

"3. The provision by C&S National to the five percent defendants of suggestions and advice on such matters as rates, hours of operation, types of loan to discourage and minimum loan rates . . . .

"The Government also asserts, and the record shows, that the advice and suggestions offered by C&S National are generally followed.

"These activities, however, do not amount to collusive price fixing. For example, there is no suggestion that any advice as to rates amounts to more than an expert appraisal of a market situation from the point of view of a lending institution—a type of opinion to which a lending institution would naturally be expected to pay great attention. . . .

"The practices involved here do not conform to the accepted definition or description of per se antitrust violations where no resort to context or circumstances is required (or permitted).

. . . . .

"There is no evidence of record to conclude that the utilization by the five percent defendant banks of the services or information received by them from C&S National or C&S Holding was a result of any tacit or explicit combinations rather than the natural deference of the recipient to information from one with greater expertise or better sources. In either case there is the flow of information as to rates, practices, etc., which the Government apparently applauds or at least condones in a correspondent banking relationship." 372 F. Supp., at 626, 627, and 628.

outlying bank—a "'mutually beneficial arrangement whereby the smaller bank receives needed services and the larger bank obtains both the benefit of the correspondent bank balance kept with it and the income from the sale of its services to the smaller bank's customers.'" *Id.*, at 628. Noting this concession, the District Court observed:

> "[S]uch assistance to, or sponsorship of, a smaller bank, is desirable and necessary and not anticompetitive. The difference between a pure correspondent relationship and a correspondent associate relationship as set forth in the evidence is merely one of degree, a fine line of demarcation almost impossible for the Court to perceive. . . .
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> ". . . [T]he Court finds as a fact that the relationship between C&S National, C&S Holding, and the five percent defendant banks, and the interchange of information between them, have been reasonable under the circumstances and not in violation of Section 1 of the Sherman Act." *Ibid.*

Turning to the claim under § 7 of the Clayton Act, the court found that the various defendant banks were each "engaged in commerce" and that the relevant "line of commerce" was "commercial banking." The court declined, however, to define the appropriate geographic markets, stating that its "disposition of the case is based upon factors which make a precise delineation of the market area unnecessary." 372 F. Supp., at 629. Simply assuming the correctness of the Government's position that the appropriate markets were DeKalb County, Fulton County, North Fulton County, or the Atlanta area generally, the court made detailed findings as to the effect of the proposed acquisitions on C&S's nominal market shares. *Id.*, at 629–633.[10] But, just as had the FDIC

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[10] See Appendix to this opinion.

before it, the court saw these increases in nominal shares as of no competitive significance because the 5-percent banks had always been *de facto* branches within the C&S system. *Id.*, at 633–638.[11]

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[11] The court noted that "no witness (for either the Government or the defendants) testified that the proposed mergers would have any adverse economic or competitive implications whatever . . . ." 372 F. Supp., at 638. Competitors of the suburban 5-percent banks "expressed the view that the proposed mergers would have no effect whatsoever on competition as it relates to third parties." *Ibid.* The court found "as a fact that there is no presently existing substantial competition between the five percent defendant banks and C&S National, or *inter sese*, or with third parties, which would be affected by the proposed merger." *Id.*, at 642.

In the interval between the trial and the announcement of the District Court's opinion, the Supreme Court of Georgia had ruled in a separate suit brought by a group of independent suburban banks that C&S was in technical violation of the state bank holding company law with respect to the 5-percent banks in the Atlanta suburbs. Its judgment was grounded on the fact that, in addition to the 5-percent stock interest directly owned by C&S Holding, substantial numbers of shares were owned by C&S officers and directors. The state court accordingly directed the Georgia Banking Commissioner to file suit to force divestiture of excess stock holdings by these shareholders. *Independent Bankers Assn.* v. *Dunn*, 230 Ga. 345, 197 S. E. 2d 129, modified *sub nom. Citizens & Southern National Bank* v. *Independent Bankers Assn.*, 231 Ga. 421, 202 S. E. 2d 78. The District Court's opinion took notice of this state-court judgment and concluded that it would not lead to genuine competition among the 5-percent banks or between them and C&S. 372 F. Supp., at 643. After the District Court's opinion was announced, the State Banking Commissioner, acting pursuant to the state-court judgment, ordered C&S Holding to limit its direct and indirect interest in the stock of correspondent associate banks to 5 percent and ordered C&S to "terminate any direct or indirect supervision of the . . . five percent banks beyond that which is available from The Citizens and Southern National Bank or the Citizens and Southern Holding Company to any bank that wishes to enter into a correspondent relationship with such bank or holding company." On June 3, 1974, the District Court

III. *The Issues Under the Sherman and Clayton Acts*

It is common ground in this case that the 5-percent banks have been operated from the outset substantially as *de facto* branches of C&S, even though they are and have always been separate corporate entities. From these agreed-upon facts, the parties draw sharply divergent conclusions under the Sherman and Clayton Acts.

Section 1 of the Sherman Act, 15 U. S. C. § 1, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . ."

The Government contends that the relationships between C&S and the six 5-percent banks constituted unreasonable restraints of trade on two alternative theories: (1) The relationships encompassed an agreement to fix interest rates and service charges among the 5-percent banks, and between these banks and C&S-owned banks, resulting in a *"per se"* violation of the Sherman Act (2) The programs unreasonably restrained interbank competition, as to prices and services, by extending interbank cooperation far beyond the conventional "correspondent" arrangements which large city banks traditionally make with small banks in outlying markets. C&S denies that its relationships with the 5-percent banks encompassed any agreements to fix prices and contends that the process of *de facto* branching was a procompetitive response to Georgia's anticompetitive ban on *de jure* branching, and thus legal under the Sher-

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amended its opinion *nunc pro tunc* to find that the Banking Commissioner's "order does not change the underlying basis of the Court's decision that the proposed mergers will not substantially lessen competition." *Id.,* at 643 n. 8.

man Act's "rule of reason." In the alternative, C&S contends that its relationships with the 5-percent banks were subject to the "exclusive primary jurisdiction" of the Federal Reserve Board and thus immune from attack under § 1 of the Sherman Act.

Section 7 of the Clayton Act, 15 U. S. C. § 18, provides:

> "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." [12]

The Government argues that the acquisitions of the five suburban banks approved by the FDIC would "lessen" competition when compared to what the situation would be if the defendant banks ceased their alleged

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[12] Pursuant to 12 U. S. C. § 1828 (c)(7)(B), referring to 12 U. S. C. § 1828 (c)(5)(B), bank mergers are made subject to Clayton Act standards unless "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." Hence, in bank merger cases brought under the Clayton Act, there is a "'convenience and needs' defense" that "comes into play only after a district court has made a *de novo* determination of the status of a bank merger under the Clayton Act." *United States* v. *Marine Bancorporation,* 418 U. S. 602, 626. See also *United States* v. *Third National Bank in Nashville,* 390 U. S. 171; *United States* v. *First City National Bank of Houston,* 386 U. S. 361. Because of its disposition of the case, the District Court did not reach this additional defense which had been asserted by C&S.

violations of the Sherman Act. The Government further contends that, even if the present relationships between C&S and the 5-percent banks do not offend the Sherman Act, since the relationships might nevertheless change and the whole situation become more competitive for business or state-law reasons, the proposed acquisitions violate § 7 by foreclosing this possibility. C&S argues that the acquisitions would merely convert *de facto* into *de jure* branches, with no perceptible effect on competition compared with the present situation, which is asserted by C&S to be lawful under the Sherman Act. C&S urges that there is no realistic possibility of future competition among the defendant banks. In the alternative, C&S contends that each of the 5-percent banks operates in a distinct and segregable market, so that the proposed acquisitions would not lessen competition in any relevant "section of the country"; and that any anticompetitive effects of the acquisitions are "outweighed in the public interest" because the acquisitions meet "the convenience and needs" of banking customers in the Atlanta area.[13] The District Court did not reach these alternative contentions.

A. *The Sherman Act Issues*

1. *The Question of Immunity*

The District Court thought the correspondent associate programs immune from Sherman Act scrutiny because they were subject to the "exclusive primary jurisdiction" of the Federal Reserve Board under the Bank Holding Company Act of 1956, as amended. We do not so understand the law. The court relied on *Whitney Bank* v. *New Orleans Bank*, 379 U. S. 411, but the question in that case was the wholly different one of whether it is the Comptroller of the Currency or the

[13] See n. 12, *supra*.

Federal Reserve Board that has jurisdiction to determine whether transactions by a bank holding company conform with applicable state banking law. For guidance as to antitrust immunities, recourse must be had directly to the provisions of the Bank Holding Company Act, 12 U. S. C. § 1841 *et seq.*

The statutory scheme requires the "prior approval" of the Federal Reserve Board for certain transactions by bank holding companies—including transactions tending to create or enlarge holding company control of independent banks. 12 U. S. C. § 1842 (a).[14] The types of transactions requiring Board approval were expanded by amendments to the Act in 1966 and 1970.[15] Prior to

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[14] "It shall be unlawful, except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company. . . ." 12 U. S. C. § 1842 (a).

[15] Prior to the amendments of July 1, 1966, Pub. L. 89–485, § 7, 80 Stat. 237, prior approval of the Board was not required for causing a bank to become a subsidiary of a bank holding company. In addition to adding this requirement, the 1966 amendments broadened the definition of a subsidiary from a company in which a bank holding company "own[s]" 25 percent of the voting shares to a company in which a bank holding company "directly or indirectly own[s] or control[s]" this percentage share. Compare § 4 of the 1966 amendments, 80 Stat. 236, with § 2 (d) of the Bank Holding Company Act of 1956, 70 Stat. 133. The provision is now codified at 12 U. S. C. § 1841 (d)(1). The definition of subsidiary has also included, from the outset of the Act, "any company the election of a majority of whose directors is controlled in any manner" by

1966, it appeared that Board approval of a transaction provided no immunity from antitrust action, for a note then set out under 12 U. S. C. § 1841 stated that nothing in the Act was to be construed as a "defense" to an antitrust suit. The 1966 amendments to the Act formalized this provision, but also blunted its force by establishing an intricate procedure for accommodating the jurisdictions of the Board and the Justice Department.[16] Under

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a bank holding company. 12 U. S. C. § 1841 (d)(2). The amendments of December 31, 1970, Pub. L. 91-607, § 101 (d), 84 Stat. 1763, further enlarged the definition of subsidiary to include "any company with respect to the management or policies of which such bank holding company has the power, directly or indirectly, to exercise a controlling influence, as determined by the Board, after notice and opportunity for hearing." 12 U. S. C. § 1841 (d)(3).

[16] § 11 of the 1966 amendments, Pub. L. 89-485, 80 Stat. 240. As presently in force, 12 U. S. C. § 1849, the provision (with subsection headings omitted) reads:

"(a) Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of existing law, nor shall anything herein contained constitute a defense to any action, suit, or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct, except as specifically provided in this section.

"(b) The Board shall immediately notify the Attorney General of any approval by it pursuant to section 1842 of this title of a proposed acquisition, merger, or consolidation transaction, and such transaction may not be consummated before the thirtieth calendar day after the date of approval by the Board. Any action brought under the antitrust laws arising out of an acquisition, merger, or consolidation transaction approved under section 1842 of this title shall be commenced within such thirty-day period. The commencement of such an action shall stay the effectiveness of the Board's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented. In any judicial proceeding attacking any acquisition, merger, or consolidation transaction approved pursuant to section 1842 of this title on the ground that such transaction alone and of itself constituted a violation of any antitrust laws other than sec-

the Act as amended, the Board "shall not approve" an otherwise forbidden transaction unless it meets certain antitrust standards derived from, but not everywhere identical to, the standards of the Sherman Act and of § 7 of the Clayton Act. 12 U. S. C. § 1842 (c). The Board's

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tion 2 of Title 15, the standards applied by the court shall be identical with those that the Board is directed to apply under section 1842 of this title. Upon the consummation of an acquisition, merger, or consolidation transaction approved under section 1842 of this title in compliance with this chapter and after the termination of any antitrust litigation commenced within the period prescribed in this section, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of Title 15, but nothing in this chapter shall exempt any bank holding company involved in such a transaction from complying with the antitrust laws after the consummation of such transaction.

"(c) In any action brought under the antitrust laws arising out of any acquisition, merger, or consolidation transaction approved by the Board under section 1842 of this title, the Board and any State banking supervisory agency having jurisdiction within the State involved, may appear as a party of its own motion and as of right, and be represented by its counsel.

"(d) Any acquisition, merger, or consolidation of the kind described in section 1842 (a) of this title which was consummated at any time prior or subsequent to May 9, 1956, and as to which no litigation was initiated by the Attorney General prior to July 1, 1966, shall be conclusively presumed not to have been in violation of any antitrust laws other than section 2 of Title 15.

"(e) Any court having pending before it on or after July 1, 1966, any litigation initiated under the antitrust laws by the Attorney General with respect to any acquisition, merger, or consolidation of the kind described in section 1842 (a) of this title shall apply the substantive rule of law set forth in section 1842 of this title.

"(f) For the purposes of this section, the term 'antitrust laws' means the Act of July 2, 1890 (the Sherman Antitrust Act), the Act of October 15, 1914 (the Clayton Act), and any other Acts in pari materia."

order granting or denying an application for prior approval is subject to review in the courts of appeals. 12 U. S. C. § 1848. Furthermore, an approved transaction is stayed automatically for 30 days, during which time an antitrust suit challenging the transaction may be brought in the district court. 12 U. S. C. § 1849 (b). Such a suit is governed by the modified antitrust standards set out in § 1842 (c). If the antitrust suit is not brought within 30 days, and the transaction is consummated,

> "the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of Title 15 [§ 2 of the Sherman Act], but nothing in this chapter shall exempt any bank holding company involved in such a transaction from complying with the antitrust laws after the consummation of such transaction." 12 U. S. C. § 1849 (b).

C&S can draw no consolation from these provisions. It is true that the *staff* of the Federal Reserve Board, in 1968, came to an "understanding" with C&S that the correspondent associate programs then in effect did not offend § 3 of the Bank Holding Company Act, 12 U. S. C. § 1842 (a), and thus did not require formal Board "approval." [17] But this did not give rise to any

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[17] The Secretary to the Federal Reserve Board described the investigation and the 1968 "understanding" in a 1972 letter to the Justice Department:

"The fact finding inquiry undertaken by Board staff into the relationship between Citizens & Southern and the other banking institutions referred to was begun in 1966 and continued into 1968. The principal focus of the inquiry concerned essentially two questions: (1) whether Citizens & Southern had unlawfully acquired a direct or indirect stock ownership in these banking institutions in excess of 5 per cent without first having secured the requisite prior Board approval; and (2) whether the banking institutions had un-

antitrust immunity. A consummated transaction acquires immunity under § 1849 (b) only when no antitrust action has been commenced within 30 days after

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lawfully become subsidiaries of Citizens & Southern by virtue of the election of directors without first having received the requisite prior Board approval. The inquiry arose in 1966 out of information contained in Citizens & Southern's registration statement filed with the Board and in 1968 as a result of information supplied by the Comptroller of the Currency in connection with the merger of the Citizens and Southern National Bank and the Citizens and Southern Bank of Augusta. The inquiry referred to was not initiated as a result of any application filed with the Board for approval of an acquisition, merger, or consolidation transaction under section 3 of the Bank Holding Company Act.

. . . . .

"The Board of Governors did not issue any order approving the relationships between Citizens & Southern and the other banking institutions under section 3 of the Bank Holding Company Act.

. . . . .

"There was no determination made that approval of the Board under section 3 of the Bank Holding Company Act was required for Citizens & Southern to retain an ownership interest of 5 per cent or less in the banking institutions referred to or to maintain the relationships with those banks in circumstances where Citizens & Southern did not elect a majority of the directors of any such bank. There was an understanding reached between members of the Board's staff and representatives of Citizens & Southern that in those cases where Citizens & Southern purchased 5 per cent or less of the stock of a bank, in some instances furnishing a principal operating officer for such bank, as well as other employee benefits, Citizens & Southern would not be deemed to have control of a majority of the directors of such bank on these facts alone. Further, where the foregoing circumstances existed and where control of additional shares was purchased by the bank's executive officer, control of such shares purchased would not be attributed to Citizens & Southern so long as Citizens & Southern did not finance the purchase of such shares, directly or indirectly. Finally, it was understood that even though Citizens & Southern was responsible, directly or indirectly, in placing one or two directors on the boards of such banks, if that number did not constitute a majority of directors of

the transaction has received the "approval" of the *Board,* in an order which is subject to judicial review and which reflects application by the Board of the special antitrust standards of § 1842 (c). The immunity applies only to "an acquisition, merger, or consolidation transaction approved under section 1842 of this title in compliance with this chapter." § 1849 (b). The obvious purpose of the complex machinery in § 1849 (b) is to accord finality to formal actions of the Board not subjected to timely challenge under the antitrust laws. There is no indication that Congress wished to accord a similar finality to the informal views of the Board's staff.

We note, however, that the 1966 amendments also added a "grandfather" provision to the Bank Holding Company Act, 12 U. S. C. § 1849 (d):

> "Any acquisition, merger, or consolidation of the kind described in section 1842 (a) of this title which was consummated at any time prior or subsequent to May 9, 1956, and as to which no litigation was initiated by the Attorney General prior to July 1, 1966, shall be conclusively presumed not to have been in violation of any antitrust laws other than section 2 of Title 15 [§ 2 of the Sherman Act]."

Unlike § 1849 (b), this provision does not state or imply that the covered transactions must have received the formal approval of the Federal Reserve Board. This grandfather provision is not, like § 1849 (b), an attempt to accommodate the competing jurisdictions of the Federal Reserve Board under § 1842 and the Justice Department under the antitrust laws. Rather, the grandfather provision is a simple conferral of legislative amnesty for

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such bank, the Board's staff would not consider that Citizens & Southern could reasonably be held to have control of a majority of the directors of such bank."

theretofore unchallenged transactions completed before Congress had clarified the nature of that accommodation.

The transactions by which C&S created a correspondent associate relationship with three of the 5-percent banks—the Sandy Springs, Chamblee, and Tucker banks—were consummated prior to July 1966, and the Attorney General had taken no action against those transactions by that date. Those transactions thus fall within the terms of the grandfather provision, and the correspondent associate programs in force at those three banks are, therefore, immune from attack under § 1 of the Sherman Act.

While the formation by C&S of a *de facto* branch was a unique type of transaction, it may fairly be characterized as an "acquisition, merger, or consolidation of the kind described in § 1842 (a)." Forming a *de facto* branch was a multifaceted operation—involving a multiplicity of purchases of stock by a number of parties, the adoption of the C&S logogram by the *de facto* branch, the connection of the *de facto* branch with C&S personnel and information programs, the structuring of the bank to receive and administer all C&S banking services, and the establishment of formal C&S influence over the board of directors at the *de facto* branch. But even before its scope was expanded in 1970, § 1842 (a) was concerned with more than the literal "acquisition" of stock: It took broad account of the "indirect" control of stock, and the control of boards of directors "in any manner," by bank holding companies.[18] The grandfather provision creates immunity under § 1 of the Sherman Act, not simply under § 7 of the Clayton Act, an indication that its protection extends not merely to literal acquisitions, mergers, and consolidations, but also to "restraints of trade" simultaneous with and function-

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[18] See n. 15, *supra*.

ally integral to such transactions. Though multifaceted, the formation by C&S of a *de facto* branch was a unitary and cohesive undertaking in the sense that all the facets were closely coordinated, simultaneously instituted, and designed to serve the single purpose of fitting the new bank into the "C&S system." There is virtually nothing about the present correspondent associate programs that was not fully evident and in place from the moment the programs were launched. There has been no increase in C&S control, nor any change in the way it has been exercised.

Whether these programs violated § 1842 (a)—as it applies today or as it applied when the programs began—is not relevant to our inquiry.[19] By its terms, the grandfather provision applies to transactions *of the kind* described in § 1842 (a). We cannot believe that Congress wished to grant the benefits of the provision only to transactions that plainly *transgressed* § 1842 (a). Such a construction would make application of the grandfather provision not only cumbersome and time consuming,[20] but also flagrantly inequitable. The formation of a *de facto* C&S branch involved the direct and

[19] The grandfather provision creates a conclusive presumption of compliance with the antitrust laws, but not necessarily of compliance with the provisions of the Bank Holding Company Act. See 12 U. S. C. § 1849 (f).

[20] If the correspondent associate program had received formal Board approval, any antitrust immunity created by the machinery in § 1849 (b) could, of course, have extended only to those features of the program clearly and expressly encompassed by the approval order. But § 1849 (d) applies even where, as here, there has been no approval order. If the provision were construed to cover only transactions actually violative of § 1842 (a), a court applying the provision would face the daunting—and quite senseless—task of dissecting a complicated, integrated transaction, such as the formation of a *de facto* branch, into those components which did and those which did not require prior approval of the Board.

indirect acquisition of bank stock, and the direct and indirect assertion of control over the governance and operations of a bank, by a bank holding company. Though unusual in form, such a transaction quite clearly falls within the class of dealings by bank holding companies which Congress intended, in § 1849 (d), to shield from retroactive challenge under the antitrust laws.

2. *De Facto Branching Under the Sherman Act*

Three of the 5-percent banks—the Park National, South DeKalb, and North Fulton banks—were formed after July 1, 1966, and their correspondent associate relationships with C&S are therefore beyond the reach of the grandfather provision of the Bank Holding Company Act and subject to scrutiny under the Sherman Act.

Each of these banks was founded *ab initio* through the sponsorship of C&S. Except for that sponsorship, they would very probably not exist. The record shows that other banking organizations had been unsuccessful in attempting to launch new banks in the area, and C&S affiliation and financial backing were instrumental in convincing state and federal banking authorities to charter these new banks. In short, these banks represented a policy by C&S of *de facto* branching through the formation of new banking units, rather than through the acquisition, and consequent elimination, of pre-existing, independent banks.[21]

Of necessity, the Government's attack on this process

[21] The Tucker Bank, which was not founded as a new bank by C&S, comes within the coverage of the grandfather provision, as explained in the previous section. *De facto* branching through the *de facto* "acquisition" of pre-existing banks might raise questions under the Sherman Act considerably different from those presented by the C&S practice of *de facto* branching through founding *new* banks.

is highly technical. Had the new banks been *de jure* branches of C&S, the whole process would have been beyond reproach. Branching allows established banks to extend their services to new markets, thereby broadening the choices available to consumers in those markets.[22] Having access to parent-bank financial support, expert advice, and proved banking services, branches of several city banks can often enter a market not yet large or developed enough to support a variety of independent, unit banks. Branching thus offers competitive choice to markets where monopoly or oligopoly might otherwise prevail. Furthermore, the branching process gives to outlying customers the benefit of sophisticated services which local unit banks might have little ability or incentive to deliver. The Government denies none of this, nor that C&S's program of *de facto* branching was, until 1970, the closest substitute to *de jure* branching allowed under Georgia law. Yet the Government insists that this *de facto* branching violated the Sherman Act because the parent bank and its *de facto* branches were legally distinct corporate entities and were obligated, therefore, to compete vigorously against each other.

It is, of course, conceded that C&S's *de facto* branches have not behaved as active competitors with respect either to each other or to C&S National and its majority-owned affiliates. But the Government goes further and contends that the correspondent associate programs have actually encompassed at least a tacit agreement to fix interest rates and service charges, see *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208, 227; *United States* v. *Masonite Corp.,* 316 U. S. 265, 275–276; *United States* v. *Bausch & Lomb Optical Co.,* 321 U. S. 707, 723; *United States* v. *General Motors Corp.,* 384 U. S. 127,

[22] See generally M. Mayer, The Bankers 83–91 (1974).

142–143, so as to make the interrelationships—to that extent at least—illegal *"per se."* See *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 224–226, n. 59; *United States* v. *Parke, Davis & Co.,* 362 U. S. 29, 47. C&S vigorously denies the existence of any agreement to fix prices. The evidence in the record is mixed.

C&S did regularly notify the 5-percent banks—as it did its *de jure* branches—of the interest rates and service charges in force at C&S National and its affiliates. But the dissemination of price information is not itself a *per se* violation of the Sherman Act. See *Maple Flooring Assn.* v. *United States,* 268 U. S. 563; *Cement Mfrs. Protective Assn.* v. *United States,* 268 U. S. 588; *United States* v. *Container Corp.,* 393 U. S. 333, 338 (concurring opinion). A few of the memoranda distributed by C&S could be construed as advocating price uniformity; on the other hand, the memoranda were almost without exception stamped "for information only," and the 5-percent banks were admonished by C&S, several times and very clearly, to use their own judgment in setting prices; indeed, the banks were warned that the antitrust laws required no less. The District Court observed that in fact prices did not often vary significantly among the 5-percent banks or between these banks and C&S National, but the court attributed this to the "natural deference of the recipient to information from one with greater expertise or better services." 372 F. Supp., at 628. And the court found as a fact that there was no "collusive price fixing." *Id.,* at 626.

Were we dealing with independent competitors having no permissible reason for intimate and continuous cooperation and consultation as to almost every facet of doing business, the evidence adduced here might well preclude a finding that the parties were not engaged in a

conspiracy to affect prices. But, as we indicate below, the correspondent associate programs, as such, were permissible under the Sherman Act. In this unusual light, we cannot hold clearly erroneous the District Court's finding that the lack of significant price competition did not flow from a tacit agreement but instead was an indirect, unintentional, and formally discouraged result of the sharing of expertise and information which was at the heart of the correspondent associate programs. Fed. Rule Civ. Proc. 52 (a); *United States* v. *General Dynamics Corp.*, 415 U. S. 486, 508.

The Government argues, alternatively, that the correspondent associate programs have gone far beyond conventional "correspondent" relationships, and that consequently these programs have "unreasonably" restrained competition among the 5-percent banks and between these banks and C&S National. The District Court was not persuaded by this theory:

> "The difference between a pure correspondent relationship and a correspondent associate relationship as set forth in the evidence is merely one of degree, a fine line of demarcation almost impossible for the Court to perceive. . . . In either case there is the flow of information as to rates, practices, etc., which the Government apparently applauds or at least condones in a correspondent banking relationship." 372 F. Supp., at 628.

The court's dilemma is understandable, for in neither law nor banking custom has there developed a clear, fixed definition of the correspondent relationship: [23]

> "Correspondent banking is an interbank practice whereby 'city' correspondent banks provide a cluster

[23] Austin & Solomon, A New Antitrust Problem: Vertical Integration in Correspondent Banking, 122 U. Pa. L. Rev. 366, 367–368 (1973).

> of services to smaller 'country' banks in exchange for interbank deposits. Dating back to colonial times, correspondent banking originally provided an extended network of independent unit banks with a link to financial centers, and at the same time furnished substitute central banking functions. Today, as a vital component of the era of electronic banking, it enables city correspondents to provide customers with a range of services that is varied, extensive and constantly expanding; one survey lists as many as fifty different categories."

Among the services typically provided within a conventional correspondent arrangement are check clearing, help with bill collections, participation in large loans, legal advice, help in building securities portfolios, counseling as to personnel policies, staff training, help in site selection, auditing, and the provision of electronic data processing. Furthermore, like C&S's program, the correspondent arrangement is often established as a prelude to a formal merger between the two banks.[24]

Nevertheless, C&S's program does appear to have gone several steps beyond conventional correspondent arrange-

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[24] *Id.*, at 367–371. On the varieties of "service packages" to be found in correspondent banking, see also Knight, Correspondent Banking, Part I: Balances and Services, Fed. Reserve Bank of Kansas City Monthly Review (Nov. 1970); Knight, Correspondent Banking, Part II: Loan Participation and Fund Flows, Fed. Reserve Bank of Kansas City Monthly Review (Dec. 1970); Subcommittee on Domestic Finance of the House Committee on Banking and Currency, 88th Cong., 2d Sess., A Report on the Correspondent Banking System (Comm. Print Dec. 1964), and Correspondent Relations: A Survey of Banker Opinion (Comm. Print Oct. 1964); Nadler, Three Score Years of Correspondent Banking, Banking 54–55 (July 1968); Correspondent Banking Survey in Am. Banker 8–71 (Dec. 18, 1970).

ments. C&S has closely advised the boards of directors of the 5-percent banks, supplied their chief executive officers, allowed full "branchlike" use of the C&S logogram, provided all the C&S services available at a *de jure* branch, dealt with the 5-percent banks through the C&S branch administration department, and provided constant and detailed information on prices and on all banking procedures.[25] It is conceivable that these relationships, separately or taken together, have restrained competition among the defendant banks more thoroughly or effectively than would have a conventional correspondence program. But even if the Government had proved this, which the District Court found not to be the case, that alone would not make out a Sherman Act violation. C&S has operated the 5-percent banks as *de facto* branches as a direct response to Georgia's historic restrictions on *de jure* branching, and the question therefore remains whether restraints of trade integral to this particular, unusual function are unreasonable. See *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238. We turn directly to that question.

The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors. This Court has held that even commonly owned firms must compete against each other, if they hold themselves out as distinct entities. "The corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act." *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 227. See also *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*,

[25] Also, of course, C&S owns 5 percent of the stock in these banks—not a common facet of correspondent banking. But the Government neither challenges C&S's 5-percent ownership, as such, nor suggests that it aggravates the alleged antitrust problems.

Inc., 340 U. S. 211, 215; *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593, 598; *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U. S. 134, 141–142. *A fortiori,* independently owned firms cannot escape competing merely by pretending to common ownership or control, for the pretense would simply perfect the cartel. We may also assume, though the question is a new one, that a business entity generally cannot justify restraining trade between itself and an independently owned entity merely on the ground that it helped launch that entity, by providing expert advice or seed capital. Otherwise the technique of sponsorship followed by restraint might displace internal growth as the normal and legitimate technique of business expansion, with unknowable consequences.

But these general principles do not dispose of the present case. C&S was absolutely restrained by state law from reaching the suburban market through the preferred process of internal expansion. *De facto* branching was the closest available substitute.[26] Just last Term, in a brief presented to this Court, the Justice Department told us that it was desirable and procompetitive for a bank to "[enter] *de novo* into areas foreclosed to branching by sponsoring the organization of an affiliate bank, and later acquiring the bank. This method of expansion is legal and a well-recognized practice used by large statewide banking organizations, and recognized by the federal banking authorities." [27] The

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[26] This case does not require us to explore the conceivable antitrust problems raised by correspondent banking in all circumstances and in all its many forms. We deal here solely with the founding and maintenance of new *de facto* branch banks in the context of a state ban on *de jure* branching.

[27] Brief for United States 15–16, filed in No. 73–38, O. T. 1973, *United States* v. *Marine Bancorporation* (citations to record omitted).

Government acknowledged that such a sponsored bank could "be affiliated with its sponsor for purposes of correspondent relationships and other inter-bank services, including financial support," and that it could be "formed" by the parent bank's "officers, directors, or their associates" and could be "assisted" by the parent firm "until acquired and converted into a branch."[28] This is as good a curbstone description as any of precisely the relationships at issue in the present case.[29]

To characterize these relationships as an unreasonable restraint of trade is to forget that their whole purpose and effect were to *defeat* a restraint of trade. Georgia's antibranching law amounted to a compulsory market division. Accomplished through private agreement, market division is a *per se* offense under the Sherman Act:

> "This Court has reiterated time and again that '[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.'" *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 608, quoting *White Motor Co.* v. *United States*, 372 U. S. 253, 263.

The obvious purpose and effect of a rigid antibranching law are to make the potential bank customers of suburban, small town, and rural areas a captive market for small unit banks.[30] C&S devised a strategy to cir-

[28] *Id.*, at 16 and 17.

[29] The brief noted with approval an example where the sponsored bank had, according to state banking authorities, become a "'satellite'" of the parent bank. *Id.*, at 16 n. 16.

[30] The banking business is, of course, riddled with state and federal regulatory barriers to entry. See *United States* v. *Marine Bancorporation*, 418 U. S., at 628–629. But most of these barriers—*e. g.*, chartering requirements—at least arguably serve the overriding public interest in maintaining customer confidence in the industry as a whole by assuring adequate financial stability and responsible management for all banks. Antibranching laws, on

cumvent this statutory barrier. By providing new banking options to suburban Atlanta customers, while eliminating no existing options, the *de facto* branching program of C&S has plainly been procompetitive.

The Government suggests that a "conventional" correspondent relationship between C&S and the 5-percent banks would have been equally procompetitive and would have had the added virtue of facilitating competition among the 5-percent banks and between them and C&S National. This is mere speculation on the present record. Moreover, it is far from clear that a conventional correspondent relationship would have allowed C&S to put its full range of services into the suburban market which, in light of the antibranching law, was the very point of its policy and program. Putting to one side the total lack of realism in suggesting that C&S might have founded new banks that would have competed vigorously with it and with each other, cf. *United States* v. *Penn-Olin Chemical Co.,* 378 U. S. 158, 169, the Government's argument wholly disregards C&S's ultimate goal of acquiring the new banks outright as soon as legally possible, a goal which the Government last year thought wholly proper. We hold that, in the face of the stringent state restrictions on

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the other hand, are now widely recognized as a simple device to protect outlying unit banks from the rigors of regional competition. See Report, President's Commission on Financial Structure and Regulation 59–63, 113 (1971); Note, Bank Charter, Branching, Holding Company and Merger Laws: Competition Frustrated, 71 Yale L. J. 502, 515–516 (1962); Smith & Greenspun, Structural Limitations on Bank Competition, 32 Law & Contemp. Prob. 40, 45–46 (1967); Comment, Bank Branching in Washington: A Need for Reappraisal, 48 Wash. L. Rev. 611 (1973); Baker, State Branch Bank Barriers and Future Shock—Will the Walls Come Tumbling Down?, 91 Banking L. J. 119 (1974). See also *United States* v. *Marine Bancorporation, supra,* at 612 n. 8.

branching, C&S's program of founding new *de facto* branches, and maintaining them as such, did not infringe § 1 of the Sherman Act.

B. *The Clayton Act Claim*

In the light of the previous discussion, disposition of the Clayton Act claim becomes relatively straightforward. The issue under § 7 of the Clayton Act is whether the effect of the proposed acquisitions, approved by the FDIC, "may be substantially to lessen competition . . . in any line of commerce in any section of the country."

The Government established that C&S is the predominant banking institution in DeKalb County, Fulton County, North Fulton County, and the Atlanta area generally; that in these markets the commercial banking industry is quite highly concentrated in terms of market share statistics; and, of course, that the proposed acquisitions would increase C&S's nominal market shares.[31] The District Court did not decide whether the geographic markets proposed by the Government were the appropriate ones. But assuming, *arguendo*, that they were, the Government plainly made out a prima facie case of a violation of § 7 under several decisions of this Court. See *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 362–366; *United States* v. *Phillipsburg National Bank & Trust Co.*, 399 U. S. 350, 365–367; *United States* v. *General Dynamics Corp.*, 415 U. S., at 497. It was thus incumbent upon C&S to show that the market-share statistics gave an inaccurate account of the acquisitions' probable effects on competition. *United States* v. *General Dynamics Corp., supra,* at 497–498; *United States* v. *Marine Bancorporation,* 418 U. S., at 631. The District Court, like

[31] See Appendix to this opinion.

the FDIC before it, concluded that C&S had made the necessary showing that these proposed acquisitions would not "lessen" competition for the simple reason that under the correspondent associate program that had been continuously in effect, no real competition had developed or was likely to develop among the 5-percent banks, or between these and C&S National.

As to present and past competition, the Government agrees there is and has been none. If this state of affairs were the result of violations of the Sherman Act, we agree with the Government that making the evil permanent through acquisition or merger would offend the Clayton Act. See *Citizen Publishing Co.* v. *United States,* 394 U. S. 131, 135. But we have already concluded that C&S's program of founding and maintaining new *de facto* branches in the face of Georgia's anti-branching law did not violate the Sherman Act, and the *de facto* branches which C&S proposes to acquire were all founded *ab initio* with C&S sponsorship. It thus indisputably follows that the proposed acquisitions will extinguish no present competitive conduct or relationships. See *United States* v. *Trans Texas Bancorporation,* 412 U. S. 946, aff'g *per curiam* 1972 Trade Cas. ¶ 74,257 (WD Tex.).

As for future competition, neither the District Court nor the FDIC could find any realistic prospect that denial of these acquisitions would lead the defendant banks to compete against each other. The 5-percent banks theoretically *could* break their ties with C&S and its correspondent associate program, for these banks are each independently owned, but the record shows that none of the shareholders, directors, or officers of the 5-percent banks expressed any inclination to do so, and there was no evidence that the program has been other than beneficial and profitable for both C&S and the 5-

percent banks.[32] The Clayton Act is concerned with "probable" effects on competition, not with "ephemeral possibilities." *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 323.

For the reasons set out in this opinion, the judgment of the District Court is affirmed.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

The District Court summarized the structure of various banking markets in the Atlanta area, and the statistical effects of the proposed acquisitions, in the following way, 372 F. Supp., at 629–632:

DeKalb County

Treating C&S National, C&S Emory and C&S DeKalb as one banking organization, there are 19 commercial banking organizations operating offices in DeKalb

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[32] In the entire history of C&S's 5-percent program, only the Stone Mountain Bank terminated its relationship with C&S. The record shows that that bank was not sponsored by C&S, that a large amount of the stock remained in the hands of a family hostile to C&S, that the bank's shareholders never intended to merge with C&S, and that the bank's board of directors resisted introduction of C&S banking methods. None of these factors exists with respect to the banks at issue in the present case.

It is true that C&S has recently been ordered by the State Banking Commissioner to trim back its percentage ownership of the suburban banks and to modify, in ways not yet fully clear, its "supervision" of those banks. See n. 11, *supra.* But the District Court considered this development and concluded that it would not lead to true competition among the defendant banks. The court explicitly found that the changes ordered would not affect the bonds of interbank consultation and cooperation which are at the heart of the correspondent associate program. 372 F. Supp., at 638, 643, and n. 8.

County. In terms of total deposits and total individual, partnership and corporation ("IPC") demand deposits held by all banking offices located in DeKalb County, the top 4 banks, respectively, are C&S (offices of C&S National in DeKalb County, C&S Emory and C&S DeKalb), First National Bank of Atlanta, Trust Company of Georgia, and Fulton National Bank. In terms of outstanding loans, the top 4 banks are C&S (offices of C&S National in DeKalb County, C&S Emory and C&S DeKalb), Trust Company of Georgia, Tucker and Fulton National Bank. The shares of total deposits, total loans and total IPC demand deposits accounted for by the four largest banks are as follows:

Banks	Total Deposits (12/31/71)	Total Loans (12/31/71)	IPC Demand Deposits (6/30/72)
Top 2	38.3%	42.7%	34.8%
Top 3	51.8%	52.4%	47.3%
Top 4	62.9%	61.8%	58.2%

C&S (offices of C&S National in DeKalb County, C&S Emory and C&S DeKalb) accounts for the following shares of total deposits, total loans and total IPC demand deposits held by all banking offices located in DeKalb County.

Bank	Total Deposits (12/31/71)	Total Loans (12/31/71)	IPC Demand Deposits (6/30/72)
C&S	24.1%	28.5%	20.1%

Chamblee, Park National and South DeKalb, all of whose banking offices are located in DeKalb County, account for the following shares of total deposits, total loans and total IPC demand deposits held by all banking offices located in DeKalb County:

Banks	Total Deposits (12/31/71)	Total Loans (12/31/71)	IPC Demand Deposits (6/30/72)
Chamblee	5.7%	5.7%	5.9%
Park National	2.9%	1.5%	3.0%
South DeKalb	1.8%	2.5%	1.9%
	10.4%	9.7%	10.8%

Depending on the unit of measurement, Chamblee is the third or fourth largest bank headquartered in DeKalb County.

If the proposed mergers were approved, the C&S system (which would include offices of C&S National and South DeKalb) would account for 34.5% of the total deposits of all the banking offices located in DeKalb County, 38.2% of the total loans and 30.9% of the total IPC demand deposits. C&S would also be acquiring the third (or fourth) largest bank headquartered in DeKalb County.

If the proposed mergers were approved, the four largest banks would account for the following shares of the DeKalb County market:

Banks	Deposits	Total Loans	IPC Demand Deposits
Top 2 after mergers	48.7%	52.4%	45.6%
Top 3 after mergers	62.2%	62.1%	58.1%
Top 4 after mergers	73.3%	71.5%	69.0%

Thus, if the proposed mergers were approved, the C&S system's share of total deposits, for example, would increase from about 24% to 34%, or an increase of about 40%. The share of total deposits accounted for by the top 4 banks would increase from about 63% to 73%, while that of the top 2 and top 3 banks would increase from 38% to 49% and from 52% to 62%, respectively.

North Fulton County

There are nine commercial banks operating offices in North Fulton County. In terms of total deposits and total IPC demand deposits held by all banking offices located in North Fulton County, the top 4 banks, respectively, are Sandy Springs, Roswell Bank, Fulton Exchange Bank and North Fulton. On June 30, 1970, however, there were only five banks operating offices in North Fulton County: the four banks just mentioned and Trust Company of Georgia Bank of Sandy Springs, which is now a branch of Trust Company of Georgia. The shares of total deposits and IPC demand deposits accounted for by the four largest banks are as follows:

Banks	IPC Demand Deposits (6/30/72)	IPC Demand Deposits (6/30/70)	Total Deposits (6/30/70)
Top 2	57.8%	66.4%	64.0%
Top 3	70.1%	78.9%	80.2%
Top 4	80.3%	90.7%	91.9%

As of June 30, 1972, the North Springs Office of C&S East Point accounted for 1.7% of total IPC demand deposits held by all banking offices located in North Fulton County.

As of June 30, 1972, Sandy Springs and North Fulton accounted for 36.4% and 10.2%, respectively, of total IPC demand deposits held by all banking offices located in North Fulton County. As of June 30, 1970, they accounted for 34.4% and 11.7%, respectively, of total deposits held by all commercial banking offices located in North Fulton County.

If the proposed mergers were approved, the C&S system (which would include C&S East Point's North Springs Office, North Fulton and Sandy Springs) would

account for 48.3% of the total IPC demand deposits held by all commercial banking offices located in North Fulton County and the four largest banks would account for the following shares of IPC demand deposits in North Fulton County:

Banks	IPC Demand Deposits
Top 2 after mergers	69.7%
Top 3 after mergers	82.0%
Top 4 after mergers	92.0%

Thus, if the proposed mergers were approved, the C&S system's [1] share of total IPC demand deposits held by all banking offices located in North Fulton County would increase from 1.7% to 48.3%, and the C&S system's share in this area would be twice that of the second largest banking organization, the Roswell Bank. Two of the four largest banks in the area would become part of the Atlanta area's largest banking organization. In addition, the share of total IPC demand deposits accounted for by the top 4 banks would increase from 80.3% to 92.0%, while the shares of the top 2 and top 3 banks would increase from 57.8% to 69.7% and from 70.1% to 82.0%, respectively.

Fulton County

Treating C&S National and C&S East Point as one banking organization, there are 18 commercial banking organizations operating offices in Fulton County. In terms of total loans, deposits and IPC demand deposits held

[1] These computations consider the 5-percent defendant banks as completely separate entities (rather than as constituting a part of the C&S system as actually is the case), and of course, do not relate to competition as such but rather to the assignment of statistical proportions to the various entities involved.

by all banking offices located in Fulton County, the top 4 banks, respectively, are C&S (offices of C&S National in Fulton County and C&S East Point), First National Bank of Atlanta, Trust Company of Georgia and Fulton National Bank. The shares of total loans, deposits and IPC demand deposits accounted for by the four largest banks are as follows: [2]

Banks	Total Loans (12/31/71)	Total Deposits (12/31/71)	IPC Demand Deposits (6/30/72)
Top 2	63.0%	55.2%	61.3%
Top 3	78.8%	73.9%	78.1%
Top 4	89.4%	87.0%	88.8%

C&S (offices of C&S National in Fulton County and C&S East Point) accounts for the following shares of total loans, deposits and IPC demand deposits held by all banking offices located in Fulton County:

Bank	Total Loans (12/31/71)	Total Deposits (12/31/71)	IPC Demand Deposits (6/30/72)
C&S	37.2%	30.8%	32.1%

Sandy Springs and North Fulton, both of whose banking offices are located in Fulton County, account for the following shares of total loans, deposits and IPC demand deposits held by all banking offices located in Fulton County:

Banks	Total Loans (12/31/71)	Total Deposits (12/31/71)	IPC Demand Deposits (6/30/72)
Sandy Springs	.7%	.8%	.9%
North Fulton	.3%	.3%	.3%
	1.0%	1.1%	1.2%

[2] See n. 1, *supra*.

Depending on the unit of measurement, Sandy Springs is the eighth or ninth largest banking organization in Fulton County.

If the proposed mergers were approved, the C&S system (which would include offices of C&S National in Fulton County, C&S East Point, Sandy Springs and North Fulton) would account for 38.2% of the total loans held by all banking offices in Fulton County, 31.9% of the total deposits and 33.3% of the total IPC demand deposits.

If the proposed mergers were approved, the four largest banks would account for the following shares in Fulton County:

Banks	Total Loans	Total Deposits	IPC Demand Deposits
Top 2 after mergers..	64.0%	56.3%	62.5%
Top 3 after mergers..	79.8%	75.0%	79.3%
Top 4 after mergers..	90.4%	88.1%	90.0%

Atlanta Area

Treating C&S National, C&S Emory, C&S DeKalb and C&S East Point as one banking organization, there are 31 commercial banking organizations operating offices in the Atlanta area, six of which operate offices in both Fulton and DeKalb Counties. In terms of total loans, deposits, and IPC demand deposits held by all banking offices located in the Atlanta area, the top 4 banks, respectively, are C&S (offices of C&S National, C&S East Point, C&S Emory and C&S DeKalb), First National Bank of Atlanta, Trust Company of Georgia and Fulton National Bank. The shares of total loans, deposits and IPC demand deposits accounted for by the four largest banks are as follows:

Banks	Total Loans (12/31/71)	Total Deposits (12/31/71)	IPC Demand Deposits (6/30/72)
Top 2	60.5%	53.2%	58.0%
Top 3	76.2%	71.3%	74.3%
Top 4	86.7%	84.2%	85.0%

C&S (offices of C&S National, C&S Emory, C&S East Point and C&S DeKalb) accounts for the following shares of total loans, deposits and IPC demand deposits held by all banking offices located in the Atlanta area:

Bank	Total Loans (12/31/71)	Total Deposits (12/31/71)	IPC Demand Deposits (6/30/72)
C&S	36.4%	30.0%	30.6%

Chamblee, Park National, South DeKalb, Sandy Springs and North Fulton account for the following shares of total loans deposits and IPC demand deposits held by all banking offices located in the Atlanta area:

Banks	Total Loans (12/31/71)	Total Deposits (12/31/71)	IPC Demand Deposits (6/30/72)
Chamblee	.5%	.6%	.8%
Park National	.1%	.3%	.4%
South DeKalb	.2%	.2%	.3%
Sandy Springs	.6%	.7%	.8%
North Fulton	.3%	.2%	.2%
	1.7%	2.0%	2.5%

If their deposits (as of 12/31/71) were combined ($71,142,252), these five banks would be the equivalent of the sixth largest banking organization in the Atlanta area. Sandy Springs and Chamblee are, alone, the tenth and eleventh largest banking organizations in the Atlanta area, respectively.

If the proposed mergers were approved, the C&S system (which would include the offices of C&S National in the Atlanta area, C&S Emory, C&S DeKalb, C&S East Point, Chamblee, Park National, South DeKalb, Sandy Springs and North Fulton) would account for 38.2% of the total loans held by all banking offices located in the Atlanta area, 32.0% of the total deposits and 33.0% of the total IPC demand deposits. C&S would also be acquiring the tenth and eleventh largest banks in the Atlanta area.

If the proposed mergers were approved, the four largest banks would account for the following shares in the Atlanta area:

Banks	Total Loans	Total Deposits	IPC Demand Deposits
Top 2 after mergers..	62.2%	55.2%	60.5%
Top 3 after mergers..	77.9%	73.3%	76.8%
Top 4 after mergers..	88.4%	86.2%	87.5%

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE join, dissenting.

I agree that the District Court erred in holding that the correspondent associate programs are immune from Sherman Act scrutiny because they are subject to the "exclusive primary jurisdiction" of the Federal Reserve Board under the Bank Holding Company Act of 1956, as amended. The District Court also erred, however, in holding that the United States did not prove the violations of § 1 of the Sherman Act, and § 7 of the Clayton Act, alleged, and I therefore dissent from the affirmance of its judgment.

The issues under the Clayton and Sherman Acts, while logically independent, are related; both present the question whether a large commercial bank, already possessing

a substantial share of the Atlanta market, may lawfully acquire other banks, rather than expand internally. Three banks now control more than 75% of the commercial banking business in Atlanta. Today's decision assures that their dominions will soon be extended as arrangements they have made with independent banks to operate as "*de facto* branches" are solidified through merger. I cannot agree with today's decision that the Government is powerless to prevent this result.

I. *The Sherman Act*

The "5-percent" banks in this litigation entered into a relationship with C&S far exceeding that of "correspondent banking," the provision of check clearance, investment advice, personnel training, or other specialized services in arm's-length transactions.[1] From the very inception of these relationships, it was contemplated that

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[1] Relationships labeled "correspondent banking" may call for careful scrutiny as the sale of specialized services by the corresponding bank shades into "consultation" by the correspondent on every business decision of significance. Correspondent banking, like other intra-industry interaction among firms or their top management, provides an opportunity both for the kind of education and sharing of expertise that ultimately enhances consumer welfare and for "understandings" that inhibit, if not foreclose, the rivalry that antitrust laws seek to promote. As one commentator on commercial banking practices has observed:

"[C]ommunication, especially when it comes from those at the top of a power hierarchy, tends to facilitate conflict resolution. Perhaps a great deal should not be made of this, but competition is a form of conflict and, in the present context, conflict resolution is a form of restraint on competition." Phillips, Competition, Confusion, and Commercial Banking, 19 J. of Finance 32, 42 (1964).

Since the relationship of C&S to the 5-percent banks goes well beyond ordinary "correspondent banking," this case does not present an occasion for further examination of the lawfulness of these more limited interconnections among firms.

the 5-percent banks would seek, and C&S would provide, advice and guidance with respect to virtually every business decision of significance. C&S provided advisory directors—treated by all parties as actual directors—made available operating manuals covering banking practices in minute detail,[2] and maintained a constant flow of bulletins whose contents ranged from admonitions about the antitrust laws to exhortations to "get the rates [on loans] up." C&S, through its Branch Supervision Department, monitored the performance of the management of the 5-percent banks and was instrumental in having replaced those who did not measure up. These arrangements had the desired effect. The elaborate fabric of "consultations," of seeking "advice and guidance," eliminated the opportunity for rivalry among the defendant banks. The District Court found "no presently existing substantial competition between the five-percent banks and C&S National, or *inter sese.*" 372 F. Supp. 616, 642 (1974).

A

The Court concludes that antitrust scrutiny of the affiliation of three 5-percent banks is foreclosed by the grandfather provision of § 11 (d) of the Bank Holding Company Act, 12 U. S. C. § 1849 (d). That holding is plainly a distorted expansion of § 11 (d) beyond its language and purpose.

The concept of an amnesty for unchallenged structural arrangements in commercial banking first appeared

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[2] The Consumer Credit Operating Bulletin, 7 App. E-1024 (DX-311), is illustrative. It explains what bank records should be established, the methods for arranging a repayment plan, and the procedures to be followed in perfecting a security interest. In addition, the manual sets forth C&S practice with respect to charges for late payments, extensions of repayment deadlines, and the notification of a borrower's employer about repayment delinquency.

in the 1966 amendments to the Bank Merger Act, 80 Stat. 7. In those amendments, Congress, responding in part to this Court's decisions in *United States* v. *Philadelphia National Bank,* 374 U. S. 321 (1963), and *United States* v. *First National Bank & Trust Co. of Lexington,* 376 U. S. 665 (1964), attempted to mesh antitrust considerations with review of proposed bank mergers by the appropriate regulatory agency. The resulting provisions, which mandate Justice Department participation in the regulatory approval process as well as consideration by the regulatory agencies of "competitive factors," and permit an antitrust suit within 30 days of regulatory approval, appear today in the Federal Deposit Insurance Act, 12 U. S. C. § 1828. See *United States* v. *First City National Bank of Houston,* 386 U. S. 361 (1967); *United States* v. *Third National Bank in Nashville,* 390 U. S. 171 (1968). The 1966 amendments also included a grandfather provision, 80 Stat. 10, that conferred immunity from antitrust challenge (except under § 2 of the Sherman Act) upon any "merger, consolidation, acquisition of assets, or assumption of liabilities" consummated before June 17, 1963, the date of the decision in *Philadelphia National Bank.*

A few months after enactment of the Bank Merger Act amendments, the "antitrust" provisions were written almost verbatim into the Bank Holding Company Act. Unlike their Merger Act counterparts, the 1966 amendments to the Bank Holding Company Act were not principally addressed to integrating antitrust standards with the regulatory process, but rather to expanding the Federal Reserve Board's jurisdiction and regulatory powers. The antitrust provisions of the Holding Company Act amendments received little legislative attention; the brief reference to them in the legislative history indicates that their pur-

pose was to "apply to bank holding company cases the same procedures as are now provided in bank merger cases . . . ."[3] Among the provisions so borrowed from the earlier Bank Merger Act amendments was the grandfather provision, § 11 (d).

Because of congressional preoccupation with the regulatory features of the 1966 amendments to the Bank Holding Company Act, interpretation of the antitrust provisions may involve as much an attribution of congressional intent as a discernment of it. This is particularly the case with respect to § 11 (d), which was transplanted from one regulatory statute to another with seemingly scant attention to the differences in the regulatory environment. Objections that grandfathering holding company acquisitions posed policy questions different from the retroactive immunization of mergers were quickly brushed aside,[4] and § 11 (d) was swept into law along with the other antitrust provisions. Thus, despite whatever dissimilarity of underlying policy considerations may have been exposed, Congress indicated that it considered the grandfather provisions in both statutes to advance substantially similar purposes. Accordingly, however difficult may be the discernment of the congressional intent expressed in § 11 (d), we must look for assistance to its counterpart in the Bank Merger Act, the only guidepost Congress has left us.

The grandfather provision of the Bank Merger Act amendments most assuredly did not provide sanctuary

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[3] As initially enacted by the House, the amendments contained no antitrust provisions. See generally H. R. Rep. No. 534, 89th Cong., 1st Sess. (1965). These were added later by the Senate Banking and Currency Committee and subsequently adopted by both Houses. See S. Rep. No. 1179, 89th Cong., 2d Sess., 10 (1966).

[4] See letter from Deputy Attorney General Clark to Sen. Robertson, reprinted at 112 Cong. Rec. 12385 (1966), and accompanying remarks by Sen. Robertson, *ibid.*

for then-unchallenged price-fixing, market-division, or other cartel activity by banks. Congressional concern was much more narrowly directed. *Philadelphia National Bank* rejected a literal interpretation of § 7 of the Clayton Act that would have limited its application to stock acquisitions by banks, an interpretation that nevertheless enjoyed some acceptance prior to the decision. Congress was concerned about the difficulty of unscrambling pre-*Philadelphia National Bank* mergers undertaken in reliance upon the literal interpretation of § 7, which the Court ultimately rejected, and accordingly immunized them from suit under that section.[5] But a provision barring suit under § 1 of the Sherman Act was also necessary to safeguard the same mergers because of our decision in *Lexington Bank, supra.* Thus, although the resulting grandfather provision covered both the Clayton and Sherman Acts (except Sherman Act § 2), its purpose was to shield structural arrangements of the sort the Government challenged in *Philadelphia National Bank* and was continuing to challenge in the District Courts thereafter.[6]

Against the foregoing background, we confront the language of the counterpart in the Bank Holding Company Act. As enacted in 1966, § 11 (d) shielded an "acquisition, merger, or consolidation of the kind described in § 3 (a) of this Act." Section 3 (a) provided then, as today, that:

"(a) It shall be unlawful, except with the prior

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[5] See S. Rep. No. 299, 89th Cong., 1st Sess., 1–7 (1965); H. R. Rep. No. 1221, 89th Cong., 2d Sess., 4 (1966); 111 Cong. Rec. 13304–13305 (1965) (remarks of Sen. Robertson); 112 Cong. Rec. 2454 (1966) (remarks of Rep. Celler).

[6] See *United States* v. *Crocker-Anglo National Bank,* 223 F. Supp. 849 (ND Cal. 1963); *United States* v. *Manufacturers Hanover Trust Co.,* 240 F. Supp. 867 (SDNY 1965), cited in Hearings on S. 1698 before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 1st Sess., 446, 463 (1965).

approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company." [7]

Section 3 (a) is thus the operative provision of the statute permitting the Federal Reserve Board to regulate the events therein described.

By "grandfathering" an "acquisition, merger, or consolidation of the kind described in § 3 (a)," Congress obviously exempted from antitrust challenge only the events for which Board approval would have been required. None of the transactions defined by § 3 (a), however, includes those features of the "correspondent associate" relationship that the Government is challenging under Sherman Act § 1 in this case. Clauses (4) and (5) of § 3 (a) refer, respectively, to an acquisition of assets and a merger of two holding companies. Clause (3) refers to ownership of voting stock by a holding company; the stock ownership by C&S is not, however, the salient feature of the affiliative relationship and indeed is not challenged in this case. Clauses (1) and (2) address the creation of a holding company-subsidiary rela-

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[7] Section 3 (a) had been in force since enactment of the Bank Holding Company Act in 1956. The 1966 amendment added clause (2) to its provisions.

tionship. The definitional provisions of § 2 (d) have undergone recent expansion, but in 1966 they designated a bank as a "subsidiary" if a holding company either (1) directly or indirectly owned or controlled 25% or more of its voting stock, or (2) controlled in any manner the election of a majority of its directors. These two conditions would often be satisfied simultaneously, and indeed shortly after enactment of the forerunner of this provision in 1956 it was suggested that the second condition was redundant. See Note, The Bank Holding Company Act of 1956, 9 Stan. L. Rev. 333, 337, and n. 59 (1957). Congress, however, was apparently concerned that stock interests could be so structured that a holding company could elect a majority of directors without satisfying the 25% ownership requirement.[8] Whether or not this fear was well-founded, it is clear that satisfaction of either condition required an arrangement whereby the holding company had the power to vote stock.

In establishing its "correspondent associates" C&S did not engage in the transactions described by § 3 (a) in 1966 and therefore sheltered by § 11 (d). Indeed, because of state-law restrictions C&S could not resort to the methods described by § 3 (a) of the Holding Company Act and turned instead to more informal arrangements, including "understandings." While the functional equivalent of a holding company-subsidiary relationship could perhaps be created through informal affiliation, § 3 (a), at least until quite recently, has been

[8] See H. R. Rep. No. 609, 84th Cong., 1st Sess., 12–13 (1955); 101 Cong. Rec. 8028 (1955) (remarks of Rep. Patman). In the form initially adopted by the House, the Act would have defined as a subsidiary a bank over which another company was found by the Federal Reserve Board to "exercise a controlling influence." The Senate amendment substituted the provision ultimately enacted, the requirement of control of the election of directors. See S. Rep. No. 1095, 84th Cong., 1st Sess., 5 (1955).

triggered by the formality of control of voting stock. To be sure, § 2 (d) has always referred to a subsidiary as one whose stock is "directly *or indirectly*" owned or controlled or whose election of directors is controlled "*in any manner*" by the holding company.[9] But there has been no suggestion by Congress, nor by the Board, that this language would embrace the less formal arrangements by which the C&S banks operated in complete harmony with C&S. Indeed, the statutory clues suggest the contrary, that Congress was concerned with powers attached to stock, and that "indirect" ownership or control merely referred to their exercise derivatively, through an intermediary.[10]

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[9] The reference to indirect ownership, though contained in § 2 (a) of the 1956 Act (defining holding company), was inadvertently omitted from § 2 (d). See 70 Stat. 134. The 1966 amendments corrected the omission. See S. Rep. No. 1179, 89th Cong., 2d Sess., 8 (1966).

[10] Section 2 (g) of the Act defined indirect control or ownership: "For the purposes of this Act—

"(1) shares owned or controlled by any subsidiary of a bank holding company shall be deemed to be indirectly owned or controlled by such bank holding company;

"(2) shares held or controlled directly or indirectly by trustees for the benefit of (A) a company, (B) the shareholders or members of a company, or (C) the employees (whether exclusively or not) of a company, shall be deemed to be controlled by such company; and

"(3) shares transferred after January 1, 1966, by any bank holding company (or by any company which, but for such transfer, would be a bank holding company) directly or indirectly to any transferee that is indebted to the transferor, or has one or more officers, directors, trustees, or beneficiaries in common with or subject to control by the transferor, shall be deemed to be indirectly owned or controlled by the transferor unless the Board, after opportunity for hearing, determines that the transferor is not in fact capable of controlling the transferee."

This provision was added by the 1966 amendments to adopt inter-

In the 1970 amendments to the Holding Company Act, 84 Stat. 1760, Congress expanded the reach of § 3. The Act now defines "control" to include a relationship whereby a company "directly or indirectly exercises a controlling influence over the management and policies of the bank . . . ." § 2 (a)(2)(C), 12 U. S. C. § 1841 (a)(2)(C). Congressional preoccupation with stock is still evident since there is a statutory presumption that "any company which directly or indirectly owns, controls, or has power to vote less than 5 per centum of any class of voting securities of a given bank or company does not have control over that bank or company." § 2 (a)(3). Nevertheless the Board has by regulation established a rebuttable presumption of control where a company

> "enters into any agreement or understanding with a bank . . . such as a management contract, pursuant to which the company or any of its subsidiaries exercises significant influence with respect to the general management or overall operations of the bank . . . ." 12 CFR § 225.2 (b)(3) (1975).

Arguably, the Board's interpretation would now bring within § 3 the affiliation of the 5-percent banks with C&S. But the Board's interpretation is based upon recent legislation expanding the reach of the Board's regulatory authority.[11] Since I do not suppose Congress intended in 1966 to immunize transactions of the kind it had not yet brought within § 3, the 1970 amendment is relevant only because it demonstrates the limited char-

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pretations previously made by the Board. S. Rep. No. 1179, *supra,* at 8.

[11] Congress specifically noted the expansion. See S. Rep. No. 91-1084, p. 6 (1970); H. R. Rep. No. 91-1747, p. 12 (1970). See also Note, The Bank Holding Company Act Amendments of 1970, 39 Geo. Wash. L. Rev. 1200, 1213-1214 (1971).

acter of the transactions previously embraced by § 3 and "grandfathered" under § 11 (d).

The conclusion that Congress had traditionally not brought informal arrangements within § 3 (a) was reinforced by the provisions of § 4 (a)(2) of the original Act, 70 Stat. 135, which forbade a bank holding company to

> "engage in any business other than that of banking or of managing or controlling banks or of furnishing services to or performing services for any bank of which it owns or controls 25 per centum or more of the voting shares."

This provision was enacted in 1956, and as early as 1960 the Board by regulation interpreted "services" to include many of the functions C&S has performed for the 5-percent banks. Included in the Board's interpretation are: "(1) [e]stablishment and supervision of loaning policies; (2) direction of the purchase and sale of investment securities; (3) selection and training of officer personnel; (4) establishment and enforcement of operating policies; and (5) general supervision over all policies and practices." 12 CFR § 225.113 (1975). The differentiation of these activities from "control or management" and their inclusion in § 4 of the Act rather than in § 3 vividly exposes the fallacy of today's holding invoking § 11 (d) to foreclose scrutiny of the "correspondent associate" relationship of three of the 5-percent banks. Since § 11 (d) shielded only the events then described in § 3 (a), the conclusion is compelled that all the 5-percent banks are properly before us on the Sherman Act counts.[12] Accordingly, I turn to the merits.

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[12] My conclusion that the affiliative relationships are not within the terms of § 3 (a), at least prior to the 1970 amendment, is further supported by the scope and outcome of the 1968 investigation of C&S undertaken by the Federal Reserve Board staff. The investigation was convened specifically to inquire into a possible violation

B

The District Court found that there were no express agreements among the defendant banks to fix prices or divide markets that would call for application of the *per se* rule, *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150 (1940); *United States* v. *Sealy, Inc.,* 388 U. S. 350 (1967), but it also found that the effect of the association was to eliminate all competition among the banks involved.

The Court finds the restraints embodied in the "correspondent associate" relationship reasonable because of state-law restrictions that blocked, for a time, the avenue of internal expansion by C&S. If the question before us were the lawfulness of these arrangements at their inception, this solution might be satisfactory. The question would be a close one, however, calling for a delicate balancing of the immediate benefits of expanded banking services against the more distant, but nevertheless real, danger of permitting the restraints necessary to circumvent *de jure* barriers to expansion to continue longer than the conditions that justified them. The inquiry would, of course, have to take into account the possibility that expansion would occur under less restrictive conditions. New entry by an unaffiliated bank [13] or entry

of § 3. The staff was principally concerned with the pattern of ownership of the stock of the 5-percent banks, especially by C&S officers and employees. Ultimately the staff found this acceptable, so long as C&S did not finance the purchases. There is no indication, however, that the staff concerned itself with communications between C&S and the 5-percent banks with respect to such matters as interest rates, loan repayment policies, or other terms of business.

[13] There is little doubt that pent-up consumer demand for additional banks would sooner or later induce efforts to organize new ones. More questionable, however, is whether regulatory authorities would respond promptly to permit new entry. In general, reg-

with a more limited form of sponsorship—a period of initial assistance, followed by a withdrawal of the sponsor's influence, at least to a conventional correspondent relationship[14]—might have sufficed to provide the expansion cited here as a justification for incidental restraints. The judicial resources consumed by such an inquiry in any particular case would not be insubstantial, and the very difficulty of making such judgments has in many cases led us to prefer *per se* rules. *United States* v. *Socony-Vacuum Co., supra,* at 220–221; *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 5 (1958); *United States* v. *Sealy, Inc., supra; United States* v. *Topco Associates, Inc.,* 405 U. S. 596 (1972). See also *United States* v. *Philadelphia National Bank,* 374 U. S., at 362.

The issue in this case, however, is not whether the affiliation of the 5-percent banks was lawful at its inception, but whether it could lawfully continue, for the Government sought only an injunction. By the time the Government brought suit, Georgia law per-

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ulatory policy has been thought to retard formation of new banking institutions. See Peltzman, Entry in Commercial Banking, 8 J. Law & Econ. 11 (1965).

[14] The record demonstrates that such a chain of events is possible. Citizens & Southern Bank of Stone Mountain, organized in 1957 with C&S assistance, functioned as a correspondent associate from 1959 until 1970. At that time it declined an offer of acquisition by C&S and became independent of the C&S system. Appellees have argued that Stone Mountain represents a unique case because a majority of voting stock remained in the hands of a single family not intimately tied to the C&S system. This contention is not wholly supported by the record, since in his trial testimony Mr. Mills Lane, President of C&S from 1946 to 1970, referred to three other banks having a similar structure of ownership. (2 App. 378–379, referring to Pelham, Fayetteville, Hogansville). The example of Stone Mountain does, in any event, demonstrate that sponsorship can occur under conditions ultimately leading to independence of the sponsored institution.

mitted C&S to branch freely in the Atlanta suburbs. Because the rule of reason requires us to assess the lawfulness of a restraint in light of all the circumstances, *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238 (1918), the lawfulness of the practices at their inception, even if assumed, could not be controlling, for changes in market conditions can deprive once-reasonable arrangements of their justification. *United States* v. *Jerrold Electronics,* 187 F. Supp. 545, 560–561 (ED Pa. 1960), aff'd, 365 U. S. 567 (1961). See also *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U. S. 586, 596–598 (1957). The claimed desirability of the challenged arrangements as a response to now-repealed restrictions of Georgia law is therefore relevant only insofar as it may also be claimed that continuation of such arrangements undisturbed by the Sherman Act would be vital to their creation were Georgia to reinstate its restrictions in the future. Put another way, we need concern ourselves with the lawfulness of "*de facto* branches" as a response to state-law restrictions only if appellees make a convincing showing that no bank would engage in "*de facto* branching" without a guarantee of perpetual noninterference from the antitrust laws.

Certainly it is open to C&S to argue that no rational banker would sponsor a *de facto* branch unless assured that the resulting relationships could continue in perpetuity. But this sort of argument has seldom carried the day in this Court, see *United States* v. *Sealy, supra; United States* v. *Topco Associates, supra,* and I do not find it persuasive in this case. A bank hemmed in by state antibranching restrictions will presumably find it profitable to take a small stock interest in an independent bank, to offer assistance and thereby attempt to win consumer loyalty through an expanded use of its own name. C&S presumably found these arrangements

profitable at their inception. The record does not show whether C&S actually charged the 5-percent banks for such assistance as site selection, economic surveys, equipment procurement, and other promotional services; there is no suggestion, however, that C&S provided these services at an ultimate loss, and presumably gains ultimately accrued to the provider. True, C&S hoped to cement the relationships through merger, but it is not clear that these expectations were essential to the initial undertaking. Indeed, C&S continued to provide assistance to certain banks as to which there was little prospect of ultimate acquisition by C&S. 2 App. 378–379. Our concern, in any event, lies not with protecting the expectations of C&S but with avoiding disincentives to the provision of desirable services. Sponsorship will be profitable to a sponsor bank assuming that there is a demand for the services of the sponsored bank and that the sponsor can recoup in some fashion a return for its assistance. These conditions should be sufficient to induce a profit-seeking bank, chafing under antibranching restrictions, to sponsor a new entrant even if permanent arrangements are forbidden.

This case, therefore, does not present an occasion for consideration whether the restraints incident to "*de facto* branching" are lawful when undertaken in response to a prohibition of *de jure* branching, a position the Court says the Government took last Term in *United States* v. *Marine Bancorporation,* 418 U. S. 602 (1974). The restraints incident to the affiliation of the 5-percent banks with C&S must be examined in light of conditions prevailing at the time of suit, which include the ability of C&S to branch freely in the Atlanta suburbs.

The arrangements between C&S and the 5-percent banks resemble a "common brand" marketing agreement or a franchising arrangement in which the franchisor

itself deals directly with consumers as well as providing entrepreneurial skill and other assistance to franchisees. Such combinations may, under certain circumstances, enhance competition. Common-brand marketing may permit a group of small firms to exploit promotional economies and thereby compete with larger enterprises whose business spans several geographic submarkets. Franchising may facilitate entry by allowing an entering firm to save on promotional expenses and to purchase needed entrepreneurial assistance. Restraints invariably accompany these combinations for the purpose of promoting product uniformity, for some standardization of product is indispensable to the success of the scheme. Because notwithstanding accompanying restraints such combinations may on balance enhance competition, it would be a mistake to regard them as *per se* or even presumptively unlawful, and lower courts have not done so. See, *e. g., United States* v. *Topco Associates, Inc.,* 319 F. Supp. 1031, 1038 (ND Ill. 1970), rev'd on other grounds, 405 U. S. 596 (1972); *Siegel* v. *Chicken Delight, Inc.,* 448 F. 2d 43 (CA9 1971); *Susser* v. *Carvel Corp.,* 332 F. 2d 505 (CA2 1964). But the Sherman Act limits the scope of cooperation incident to such arrangements. The participants may not fix prices or divide markets. *United States* v. *Topco Associates, Inc., supra; United States* v. *Sealy, Inc., supra; United States* v. *Arnold, Schwinn & Co.,* 388 U. S. 365 (1967). Such combinations, moreover, warrant careful scrutiny when their participants collectively possess a dominant share of a common market, as to which there are substantial barriers to entry, for these conditions enhance the profitability of price collusion among participants and thus may tempt them to standarize price as well as other product attributes.

Despite the acceptability generally of common-brand

or franchising arrangements, they pose particular difficulty in the commercial banking context. Many features of a commercial bank's services are set by regulation, thus inhibiting competition by restricting the number of product features that individual firms are free to vary. With interest rates on loans fixed by law, for example, competition is confined to such "non-price" features as collateral requirements or repayment policies. With competition thus already delimited, few additional restraints incident to a cooperative scheme can be tolerated before competition is extinguished entirely. Moreover, the entry barriers posed by regulation enhance the danger that incidental cooperation will be extended to abolish all rivalry. These considerations suggest that cooperative arrangements in commercial banking should be permitted only where their competitive benefits are clear, and where the combined market shares of the participants dispel the fear that price collusion will accompany them.

The situation here fails to satisfy the test. The combined shares of C&S and the 5-percent banks are substantial under any of the alternative definitions of the geographic market cited by the Court. *Ante,* at 122–130.[15] Furthermore, the cooperative arrangements in-

[15] The District Court made no finding as to the relevant geographic market, accepting the Government's contentions *arguendo* in deciding the case. The Court apparently does the same. A report prepared by the Government's expert witness concluded that while the Atlanta Standard Metropolitan Statistical Area was too large to be considered an integral geographic market, the constituent counties of DeKalb and Fulton were "reasonable geographic areas within which it is appropriate to analyze the competitive effects of the proposed mergers." 4 App. E–83. This is an approximation, of course, since the same report revealed that a number of DeKalb residents use Fulton County banks, thus suggesting that in certain respects DeKalb and Fulton County banks compete for the same business. Accordingly, it appears that defining the geographic mar-

volve not a group of small firms allied to challenge a larger rival, *United States* v. *Topco Associates, supra,* but instead the dominant firm which thereby extends its hegemony. In a market so concentrated as is commercial banking in Atlanta, the most must be made of opportunity for rivalry among existing firms. Cf. *United States* v. *Philadelphia National Bank,* 374 U. S., at 372. The 5-percent banks are now substantial, thriving enterprises,[16] inhibited from competing with C&S only by the "correspondent associate" relationship. I would hold that the Government is entitled to an injunction, specifically against the continued use by the 5-percent banks of the C&S name, the continued use of advisory directors furnished by C&S, and continued "consultations" between the management of the 5-percent banks and C&S, including the flow of memoranda for "advice and guidance."

II. *The Clayton Act*

The Court concedes that under our prior decisions the Government has established a prima facie case under § 7. *Ante,* at 120. But the Court affirms the District Court's determination that the acquisitions add nothing

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ket to include both DeKalb and Fulton Counties would be justified under our cases. See *United States* v. *Phillipsburg National Bank & Trust Co.,* 399 U. S. 350 (1970); *United States* v. *Philadelphia National Bank,* 374 U. S. 321 (1963).

[16] Three of the 5-percent banks—Sandy Springs, Chamblee, and Tucker—had deposits exceeding $15 million as of January 1, 1970. North Fulton, Park National, and South DeKalb were smaller and more recently organized, but all have experienced vigorous growth. The average annual rate of deposit growth for the two years preceding January 1, 1970, was 102% for North Fulton and 50% for Park National, in contrast to a national average rate for all commercial bank deposits during the same period of slightly more than 10%. South DeKalb, organized in late 1969, had more than doubled its deposits from $1.5 to $3 million during the first half of 1970. 5 App. E–422, E–546.

of anticompetitive significance to the pre-existing "correspondent associate" relationship. Since I have concluded that the relationship itself violates the Sherman Act, I also disagree with the Court's affirmance of the District Court on the Clayton Act issue. Since, in my view, appellees can no longer rely upon the affiliation to rebut the Government's prima facie case, I would remand to the District Court for consideration of the "convenience and needs" defense of 12 U. S. C. § 1828 (c)(5)(B). But I also disagree with the Court's conclusion that the acquisitions add nothing of significance to the existing arrangements, and I would therefore reverse even if I accepted the Court's disposition of the Sherman Act counts. I state briefly my reasons for so concluding.

If not acquired, the 5-percent banks have the power to break their ties with C&S, and the likelihood that any would do so may be expected to increase as the demand for their services grows and as their managements acquire additional business experience. However risky these ventures may have been at their inception, the recent performance of the 5-percent banks attests to their present viability.[17] Because of the continuing population growth of the Atlanta area, the banks may anticipate an expanding demand for their services. These circumstances might well induce the management of a 5-percent bank to assume a more independent posture, at least to shop around among other large Atlanta banks for more conventional "correspondent" services.[18]

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[17] See n. 16, *supra*.

[18] Officers of both C&S and the 5-percent banks testified that they had not contemplated a severance of relations, but this testimony does not establish what would happen if the acquisitions were enjoined. Had the managements testified that they would not consider severance under any circumstances, such declarations of an intention to eschew a course dictated by economic self-interest would have to be viewed with skepticism. See *United States* v. *Falstaff*

Quite apart from what the managements of the 5-percent banks might do, it is most improbable that C&S would long be happy with existing arrangements if acquisition were enjoined. The record demonstrates the aggressive, expansionist performance of C&S, having increased its Atlanta offices from three in 1946 to more than 100 by the time of trial. It is quite inconceivable that such a firm would long be content to continue operations through *de facto* branches in which its interest was limited to 5%. The formation of *de jure* branches, ultimately in competition with former "correspondent associates," would be a plausible result.

The foregoing are not "ephemeral possibilities," *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 323 (1962), that antitrust analysis should ignore. Section 7 was intended, as we have repeatedly said, to "arrest anticompetitive tendencies in their 'incipiency.'" *United States* v. *Philadelphia National Bank,* 374 U. S., at 362. In applying the § 7 standards, we are obliged to hold acquisitions unlawful if a reasonable likelihood of a substantial lessening of competition under future conditions is discernible. *E. g., United States* v. *Continental Can Co.,* 378 U. S. 441, 458 (1964); *FTC* v. *Procter & Gamble Co.,* 386 U. S. 568, 577 (1967); *United States* v. *Falstaff Brewing Corp.,* 410 U. S. 526, 539 (1973) (DOUGLAS, J., concurring in part). While inquiry as to future market conditions and performance inevitably involves speculation, fidelity to the

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Brewing Corp., 410 U. S. 526, 568–570 (1973) (MARSHALL, J., concurring in result).

Whether the 5-percent banks would have been formed at all had their principals expected the Clayton Act to bar ultimate acquisition by C&S is a different question. I am not troubled by it for essentially the same reasons that have led me to conclude above that enjoining continuation of correspondent associate relationships would not deter sponsorship of *de facto* branches under state-law restrictions on *de jure* branching. See *supra,* at 143–144.

congressional purpose requires us to resolve reasonable doubts in favor of the preservation of independent entities. This is perforce true where, as here, the market is highly concentrated and the acquiring firm is the dominant one.

My Brother WHITE reminded us in his dissent last Term in *United States* v. *Marine Bancorporation,* 418 U. S., at 653:

> "In the last analysis, one's view of this case, and the rules one devises for assessing whether this merger should be barred, turns on the policy of § 7 of the Clayton Act to bar mergers which may contribute to further concentration in the structure of American business. . . . The dangers of concentration are particularly acute in the banking business, since 'if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected. . . .'" (Citations omitted.)

Today's decision permits C&S, the dominant commercial bank in Atlanta, further to entrench its position. Two other rivals, which together with C&S control more than 75% of the banking business in Atlanta, may now be expected to follow suit, acquiring their own *"de facto* branches." [19] I believe these developments exemplify the "further concentration in the structure of American business" that § 7 was designed to prevent. Accordingly, I would reverse the judgment of the District Court.

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[19] The record indicates that at the time C&S applied for regulatory approval of the acquisitions, its two largest competitors, First National Bank of Atlanta and Trust Company of Georgia, had sought and in some cases had obtained, approval for similar acquisitions of affiliated banks. 1 App. E-39.

TWENTIETH CENTURY MUSIC CORP. ET AL. *v.* AIKEN

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

No. 74-452. Argued April 21, 1975—Decided June 17, 1975

Petitioners' copyrighted songs were received on the radio in respondent's food shop from a local broadcasting station, which was licensed by the American Society of Composers, Authors and Publishers to perform the songs, but respondent had no such license. Petitioners then sued respondent for copyright infringement. The District Court granted awards, but the Court of Appeals reversed. *Held:* Respondent did not infringe upon petitioners' exclusive right, under the Copyright Act, "[t]o perform the copyrighted work publicly for profit," since the radio reception did not constitute a "performance" of the copyrighted songs. *Fortnightly Corp.* v. *United Artists,* 392 U. S. 390; *Teleprompter Corp.* v. *CBS,* 415 U. S. 394. To hold that respondent "performed" the copyrighted works would obviously result in a wholly unenforceable regime of copyright law, and would also be highly inequitable, since (short of keeping his radio turned off) one in respondent's position would be unable to protect himself from infringement liability. Such a ruling, moreover, would authorize the sale of an untold number of licenses for what is basically a single rendition of a copyrighted work, thus conflicting with the balanced purpose of the Copyright Act of assuring the composer an adequate return for the value of his composition while at the same time protecting the public from oppressive monopolies. Pp. 154-164.

500 F. 2d 127, affirmed.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, *post,* p. 164. BURGER, C. J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post,* p. 167.

Simon H. Rifkind argued the cause for petitioners.

With him on the briefs were *Herman Finkelstein, Jay H. Topkis,* and *Bernard Korman.*

Harold David Cohen argued the cause for respondent. With him on the brief were *Thomas N. Dowd* and *William S. D'Amico.**

MR. JUSTICE STEWART delivered the opinion of the Court.

The question presented by this case is whether the reception of a radio broadcast of a copyrighted musical composition can constitute copyright infringement, when the copyright owner has licensed the broadcaster to perform the composition publicly for profit.

I

The respondent George Aiken owns and operates a small fast-service food shop in downtown Pittsburgh, Pa., known as "George Aiken's Chicken." Some customers carry out the food they purchase, while others remain and eat at counters or booths. Usually the "carry-out" customers are in the restaurant for less than five minutes, and those who eat there seldom remain longer than 10 or 15 minutes.

A radio with outlets to four speakers in the ceiling receives broadcasts of music and other normal radio programing at the restaurant. Aiken usually turns on the radio each morning at the start of business. Music, news, entertainment, and commercial advertising broadcast by radio stations are thus heard by Aiken, his employees, and his customers during the hours that the establishment is open for business.

On March 11, 1972, broadcasts of two copyrighted musical compositions were received on the radio from a

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**Irwin Karp* filed a brief for the Authors League of America, Inc., as *amicus curiae* urging reversal.

local station while several customers were in Aiken's establishment. Petitioner Twentieth Century Music Corp. owns the copyright on one of these songs, "The More I See You"; petitioner Mary Bourne the copyright on the other, "Me and My Shadow." Petitioners are members of the American Society of Composers, Authors and Publishers (ASCAP), an association that licenses the performing rights of its members to their copyrighted works. The station that broadcast the petitioners' songs was licensed by ASCAP to broadcast them.[1] Aiken, however, did not hold a license from ASCAP.

The petitioners sued Aiken in the United States District Court for the Western District of Pennsylvania to recover for copyright infringement. Their complaint alleged that the radio reception in Aiken's restaurant of the licensed broadcasts infringed their exclusive rights to "perform" their copyrighted works in public for profit. The District Judge agreed, and granted statutory monetary awards for each infringement. 356 F. Supp. 271. The United States Court of Appeals for the Third Circuit reversed that judgment, 500 F. 2d 127, holding that the petitioners' claims against the respondent were foreclosed by this Court's decisions in *Fortnightly Corp.* v. *United Artists,* 392 U. S. 390, and *Teleprompter Corp.* v.

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[1] For a discussion of ASCAP, see *K-91, Inc.* v. *Gershwin Publishing Corp.,* 372 F. 2d 1 (CA9).

ASCAP's license agreement with the Pittsburgh broadcasting station contained, as is customary, the following provision:

"Nothing herein contained shall be construed as authorizing LICENSEE [WKJF-FM] to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions licensed hereunder or as authorizing any receiver of any radio broadcast to perform publicly or reproduce the same for profit, by any means, method or process whatsoever."

CBS, 415 U. S. 394. We granted certiorari. 419 U. S. 1067.

II

The Copyright Act of 1909, 35 Stat. 1075, as amended, 17 U. S. C. § 1 *et seq.,*[2] gives to a copyright holder a monopoly limited to specified "exclusive" rights in his copyrighted works.[3] As the Court explained in *Fortnightly Corp.* v. *United Artists, supra:*

"The Copyright Act does not give a copyright

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[2] The Constitution gives Congress the power: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U. S. Const., Art. I, § 8, cl. 8. See, *e. g., Burrow-Giles Lithographic Co.* v. *Sarony,* 111 U. S. 53, 58; *Trade-Mark Cases,* 100 U. S. 82, 94.

[3] Title 17 U. S. C. § 1 provides in part:

"Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

"(a) To print, reprint, publish, copy, and vend the copyrighted work;

"(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

"(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not

holder control over all uses of his copyrighted work. Instead, § 1 of the Act enumerates several 'rights' that are made 'exclusive' to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of these 'exclusive rights,' he infringes the copyright. If he puts the work to a use not enumerated in § 1, he does not infringe." 392 U. S., at 393–395.

Accordingly, if an unlicensed use of a copyrighted work does not conflict with an "exclusive" right conferred by the statute, it is no infringement of the holder's rights. No license is required by the Copyright Act, for example, to sing a copyrighted lyric in the shower.[4]

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aware that he was infringing and that such infringement could not have been reasonably foreseen; and

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever; and

"(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced . . . ."

[4] Cf. *Wall* v. *Taylor*, 11 Q. B. D. 102, 106–107 (1883) (Brett, M. R.): "Singing for one's own gratification without intending thereby to represent anything, or to amuse any one else, would not, I think, be either a representation or performance, according to the ordinary meaning of those terms, nor would the fact of some other person being in the room at the time of such singing make it so . . . ."

The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution,[5] reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.[6] The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. "The sole interest of the United States and the primary object in conferring the monopoly," this Court has said, "lie in the general benefits derived by the public from the labors of authors." *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 127. See *Kendall* v. *Winsor,* 21 How. 322, 327–328; *Grant* v. *Raymond,* 6 Pet. 218, 241–242. When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.[7]

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[5] See 1 M. Nimmer, Copyright § 5 (1974).

[6] Lord Mansfield's statement of the problem almost 200 years ago in *Sayre* v. *Moore,* quoted in a footnote to *Cary* v. *Longman,* 1 East *358, 362 n. (b), 102 Eng. Rep. 138, 140 n. (b) (1801), bears repeating:

"[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded."

[7] In *Fortnightly Corp.* v. *United Artists,* 392 U. S. 390, the Court stated:

"[O]ur inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here. In 1909 radio itself was in its infancy, and television had not been

The precise statutory issue in the present case is whether Aiken infringed upon the petitioners' exclusive right, under the Copyright Act of 1909, 17 U. S. C. § 1 (e), "[t]o perform the copyrighted work publicly for profit."[8] We may assume that the radio reception of the musical compositions in Aiken's restaurant occurred "publicly for profit." See *Herbert* v. *Shanley Co.*, 242 U. S. 591. The dispositive question, therefore, is whether this radio reception constituted a "performance" of the copyrighted works.

When this statutory provision was enacted in 1909, its purpose was to prohibit unauthorized performances of copyrighted musical compositions in such public places as concert halls, theaters, restaurants, and cabarets. See H. R. Rep. No. 2222, 60th Cong., 2d Sess. (1909). An orchestra or individual instrumentalist or singer who performs a copyrighted musical composition in such a public place without a license is thus clearly an infringer under the statute. The entrepreneur who sponsors such a public performance for profit is also an infringer— direct or contributory. See generally 1 & 2 M. Nimmer, Copyright §§ 102, 134 (1974). But it was never contemplated that the members of the audience who heard the composition would themselves also be simultaneously "performing," and thus also guilty of infringement. This much is common ground.

With the advent of commercial radio, a broadcast musical composition could be heard instantaneously by an enormous audience of distant and separate persons operating their radio receiving sets to reconvert the broad-

invented. We must read the statutory language of 60 years ago in the light of drastic technological change." *Id.*, at 395–396 (footnotes omitted).

[8] See n. 3, *supra*.

cast to audible form.[9] Although Congress did not revise the statutory language, copyright law was quick to adapt to prevent the exploitation of protected works through the new electronic technology. In short, it was soon established in the federal courts that the broadcast of a copyrighted musical composition by a commercial radio station was a public performance of that composition for profit—and thus an infringement of the copyright if not licensed. In one of the earliest cases so holding, the Court of Appeals for the Sixth Circuit said:

> "While the fact that the radio was not developed at the time the Copyright Act . . . was enacted may raise some question as to whether it properly comes within the purview of the statute, it is not by that fact alone excluded from the statute. In other words, the statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning. . . . While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.
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> . . . . .
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> "A performance, in our judgment, is no less public because the listeners are unable to communicate with one another, or are not assembled within an inclosure, or gathered together in some open stadium or park or other public place. Nor can a performance, in our judgment, be deemed private because each listener may enjoy it alone in the privacy of

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[9] Station KDKA, established in Pittsburgh in 1920, is said to have been the first commercial radio broadcasting station in the world. See *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191, 196 n. 2.

his home. Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance. The artist is consciously addressing a great, though unseen and widely scattered, audience, and is therefore participating in a public performance." *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.,* 5 F. 2d 411, 411–412.

See also *M. Witmark & Sons* v. *L. Bamberger & Co.,* 291 F. 776 (NJ); *Jerome H. Remick & Co.* v. *General Electric Co.,* 4 F. 2d 160 (SDNY); *Jerome H. Remick & Co.* v. *General Electric Co.,* 16 F. 2d 829 (SDNY); *Associated Music Publishers, Inc.* v. *Debs Memorial Radio Fund,* 141 F. 2d 852 (CA2). Cf. *Chappell & Co., Ltd.* v. *Associated Radio Co. of Australia, Ltd.,* [1925] Vict. L. R. 350; *Messager* v. *British Broadcasting Co., Ltd.,* [1927] 2 K. B. 543, rev'd on other grounds, [1928] 1 K. B. 660, aff'd, [1929] A. C. 151. See generally Caldwell, The Broadcasting of Copyrighted Works, 1 J. Air L. 584 (1930); Note, 75 U. Pa. L. Rev. 549 (1927); Note, 39 Harv. L. Rev. 269 (1925).

If, by analogy to a live performance in a concert hall or cabaret, a radio station "performs" a musical composition when it broadcasts it, the same analogy would seem to require the conclusion that those who listen to the broadcast through the use of radio receivers do not perform the composition. And that is exactly what the early federal cases held. "Certainly those who listen do not perform, and therefore do not infringe." *Jerome H. Remick & Co.* v. *General Electric Co., supra,* at 829. "One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform'

within the meaning of the Copyright Law." *Buck* v. *Debaum,* 40 F. 2d 734, 735 (SD Cal. 1929).

Such was the state of the law when this Court in 1931 decided *Buck* v. *Jewell-LaSalle Realty Co.,* 283 U. S. 191. In that case the Court was called upon to answer the following question certified by the Court of Appeals for the Eighth Circuit: "Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of 17 USC Sec. 1 (e)?" The Court answered the certified question in the affirmative. In stating the facts of the case, however, the Court's opinion made clear that the broadcaster of the musical composition was not licensed to perform it, and at least twice in the course of its opinion the Court indicated that the answer to the certified question might have been different if the broadcast itself had been authorized by the copyright holder.[10]

We may assume for present purposes that the *Jewell-LaSalle* decision retains authoritative force in a factual situation like that in which it arose.[11] But, as the Court of Appeals in this case perceived, this Court has in two

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[10] "[W]e have no occasion to determine under what circumstances a broadcaster will be held to be a performer, *or the effect upon others of his paying a license fee.*" 283 U. S., at 198 (emphasis added). See also *id.,* at 199 n. 5.

[11] The decision in *Jewell-LaSalle* might be supported by a concept akin to that of contributory infringement, even though there was no relationship between the broadcaster and the hotel company and, therefore, technically no question of actual contributory infringement in that case. *Id.,* at 197 n. 4.

recent decisions explicitly disavowed the view that the reception of an electronic broadcast can constitute a performance, when the broadcaster himself is licensed to perform the copyrighted material that he broadcasts. *Fortnightly Corp.* v. *United Artists,* 392 U. S. 390; *Teleprompter Corp.* v. *CBS,* 415 U. S. 394.

The language of the Court's opinion in the *Fortnightly* case could hardly be more explicitly dispositive of the question now before us:

> "The television broadcaster in one sense does less than the exhibitor of a motion picture or stage play; he supplies his audience not with visible images but only with electronic signals. The viewer conversely does more than a member of a theater audience; he provides the equipment to convert electronic signals into audible sound and visible images. Despite these deviations from the conventional situation contemplated by the framers of the Copyright Act, broadcasters have been judicially treated as exhibitors, and viewers as members of a theater audience. Broadcasters perform. Viewers do not perform. Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, as passive beneficiary." 392 U. S., at 398–399 (footnotes omitted).

The *Fortnightly* and *Teleprompter* cases, to be sure, involved television, not radio, and the copyrighted materials there in issue were literary and dramatic works, not musical compositions. But, as the Court of Appeals correctly observed: "[I]f Fortnightly, with its elaborate CATV plant and Teleprompter with its even more sophisticated and extended technological and programming facilities were not 'performing,' then logic dictates that no 'performance' resulted when the [respond-

ent] merely activated his restaurant radio." 500 F. 2d, at 137.

To hold in this case that the respondent Aiken "performed" the petitioners' copyrighted works would thus require us to overrule two very recent decisions of this Court. But such a holding would more than offend the principles of *stare decisis;* it would result in a regime of copyright law that would be both wholly unenforceable and highly inequitable.

The practical unenforceability of a ruling that all of those in Aiken's position are copyright infringers is self-evident. One has only to consider the countless business establishments in this country with radio or television sets on their premises—bars, beauty shops, cafeterias, car washes, dentists' offices, and drive-ins—to realize the total futility of any evenhanded effort on the part of copyright holders to license even a substantial percentage of them.[12]

And a ruling that a radio listener "performs" every broadcast that he receives would be highly inequitable for two distinct reasons. First, a person in Aiken's position would have no sure way of protecting himself from liability for copyright infringement except by keeping his radio set turned off. For even if he secured a license from ASCAP, he would have no way of either foreseeing or controlling the broadcast of compositions whose copyright was held by someone else.[13] Secondly, to hold that

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[12] The Court of Appeals observed that ASCAP now has license agreements with some 5,150 business establishments in the whole country, 500 F. 2d 127, 129, noting that these include "firms which employ on premises sources for music such as tape recorders and live entertainment." *Id.,* at 129 n. 4. As a matter of so-called "policy" or "practice," we are told, ASCAP has not even tried to exact licensing agreements from commercial establishments whose radios have only a single speaker.

[13] This inequity, in the context of the decision in *Buck* v. *Jewell-*

all in Aiken's position "performed" these musical compositions would be to authorize the sale of an untold number of licenses for what is basically a single public rendition of a copyrighted work. The exaction of such multiple tribute would go far beyond what is required for the economic protection of copyright owners,[14] and would be wholly at odds with the balanced congressional purpose behind 17 U. S. C. § 1 (e):

> "The main object to be desired in expanding copyright protection accorded to music has been to give to the composer an adequate return for the value of

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LaSalle Realty Co., 283 U. S. 191, was pointed out by Professor Zechariah Chafee, Jr., 30 years ago:

"A rule which is very hard for laymen to apply so as to keep clear of litigation was established by the *La Salle Hotel* case. The hotel was heavily liable if it rebroadcast unlicensed music, but how could it protect itself? Must it maintain a monitor always on the job to sit with a list before him pages long showing what pieces are licensed and turn off the master set the instant an unlicensed piece comes from the broadcasting station? The dilemma thus created by the Copyright Act was mitigated for a time by the machinery of ASCAP, which was a device entirely outside the statute. The hotel could obtain a blanket license from ASCAP and thus be pretty sure of safety about all the music which came through its master set. . . . [But if] any composer outside of ASCAP has his music broadcast, what is the hotel to do? Besides getting an ASCAP license, must the hotel bargain separately with every independent composer on the chance that his music may come through to the hotel patrons?

"Such divergences from the ideal . . . are likely to be corrected . . . ." Reflections on the Law of Copyright: I, 45 Col. L. Rev. 503, 528–529.

[14] The petitioners have not demonstrated that they cannot receive from a broadcaster adequate royalties based upon the total size of the broadcaster's audience. On the contrary, the respondent points out that generally copyright holders can and do receive royalties in proportion to advertising revenues of licensed broadcasters, and a broadcaster's advertising revenues reflect the total number of its listeners, including those who listen to the broadcasts in public business establishments.

his composition, and it has been a serious and a difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests." H. R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909).

For the reasons stated in this opinion, the judgment of the Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE BLACKMUN, concurring in the result.

My discomfort, now decisionally outdated to be sure, with the Court's opinion and judgment is threefold:

1. My first discomfort is factual. Respondent Aiken hardly was an innocent "listener," as the Court seems to characterize him throughout its opinion and particularly *ante,* at 162. In one sense, of course, he was a listener, for as he operated his small food shop and served his customers, he heard the broadcasts himself. Perhaps his work was made more enjoyable by the soothing and entertaining effects of the music. With this aspect I would have no difficulty.

But respondent Aiken installed four loudspeakers in his small shop. This, obviously, was not done for his personal use and contentment so that he might hear the broadcast, in any corner he might be, above the noise of commercial transactions. It was done for the entertainment and edification of his customers. It was part of what Mr. Aiken offered his trade, and it added, in his estimation, to the atmosphere and attraction of his estab-

lishment. Viewed in this light, respondent is something more than a mere listener and is not so simply to be categorized.

2. My second discomfort is precedential. Forty-four years ago, in a unanimous opinion written by Mr. Justice Brandeis, this Court held that a hotel proprietor's use of a radio receiving set and loudspeakers for the entertainment of hotel guests constituted a performance within the meaning of § 1 of the Copyright Act, 17 U. S. C. § 1. *Buck* v. *Jewell-LaSalle Realty Co.,* 283 U. S. 191 (1931). For more than 35 years the rule in *Jewell-LaSalle* was a benchmark in copyright law and was the foundation of a significant portion of the rather elaborate licensing agreements that evolved with the developing media technology. Seven years ago the Court, by a 5–1 vote, and with three Justices not participating, held that a community antenna television (CATV) station that transmitted copyrighted works to home subscribers was not performing the works, within the meaning of § 1 of the Copyright Act. *Fortnightly Corp.* v. *United Artists,* 392 U. S. 390 (1968). The divided Court only briefly noted the relevance of *Jewell-LaSalle* and announced that that decision "must be understood as limited to its own facts." *Id.,* at 396–397, n. 18. I have already indicated my disagreement with the reasoning of *Fortnightly* and my conviction that it, rather than *Jewell-LaSalle,* is the case that should be limited to its facts. *Teleprompter Corp.* v. *CBS,* 415 U. S. 394, 415 (1974) (dissenting opinion.) I was there concerned about the Court's simplistic view of television's complications, a view perhaps encouraged by the obvious inadequacies of an ancient copyright Act for today's technology. A majority of the Court, however, felt otherwise and extended the simplistic analysis rejected in *Jewell-LaSalle,* but embraced in *Fortnightly,* to even more complex arrangements in the CATV industry. *Teleprompter Corp.* v. *CBS, supra.*

I had hoped, secondarily, that the reasoning of *Fortnightly* and *Teleprompter* would be limited to CATV. At least in that context the two decisions had the arguably desirable effect of protecting an infant industry from a premature death. Today, however, the Court extends *Fortnightly* and *Teleprompter* into radio broadcasting, effectively overrules *Jewell-LaSalle,* and thereby abrogates more than 40 years of established business practices. I would limit the application of *Teleprompter* and *Fortnightly* to the peculiar industry that spawned them. Parenthetically, it is of interest to note that this is precisely the result that would be achieved by virtually all versions of proposed revisions of the Copyright Act. See, *e. g.,* § 101 of S. 1361, 93d Cong., 2d Sess., which sought to amend 17 U. S. C. § 110 (5). See also §§ 48 (5) and (6) of the British Copyright Act of 1956, 4 & 5 Eliz. 2, c. 74, which distinguishes between the use of a radio in a public place and "the causing of a work or other subject-matter to be transmitted to subscribers to a diffusion service."

Resolution of these difficult problems and the fashioning of a more modern statute are to be expected from the Congress. In any event, for now, the Court seems content to continue with its simplistic approach and to accompany it with a pragmatic reliance on the "practical unenforceability," *ante,* at 162, of the copyright law against persons such as George Aiken.

3. My third discomfort is tactical. I cannot understand why the Court is so reluctant to do directly what it obviously is doing indirectly, namely, to overrule *Jewell-LaSalle.* Of course, in my view, that decision was correct at the time it was decided, and I would regard it as good law today under the identical statute and with identical broadcasting. But, as I have noted, the Court

in *Fortnightly* limited *Jewell-LaSalle* "to its own facts," and in *Teleprompter* ignored its existence completely by refusing even to cite it. This means, it seems to me, that the Court did not want to overrule it, but nevertheless did not agree with it and felt, hopefully, that perhaps it would not bother us anymore anyway. Today the Court does much the same thing again by extracting and discovering great significance in the fact that the broadcaster in *Jewell-LaSalle* was not licensed to perform the composition. I cannot join the Court's intimation, *ante,* at 160—surely stretched to the breaking point—that Mr. Justice Brandeis and the unanimous Court for which he spoke would have reached a contrary conclusion in *Jewell-LaSalle* in 1931 had that broadcaster been licensed. The Court dances around *Jewell-LaSalle,* as indeed it must, for it is potent opposing precedent for the present case and stands stalwart against respondent Aiken's position. I think we should be realistic and forthright and, if *Jewell-LaSalle* is in the way, overrule it.

Although I dissented in *Teleprompter,* that case and *Fortnightly,* before it, have been decided. With the Court insisting on adhering to the rationale of those cases, the result reached by the Court of Appeals and by this Court is compelled. Accepting the precedent of those cases, I concur in the result.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE DOUGLAS joins, dissenting.

In *Fortnightly Corp.* v. *United Artists,* 392 U. S. 390, 402 (1968), Mr. Justice Fortas observed that cases such as this call "not for the judgment of Solomon but for the dexterity of Houdini." There can be no really satisfactory solution to the problem presented here, until Congress acts in response to longstanding proposals. My primary purpose in writing is not merely to express

disagreement with the Court but to underscore what has repeatedly been stated by others as to the need for legislative action. Radio today is certainly a more commonplace and universally understood technological innovation than CATV, for example, yet we are, basically, in essentially the same awkward situation as in the past when confronted with these problems. We must attempt to apply a statute designed for another era to a situation in which Congress has never affirmatively manifested its view concerning the competing policy considerations involved.

Yet, the issue presented can only be resolved appropriately by the Congress; perhaps it will find the result which the Court reaches today a practical and equitable resolution, or perhaps it will find this "functional analysis" [1] too simplistic an approach, cf. *Teleprompter Corp.* v. *CBS,* 415 U. S. 394, 415 (1974) (BLACKMUN, J., dissenting), and opt for another solution.

The result reached by the Court is not compelled by the language of the statute; it is contrary to the applicable case law and, even assuming the correctness and relevance of the CATV cases, *Fortnightly, supra,* and *Teleprompter, supra,* it is not analytically dictated by those cases. In such a situation, I suggest, "the fact that the Copyright Act was written in a different day, for different factual situations, should lead us to tread cautiously here. Our major object . . . should be to do as little damage as possible to traditional copyright principles and to business relationships, until the Congress legislates and relieves the embarrassment which we and the interested parties face." *Fortnightly, supra,* at 404 (Fortas, J., dissenting).

As the Court's opinion notes, *ante,* at 160, in *Buck* v.

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[1] "Broadcasters perform. Viewers do not perform." *Fortnightly Corp.* v. *United Artists,* 392 U. S. 390, 398 (1968) (footnotes omitted).

Jewell-LaSalle Realty Co., 283 U. S. 191 (1931), answering a precisely phrased certified question, the Court construed the Copyright Act in a manner which squarely conflicts with what is held today. Congress, despite many opportunities, has never legislatively overruled *Buck, supra.* It was not overruled in *Fortnightly* but treated "as limited to its own facts." 392 U. S., at 396–397, n. 18. Even assuming the correctness of this dubious process of limitation, see *Fortnightly, supra,* at 405 (Fortas, J., dissenting); *Teleprompter, supra,* at 415 (BLACKMUN, J., dissenting), *Buck* is squarely relevant here since the license at issue expressly negated any right on the part of the broadcaster to further license performances by those who commercially receive and distribute broadcast music. Moreover, even accepting, *arguendo,* the restrictive reading given to *Buck* by the Court today, and assuming the correctness of *Fortnightly* and *Teleprompter* in the CATV field, it is not at all clear that the analysis of these latter cases supports the result here.[2] Respondent was more than a "passive beneficiary." *Fortnightly, supra,* at 399. He took the transmission and used that transmission for commercial entertainment in his own profit enterprise, through a multispeaker audio system specifically designed for his business purposes.[3] In short, this case does not call for what the

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[2] Recent congressional proposals have treated the present problem distinctly from CATV questions. See, *e. g.,* S. 1361, 93d Cong., 2d Sess. (1974). See also British Copyright Act of 1956, §§ 48 (5), (6), 4 & 5 Eliz. 2, c. 74.

[3] Indeed, in its consideration of S. 1361, the Senate Committee on the Judiciary undertook to distinguish use of "ordinary radios" from situations "where broadcasts are transmitted to substantial audiences by means of loudspeakers covering a wide area." S. Rep. No. 93–983, p. 130 (1974). The value of this distinction, without drawing a line on the number of outlets that would be exempt is at best dubious; this version leaves the obvious gap in the statute to be filled in by the courts.

Court describes as "a ruling that a radio listener 'performs' every broadcast that he receives . . . ," *ante,* at 162. Here, respondent received the transmission and then put it to an independent commercial use. His conduct seems to me controlled by *Buck's* unequivocal holding that:

> "One who hires an orchestra for a public performance for profit is not relieved from a charge of infringement merely because he does not select the particular program to be played. Similarly, when he tunes in on a broadcasting station, for his own commercial purposes, he necessarily assumes the risk that in so doing he may infringe the performing rights of another." 283 U. S., at 198–199.

See also *Herbert* v. *Shanley Co.,* 242 U. S. 591 (1917).

In short, as MR. JUSTICE DOUGLAS observed in the *Teleprompter* case: "The Court can read the result it achieves today only by 'legislating' important features of the Copyright Act out of existence." 415 U. S., at 421. In my view, we should bear in mind that "[o]ur ax, being a rule of law, must cut straight, sharp, and deep; and perhaps this is a situation that calls for the compromise of theory and for the architectural improvisation which only legislation can accomplish." *Fortnightly, supra,* at 408 (Fortas, J., dissenting).

UNITED STATES *v.* HALE

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

No. 74-364. Argued April 14, 1975—Decided June 23, 1975

Following respondent's arrest for robbery he was taken to the police station, where, advised of his right to remain silent, he made no response to an officer's inquiry as to the source of money found on his person. Respondent testified at his trial and, in an effort to impeach his alibi, the prosecutor caused respondent to admit on cross-examination that he had not offered the exculpatory information to the police at the time of his arrest. The trial court instructed the jury to disregard the colloquy but refused to declare a mistrial. Respondent was convicted. The Court of Appeals reversed, holding that inquiry into respondent's prior silence impermissibly prejudiced his defense as well as infringed upon his constitutional right to remain silent under *Miranda* v. *Arizona,* 384 U. S. 436. The Government, relying on *Raffel* v. *United States,* 271 U. S. 494, contends that since respondent chose to testify in his own behalf, it was permissible to impeach his credibility by proving that he had chosen to remain silent at the time of his arrest. *Held:* Respondent's silence during police interrogation lacked significant probative value and under these circumstances any reference to his silence carried with it an intolerably prejudicial impact. This Court, exercising its supervisory authority over the lower federal courts, therefore concludes that respondent is entitled to a new trial. Pp. 176-181.

(a) Under the circumstances of this case the failure of respondent, who had just been given the *Miranda* warnings, to respond during custodial interrogation to inquiry about the money can as easily connote reliance on the right to remain silent as to support an inference that his trial testimony was a later fabrication. *Raffel* v. *United States, supra,* distinguished. Pp. 176-177.

(b) Respondent's prior silence was not so clearly inconsistent with his trial testimony as to warrant admission into evidence of that silence as evidence of a prior inconsistent "statement," as is manifested by the facts that (1) respondent had repeatedly asserted innocence during the proceedings; (2) he was being questioned in secretive surroundings with no one but the police also

present; and (3) as the target of eyewitness identification, he was clearly a "potential defendant." *Grunewald* v. *United States,* 353 U. S. 391, followed. Pp. 177-180.

(c) Admission of evidence of silence at the time of arrest has a significant potential for prejudice in that the jury may assign much more weight to the defendant's previous silence than is warranted. P. 180.

162 U. S. App. D. C. 305, 498 F. 2d 1038, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., *post,* p. 181, DOUGLAS, J., *post,* p. 182, and WHITE, J., *post,* p. 182, filed opinions concurring in the judgment. BLACKMUN, J., concurred in the result.

Deputy Solicitor General Frey argued the cause for the United States. With him on the brief were *Solicitor General Bork, Acting Assistant Attorney General Keeney, Jerome M. Feit,* and *Ivan Michael Schaeffer.*

Larry J. Ritchie, by appointment of the Court, 421 U. S. 928, argued the cause and filed a brief for respondent.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Respondent was tried and convicted of robbery in the District Court for the District of Columbia.[1] During cross-examination at trial the prosecutor asked respondent why he had not given the police his alibi when he was questioned shortly after his arrest. The trial court instructed the jury to disregard the colloquy but refused

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**Frank G. Carrington, Fred E. Inbau,* and *Wayne W. Schmidt* filed a brief for Americans for Effective Law Enforcement, Inc., as *amicus curiae* urging reversal.

[1] Respondent was tried in Federal District Court prior to the effective date for the transfer of jurisdiction over D. C. Code offenses under the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473.

to declare a mistrial. The Court of Appeals for the District of Columbia Circuit reversed, holding that inquiry into respondent's prior silence impermissibly prejudiced his defense and infringed upon his right to remain silent under *Miranda* v. *Arizona,* 384 U. S. 436, 468 n. 37 (1966). We granted certiorari, 419 U. S. 1045, because of a conflict among the Courts of Appeals over whether a defendant can be cross-examined about his silence during police interrogation,[2] and because of the importance of this question to the administration of justice.

We find that the probative value of respondent's pretrial silence in this case was outweighed by the prejudicial impact of admitting it into evidence. Affirming the judgment on this ground, we have no occasion to reach the broader constitutional question that supplied an alternative basis for the decision below.

I

On June 1, 1971, Lonnie Arrington reported to police that he had been attacked and robbed by a group of five men. Initially, he claimed that $65 had been stolen, but he later changed the amount to $96 after consulting with his wife. As the police were preparing to accompany Arrington through the neighborhood in search of the attackers, he observed two men and identified one of them as one of his assailants. When the police gave chase, the two men fled but one was immediately cap-

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[2] Compare *United States* v. *Semensohn,* 421 F. 2d 1206, 1209, (CA2 1970); *United States* v. *Brinson,* 411 F. 2d 1057, 1060 (CA6 1969); *Fowle* v. *United States,* 410 F. 2d 48 (CA9 1969); and *Johnson* v. *Patterson,* 475 F. 2d 1066 (CA10), cert. denied, 414 U. S. 878 (1973), with *United States ex rel. Burt* v. *New Jersey,* 475 F. 2d 234 (CA3), cert. denied, 414 U. S. 938 (1973); and *United States* v. *Ramirez,* 441 F. 2d 950, 954 (CA5), cert. denied, 404 U. S. 869 (1971).

tured. The victim identified respondent Hale as one of the robbers.

Respondent was then arrested, taken to the police station, and advised of his right to remain silent. He was searched and found to be in possession of $158 in cash. An officer then asked: "Where did you get the money?" Hale made no response.

At trial respondent took the witness stand in his own defense. He acknowledged having met Arrington in a shoe store on the day in question. Hale stated that, after the meeting, he was approached by three men who inquired whether Arrington had any money, to which Hale replied he "didn't know." From there respondent claimed he went to a narcotics treatment center, where he remained until after the time of the robbery. According to his testimony he left the center with a friend who subsequently purchased narcotics. Shortly after the transaction they were approached by the police. Hale testified that he fled because he feared being found in the presence of a person carrying narcotics. He also insisted that his estranged wife had received her welfare check on that day and had given him approximately $150 to purchase some money orders for her as he had done on several prior occasions.

In an effort to impeach Hale's explanation of his possession of the money, the prosecutor caused Hale to admit on cross-examination that he had not offered the exculpatory information to the police at the time of his arrest:

> "Q. Did you in any way indicate [to the police] where that money came from?
>
> "A. No, I didn't.
>
> "Q. Why not?
>
> "A. I didn't feel that it was necessary at the time."

The Government takes the position that since the respondent chose to testify in his own behalf, it was permissible to impeach his credibility by proving that he had chosen to remain silent at the time of his arrest.[3] For this proposition the Government relies heavily on this Court's decision in *Raffel* v. *United States,* 271 U. S. 494 (1926).[4] There, a second trial was required when the first jury failed to reach a verdict. In reliance on his privilege against compulsory self-incrimination, the accused declined to testify at his first trial. At the second trial, however, he took the stand in an effort to refute the testimony of a Government witness. Over objection, Raffel admitted that he had remained silent in the face of the same testimony at the earlier proceeding. Under these circumstances the Court concluded that Raffel's silence at the first trial was inconsistent with his testimony at the second, and that his silence could be used to impeach the credibility of his later representations. The Government argues that silence during police interrogation is similarly probative and should therefore be admissible for impeachment purposes.

We cannot agree. The assumption of inconsistency underlying *Raffel* is absent here. Rather, we find the circumstances of this case closely parallel to those in *Grunewald* v. *United States,* 353 U. S. 391 (1957), and

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[3] Immediately following the exchange, the court cautioned the jury that the questioning was improper and that they were to disregard it. The Court of Appeals held that the error was not cured by this instruction, and the Government does not contend in this Court that the error was harmless.

[4] Since we do not reach the constitutional claim raised today, we need not decide whether the *Raffel* decision has survived *Johnson* v. *United States,* 318 U. S. 189 (1943), and *Griffin* v. *California,* 380 U. S. 609 (1965). See *Grunewald* v. *United States,* 353 U. S. 391, 425–426 (1957) (Black, J., concurring).

we conclude that the principles of that decision compel affirmance here.

II

A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness. As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent. 3A J. Wigmore, Evidence § 1040 (J. Chadbourn rev. 1970) (hereafter Wigmore). If the Government fails to establish a threshold inconsistency between silence at the police station and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded.

In most circumstances silence is so ambiguous that it is of little probative force. For example, silence is commonly thought to lack probative value on the question of whether a person has expressed tacit agreement or disagreement with contemporaneous statements of others. See 4 Wigmore § 1071. Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation. Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question. 3A Wigmore § 1042. The *Raffel* Court found that the circumstances of the earlier confrontation naturally called for a reply. Accordingly, the Court held that evidence of the prior silence of the accused was admissible. But the situation of an arrestee is very different, for he is under no duty to speak and, as in this case, has ordinarily been advised by government authorities only moments earlier that he has a right to remain silent, and that anything he does say can and will be used against him in court.

At the time of arrest and during custodial interrogation, innocent and guilty alike—perhaps particularly the innocent—may find the situation so intimidating that they may choose to stand mute. A variety of reasons may influence that decision. In these often emotional and confusing circumstances, a suspect may not have heard or fully understood the question, or may have felt there was no need to reply. See Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U. Chi. L. Rev. 657, 676 (1966). He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention. In sum, the inherent pressures of in-custody interrogation exceed those of questioning before a grand jury and compound the difficulty of identifying the reason for silence.[5]

Respondent, for example, had just been given the *Miranda* warnings and was particularly aware of his right to remain silent and the fact that anything he said could be used against him. Under these circumstances, his failure to offer an explanation during the custodial interrogation can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication. There is simply nothing to indicate which interpretation is more probably correct.

III

Our analysis of the probative value of silence before police interrogators is similar to that employed in *Grunewald* v. *United States, supra.* In that case a witness before a grand jury investigating corruption in the Inter-

[5] See Kamisar, Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article, 73 Mich. L. Rev. 15, 34 n. 70 (1974).

nal Revenue Service declined to answer a series of questions on the ground that the answers might tend to incriminate him. The witness, Max Halperin, was later indicted for conspiracy to defraud the United States. At trial he took the stand to testify in his own defense, and there responded to the same questions in a manner consistent with innocence. On cross-examination the prosecutor elicited, for purposes of impeachment, testimony concerning the defendant's earlier invocation of the Fifth Amendment on the same subject matter. The Court framed the issue of Halperin's prior silence as an evidentiary problem and concluded that the circumstances surrounding Halperin's appearance before the grand jury justified his reliance on the Fifth Amendment, imposed no mandate to speak, and presented valid reasons, other than culpability, for deferring comment. The Court ruled that Halperin's prior silence was not so clearly inconsistent with his later testimony as to justify admission of evidence of such silence as evidence of a prior inconsistent "statement."

In *Grunewald* the Court identified three factors relevant to determining whether silence was inconsistent with later exculpatory testimony: (1) repeated assertions of innocence before the grand jury; (2) the secretive nature of the tribunal in which the initial questioning occurred;[6] and (3) the focus on petitioner as potential defendant at the time of the arrest, making it "natural for him to fear that he was being asked ques-

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[6] "Innocent men are more likely to [remain silent] in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judicially supervised procedure provide safeguards for the establishing of the whole, as against the possibility of merely partial, truth." *Grunewald* v. *United States*, 353 U. S., at 422–423.

tions for the very purpose of providing evidence against himself." 353 U. S., at 423.

Applying these factors here, it appears that this case is an even stronger one for exclusion of the evidence than *Grunewald*. First, the record reveals respondent's repeated assertions of innocence during the proceedings; there is nothing in the record of respondent's testimony inconsistent with his claim of innocence. Second, the forum in which the questioning of Hale took place was secretive and in addition lacked such minimal safeguards as the presence of public arbiters and a reporter, which were present in *Grunewald*. Even more than Halperin, respondent may well have been intimidated by the setting, or at the very least, he may have preferred to make any statements in more hospitable surroundings, in the presence of an attorney, or in open court. Third, Hale's status as a "potential defendant" was even clearer than Halperin's since Hale had been the subject of eyewitness identification and had been arrested on suspicion of having committed the offense.

The Government nonetheless contends that respondent's silence at the time of his arrest is probative of the falsity of his explanation later proffered at trial because the incentive of immediate release and the opportunity for independent corroboration would have prompted an innocent suspect to explain away the incriminating circumstances. On the facts of this case, we cannot agree. Petitioner here had no reason to think that any explanation he might make would hasten his release. On the contrary, he had substantial indication that nothing he said would influence the police decision to retain him in custody. At the time of his arrest petitioner knew that the case against him was built on seemingly strong evidence—on an identification by the complainant, his flight at that time, and his possession of $158. In these cir-

cumstances he could not have expected the police to release him merely on the strength of his explanation. Hale's prior contacts with the police and his participation in a narcotics rehabilitation program further diminished the likelihood of his release, irrespective of what he might say. In light of the many alternative explanations for his pretrial silence, we do not think it sufficiently probative of an inconsistency with his in-court testimony to warrant admission of evidence thereof.

IV

Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.[7]

As we have stated before: "When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." *Shepard* v. *United States,* 290 U. S. 96, 104 (1933). We now conclude that the respondent's silence during police interrogation lacked significant probative value and that any reference to his silence under such circumstances carried with it an intolerably prejudicial impact.

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[7] We recognize that the question whether evidence is sufficiently inconsistent to be sent to the jury on the issue of credibility is ordinarily in the discretion of the trial court. "But where such evidentiary matter has grave constitutional overtones . . . we feel justified in exercising this Court's supervisory control." *Grunewald* v. *United States,* 353 U. S., at 423–424.

Accordingly, we hold that under the circumstances of this case it was prejudicial error for the trial court to permit cross-examination of respondent concerning his silence during police interrogation, and we conclude, in the exercise of our supervisory authority over the lower federal courts, that Hale is entitled to a new trial.

The judgment below is

Affirmed.

MR. JUSTICE BLACKMUN concurs in the result.

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I cannot escape the conclusion that this case is something of a tempest in a saucer, and the Court rightly avoids placing the result on constitutional grounds. A dubious aspect of the Court's opinion is to renew the dictum of *Grunewald* v. *United States,* 353 U. S. 391 (1957), see *ante,* at 178, and n. 6. There the Court casually elevated a fallacy into a general proposition in terms that the innocent "are more likely to [remain silent] in secret proceedings . . . than in open court proceedings . . . ." To begin with, there is not a scintilla of empirical data to support the first generalization nor is it something generally accepted as validated by ordinary human experience. It is no more accurate than to say, for example, that the innocent rather than the guilty, are the first to protest their innocence. There is simply no basis for declaring a generalized probability one way or the other. Second, the *Grunewald* suggestion that people are more likely to speak out "in open court proceedings . . ." has no basis in human experience. A confident, assured person will likely speak out in either place; a timid, insecure person may be more overwhelmed by the formality of "open court proceedings" than by a police station. Moreover, if an accused is in

"open court," there is a constitutional option to remain totally silent, but if an accused takes the stand all admissible questions must be answered. A nonparty witness has less option than the accused and must take the stand if called. We ought to be wary of casual generalizations that read well but "do not wash."

MR. JUSTICE DOUGLAS, concurring in the judgment.

I agree with the Court that the judgment below should be affirmed, but "I do not, like the Court, rest my conclusion on the special circumstances of this case. I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it." *Grunewald* v. *United States,* 353 U. S. 391, 425 (1957) (concurring opinion). My view of this case is therefore controlled by *Miranda* v. *Arizona,* 384 U. S. 436 (1966). I do not accept the idea that *Miranda* loses its force in the context of impeaching the testimony of a witness. See *Harris* v. *New York,* 401 U. S. 222 (1971). In my opinion *Miranda* should be given full effect.

I also believe, as does my Brother WHITE, that given the existence of *Miranda* due process is violated when the prosecution calls attention to the silence of the accused at the time of arrest.

MR. JUSTICE WHITE, concurring in the judgment.

I am no more enthusiastic about *Miranda* v. *Arizona,* 384 U. S. 436 (1966), now than I was when that decision was announced. But when a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his

silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. Cf. *Johnson* v. *United States,* 318 U. S. 189, 196–199 (1943). Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from *Miranda* warnings that this would not be the case. I would affirm on this ground.

UNITED STATES *v.* ALASKA

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

No. 73-1888. Argued April 16, 1975—Decided June 23, 1975

Proof *held* insufficient to establish Cook Inlet as a historic bay, and hence the United States, as against Alaska, has paramount rights to the land beneath the waters of the lower, or seaward, portion of the inlet. Pp. 189-204.

(a) The sparse evidence as to Russia's exercise of authority over the lower inlet during the period of Russian sovereignty is insufficient to demonstrate the exercise of authority essential to the establishment of a historic bay. Pp. 190-192.

(b) Nor was the enforcement of fishing and wildlife regulations under various federal statutes and an Executive Order during the period of United States sovereignty over the Territory of Alaska sufficient in scope to establish historic title to Cook Inlet as inland waters, especially where it appears that the geographic scope of such enforcement efforts was determined primarily, if not exclusively, by the needs of effective management of the fish and game population involved, rather than as an intended assertion of territorial sovereignty to exclude all foreign vessels and navigation. Pp. 192-199.

(c) The mere failure of any foreign nation to protest the authority asserted by the United States during the territorial period is inadequate proof of the acquiescence essential to historic title. It must also be shown that the foreign governments knew or should have known of the authority being asserted, and here the routine enforcement of domestic fish and game regulations was insufficient to inform those governments of any claim of dominion. Pp. 199-200.

(d) The fact that Alaska during its statehood has enforced fishing regulations in the same way as the United States did during the territorial period is likewise insufficient to give rise to historic title to Cook Inlet as inland waters. Pp. 200-201.

(e) Nor is Alaska's arrest of two Japanese fishing vessels in the Shelikof Strait in 1962 adequate to establish historic title. That incident was an exercise of sovereignty, if at all, only over the waters of Shelikof Strait, and, even if considered as an asser-

tion of authority over the waters of Cook Inlet, the incident was not sufficiently unambiguous to serve as the basis of historic title: Alaska, as against the Japanese Government, claimed the waters as inland waters but the United States neither supported nor disavowed the State's position. And regardless of how the incident is viewed, it is impossible to conclude that Alaska's exercise of sovereignty was acquiesced in by the Japanese Government, which immediately protested the incident and has never acceded to Alaska's position. Pp. 201–203.

497 F. 2d 1155, reversed and remanded.

Blackmun, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, White, Marshall, and Powell, JJ., joined. Stewart and Rehnquist, JJ., filed a dissenting statement, *post,* p. 204. Douglas, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Randolph argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Johnson, Gerald P. Norton, Bruce C. Rashkow,* and *Edward F. Bradley.*

Charles K. Cranston and *Thomas M. Phillips* argued the cause and filed a brief for respondent.

Mr. Justice Blackmun delivered the opinion of the Court.

The issue here is whether the body of water known as Cook Inlet is a historic bay.[1] The inlet extends northeastward well over 150 miles into the Alaskan land mass, with Kenai Peninsula to the southeast and the Chigmit Mountains to the northwest. The city of Anchorage is near the head of the inlet. The upper, or inner por-

[1] Cook Inlet is larger than Great Salt Lake and Lake Ontario. It is about the same size as Lake Erie. It dwarfs Chesapeake Bay, Delaware Bay, and Long Island Sound, all of which the United States has claimed as historic bays.

tion, of the inlet is not in dispute, for that part is conceded to be inland waters subject to Alaska's sovereignty.

If the inlet is a historic bay, the State of Alaska possesses sovereignty over the land beneath the waters of the lower, or seaward, portion of the inlet. If the inlet is not a historic bay, the United States, as against the State, has paramount rights to the subsurface lands in question.

I

In early 1967 the State of Alaska offered 2,500 acres of submerged lands in lower Cook Inlet for a competitive oil and gas lease sale. The tract in question is more than three geographical miles from the shore of the inlet and is seaward more than three miles from a line across the inlet at Kalgin Island, where the headlands are about 24 miles apart, as contrasted with 47 miles at the natural entrance at Cape Douglas. In the view of the United States, the Kalgin Island line marks the limit of the portion of the inlet that qualifies as inland waters. The United States, contending that the lower inlet constitutes high seas, brought suit in the United States District Court for the District of Alaska to quiet title and for injunctive relief against the State.[2] Alaska defended on the ground that the inlet, in its entirety, was within the accepted definition of a "historic bay" and thus constituted inland waters properly subject to state sovereignty. Alaska prevailed in the District Court. 352 F. Supp. 815 (1972). The United States Court of Appeals for the Ninth Circuit affirmed with a *per curiam* opinion. 497 F. 2d 1155 (1974). We granted certiorari

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[2] It would appear that the case qualifies, under Art. III, § 2, cl. 2, of the Constitution, for our original jurisdiction. *United States* v. *West Virginia,* 295 U. S. 463, 470 (1935). We are not enlightened as to why the United States chose not to bring an original action in this Court.

because of the importance of the litigation and because the case presented a substantial question concerning the proof necessary to establish a body of water as a historic bay. 419 U. S. 1045 (1974).

II

State sovereignty over submerged lands rests on the Submerged Lands Act of 1953, 67 Stat. 29, 43 U. S. C. §§ 1301–1315.[3] By this Act, Congress effectively confirmed to the States the ownership of submerged lands within three miles of their coastlines.[4] See *United States* v. *Maine,* 420 U. S. 515 (1975). "Coast line" was defined in terms not only of land but, as well, of "the seaward

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[3] Section 6 (m) of the Alaska Statehood Act of July 7, 1958, provides that the Submerged Lands Act "shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder." 72 Stat. 343, note following 48 U. S. C. c. 2. Section 2 of the Act provides: "The State of Alaska shall consist of all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska." 72 Stat. 339, note following 48 U. S. C. c. 2.

[4] Section 3 (a) of the Submerged Lands Act, 43 U. S. C. § 1311 (a), provides:

"It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States . . . ."

Section 2 (b), 43 U. S. C. § 1301 (b), defines a State's boundaries: "The term 'boundaries' includes the seaward boundaries of a State . . . as they existed at the time such State became a member of the Union . . . but in no event shall the term 'boundaries' or the term 'lands beneath navigable waters' be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean . . . ."

limit of inland waters."[5] The term "inland waters" was left undefined.

In *United States* v. *California,* 381 U. S. 139, 161–167 (1965), the Court concluded that the definitions provided in the Convention on the Territorial Sea and the Contiguous Zone, [1964] 2 U. S. T. 1606, T. I. A. S. No. 5639, should be adopted for purposes of the Submerged Lands Act. See also *United States* v. *Louisiana* (*Louisiana Boundary Case*), 394 U. S. 11, 35 (1969). Under Art. 7 of the Convention,[6] and particularly ¶¶ 5

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[5] Section 2 (c) of the Act, 43 U. S. C. § 1301 (c), reads:

"The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."

[6] The full text of Art. 7 is as follows:

"1. This article relates only to bays the coasts of which belong to a single State.

"2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

"3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

"4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

"5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such

and 6 thereof, a bay with natural entrance points separated by more than 24 miles is considered as inland water only if it is a "historic" bay. Since the distance between the natural entrance points to Cook Inlet is greatly in excess of 24 miles, the parties agree that Alaska must demonstrate that the inlet is a historic bay in order successfully to claim sovereignty over its lower waters and the land beneath those waters.[7]

The term "historic bay" is not defined in the Convention. The Court, however, has stated that in order to establish that a body of water is a historic bay, a coastal nation must have "traditionally asserted and maintained dominion with the acquiescence of foreign nations." *United States* v. *California,* 381 U. S., at 172. Furthermore, the Court appears to have accepted the general view that at least three factors are significant in the determination of historic bay status: (1) the claiming nation must have exercised authority over the area; (2) that exercise must have been continuous; and (3) foreign states must have acquiesced in the exercise of authority. *Louisiana Boundary Case,* 394 U. S., at 75 and 23–24, n. 27.[8] These were the general guidelines for the District Court and for the Court of Appeals in the present case.

III

The District Court divided its findings on the exercise

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a manner as to enclose the maximum area of water that is possible with a line of that length.

"6. The foregoing provisions shall not apply to so-called 'historic' bays, or in any case where the straight baseline system provided for in article 4 is applied."

[7] Brief for Respondent 1; Brief for United States 2, 32.

[8] Some disagreement exists as to whether there must be formal acquiescence on the part of foreign states, or whether the mere absence of opposition is sufficient. *United States* v. *Louisiana* (*Louisiana Boundary Case*) 394 U. S. 11, 23–24, n. 27 (1969).

of authority over lower Cook Inlet into three time periods, namely, that of Russian sovereignty, that of United States sovereignty, and that of Alaskan statehood. We discuss these in turn.

A

The evidence that Russia exercised authority over lower Cook Inlet as inland waters is understandably sparse. The District Court, nonetheless, concluded that "Russia exercised sovereignty over the disputed area of Cook Inlet."[9] The court based this conclusion on three findings. First, by the early 1800's there were four Russian settlements on the shores of Cook Inlet. Second, about 1786, an attempt by an English vessel to enter the inlet drew a volley of cannon fire from a Russian fur trader in the vicinity of Port Graham. Third, in 1821, Tsar Alexander I issued a ukase that purported to exclude all foreign vessels from the waters within 100 miles of the Alaska coast. S. Exec. Doc. No. 106, 50th Cong., 2d Sess., 204–205 (1889).

We feel that none of these facts, as found by the District Court, demonstrate the exercise of authority essential to the establishment of a historic bay. The presence of early Russian settlements on the shores of Cook Inlet certainly demonstrates the existence of a claim to the land, but it gives little indication of the authority Russia may have exerted over the vast expanse of waters that constitutes the inlet. The incident of

[9] Pet. for Cert. 25a. In addition to its reported opinion, 352 F. Supp. 815 (Alaska 1972), the District Court made detailed written findings and conclusions that are not published. These are reproduced in the Petition for Certiorari 21a–55a. The reported opinion of the District Court did not discuss the exercise of sovereignty prior to 1906, but the unreported findings indicate that the court relied on assertions of authority dating from Russian territorial times as well as the early American period.

the fur trader's firing on an English vessel near Port Graham might be some evidence of a claim of sovereignty over the waters involved, but the act appears to be that of a private citizen rather than of a government official.[10] In the absence of some evidence that the trader was acting with governmental authority, the incident is entitled to little legal significance. Moreover, under the then-common Cannon Shot Rule, the firing of cannon from shore was wholly consistent with the present position of the United States that the inland waters of Alaska near Port Graham are to be measured by the three-mile limit.[11] Finally, the imperial ukase of 1821 is clearly inadequate as a demonstration of Russian authority over the waters of Cook Inlet because shortly after it had been issued the ukase was unequivocally

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[10] As with many colonial enterprises of the day, the governance of Alaska in the Russian period, for the most part, was exercised through semiprivate corporations. See generally H. Chevigny, Russian America: The Great Alaska Venture, 1741–1867 (1965). The most important of these corporations, the Russian-American Company, was chartered in 1799, several years after the incident near Port Graham. *Id.*, at 75 The record and findings are silent on the relationship between the fur trader and the interests asserted. Thus, we have no occasion to consider whether the acts of a semiprivate colonial corporation are to be given the same weight as the direct acts of a national government for purposes of establishing a claim to historic waters.

[11] The Cannon Shot Rule was to the effect that a coastal state possessed sovereignty over the waters within range of cannon shot from its shore. Many modern scholars believe that the present 3-mile limit is derived from the traditional range of 18th century cannon. Kent, The Historical Origins of the Three-Mile Limit, 48 Am. J. Int'l L. 537 (1954); Walker, Territorial Waters: The Cannon Shot Rule, 22 Brit. Y. B. Int'l L. 210 (1945). The actual range of the cannon fired by the fur trader is, of course, now irrelevant. The significant fact is that the incident can be viewed as an assertion of jurisdiction only over those waters in Cook Inlet that were within range of cannon shot from shore.

withdrawn in the face of vigorous protests from the United States and England.[12]

B

In reviewing the period of United States sovereignty over the Territory of Alaska,[13] the District Court found that there had been five separate instances in which the Federal Government had exercised authority over all the waters of Cook Inlet. Pet. for Cert. 26a–37a.

1. *Revised Statutes* § *1956* (*1878*). Soon after Alaska was ceded to the United States, Congress prohibited the killing of sea otter and other fur-bearing animals "within the limits of said territory, or in the waters thereof." Act of July 27, 1868, 15 Stat. 241, codified as Rev. Stat. § 1956 (1878). By itself, the statutory language does not indicate whether the waters of lower Cook Inlet were encompassed within the limits of Alaska "territory, or in the waters thereof." The District Court, however, found that in 1892 and 1893 five American vessels were boarded more than three miles from shore in the lower inlet by United States revenue officials investigating possible violations of § 1956.[14] From these boardings the

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[12] For a discussion of the events surrounding the issuance and withdrawal of the ukase, see Chevigny, *supra,* n. 10, at 174–188.

[13] By the Treaty of Cession in 1867 Russia ceded to the United States "all the territory and dominion now possessed [by Russia] on the continent of America and in the adjacent islands." 15 Stat. 539. The cession was effectively a quitclaim. It is undisputed that the United States thereby acquired whatever dominion Russia had possessed immediately prior to cession.

[14] In June 1892 a United States revenue cutter, the *Mohican,* entered Cook Inlet to enforce Rev. Stat. § 1956. The *Mohican* arrested three American vessels in the lower inlet on charges of violating the statute. The prosecutions ultimately were dismissed on the ground that the vessels merely had been purchasing pelts from natives who were authorized by § 1956 to hunt sea otter for commercial sale. See *The Kodiak,* 53 F. 126 (Alaska 1892). In

District Court concluded that the statutory prohibition was enforced throughout Cook Inlet.

2. *The Alien Fishing Act of 1906*. This Act, 34 Stat. 263, prohibited noncitizens of the United States from fishing by commercial methods "in any of the waters of Alaska under the jurisdiction of the United States." Once again, the bare language of the statute fails to reveal the extent to which the prohibition applied to the waters of lower Cook Inlet. There is no evidence in the record and no findings by the District Court of any instance in which the Alien Fishing Act was enforced in the waters of Cook Inlet.[15]

3. *Executive Order No. 3752*. In 1922 President Harding issued an Executive Order creating the Southwestern Alaska Fisheries Reservation. Exec. Order No. 3752 (Nov. 3, 1922); 2 App. 676. The Order subjected all commercial fishing within the reservation to substantial regulation. See Regulations for the Administration of the Southwestern Alaska Fisheries Reservation, Department of Commerce Circular No. 251, pp. 8–9 (9th ed., Jan. 9, 1923); 2 App. 678–679. The reservation was described in the Order by a series of straight baselines to

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1893 two other American vessels were stopped in the lower inlet by a revenue cutter. Since these vessels, like the *Kodiak*, were carrying only native hunting parties, they were allowed to proceed without further incident. The District Court made no findings about the enforcement of § 1956 after June 1893.

[15] The District Court acknowledged that no foreign vessels had ever been arrested in Cook Inlet on charges of violating the Alien Fishing Act. The court sought to explain this fact on the ground that foreign vessels entered the inlet infrequently. The court relied on statements of certain former wildlife officials that "they would have taken affirmative action" against foreign vessels if they had seen any in the inlet. 352 F. Supp., at 819–820. In the absence of any actual enforcement or official announcement of intentions to enforce the Alien Fishing Act in lower Cook Inlet, the private intentions of witnesses are largely irrelevant.

encompass a substantial expanse of waters, and the regulations promulgated pursuant to the Order by Secretary of Commerce Hoover referred to and embraced "all the shores and waters of Cook Inlet."

4. *The White Act.* In 1924 Congress passed "An Act For the protection of the fisheries of Alaska, and for other purposes," otherwise known as the White Act. C. 272, 43 Stat. 464. This authorized the Secretary of Commerce to "set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction." *Ibid.* The Act subjected commercial fishing within the reserved waters to such regulations as the Secretary might issue. From that time until Alaska statehood, the regulations of the Secretary defined the waters set aside pursuant to the Act to include all the waters of Cook Inlet. The District Court found that there had been several instances of enforcement of fishing regulations against American vessels more than three miles from shore in lower Cook Inlet.

5. *The Gharrett-Scudder line.* In 1957 representatives of Canada and of the United States met to discuss the possibility of prohibiting citizens of the two countries from fishing with nets for salmon in international waters in the North Pacific. The delegates generally agreed that the line used by the United States for enforcing fishing regulations under the White Act and related statutes would be used to delimit "offshore waters" for purposes of the joint salmon fishing limitations. Since the Canadian delegates felt that the description of the closing lines connecting headlands in the Alaska fishery regulations were not definitive, they requested a map showing the American line with greater precision. Two United States Bureau of Fisheries employees, John T. Gharrett and Henry Clay Scudder, prepared a chart of the Alaska coast with a line reflecting the boundaries in

the then-current United States fishery regulations. This so-called Gharrett-Scudder line enclosed all the waters of Cook Inlet. Charts reflecting the line were transmitted to the Canadian delegates. It is undisputed that the exact location of the Gharrett-Scudder line was determined primarily with reference to the needs of fishery management.[16] The maps were forwarded by the Bu-

[16] The testimony of John T. Gharrett, who was called as a witness by the State of Alaska, is indicative of the predominance of fish and wildlife concerns in the preparation of the Gharrett-Scudder line:

On direct examination:

"Q What was your role in the preparation of that line?

"A My role was to decide where the line goes.

"Q Did you have assistance from anyone?

"A Mr. Clay Scutter [*sic*].

"Q Has the line since been given any kind of name?

"A Oh, I don't know since. At the time we drew it, rather than to say 'a line beyond which we proposed,' et cetera, et cetera, we called it the Gharrett-Scutter [*sic*] line for short.

"Q In your preparation of the line what criteria did you use for placing the line on the chart?

"A We used two basic criteria: 1) we wanted to encompass within the line existing salmon net fisheries along the Coast of Alaska, and 2) we wanted in some areas to allow for a modest, perhaps, expansion of existing fisheries, salmon net fisheries." 1 App. 292–293.

On cross-examination by counsel for the United States:

"Q Did the lines you drew enclose areas in which you knew foreigners had previously fished?

"A Yes.

"Q By drawing these lines did you intend to stop those fisheries?

"A No.

"Q Was the line you drew with Mr. Scutter [*sic*] intended to represent the outer limit of the territorial sea?

"A No.

"Q Was the line you drew with Mr. Scutter [*sic*] intended to represent the base line from which the territorial sea was to be measured?

[*Footnote 16 is continued on p. 196*]

reau of Fisheries to the State Department for transmittal to the Canadian delegates with express disclaimers that the line was intended to bear any relationship to the territorial waters of the United States in a legal sense.

Based on the facts summarized above, the District Court concluded that the United States had exercised authority over the waters of lower Cook Inlet continuously from the Treaty of Cession in 1867 until Alaska statehood. The District Court, of course, was clearly correct insofar as it found that the United States had exercised jurisdiction over lower Cook Inlet during the territorial period *for the purpose of fish and wildlife management.* It is far from clear, however, that the District Court was correct in concluding that the fact of enforcement of fish and wildlife regulations was legally sufficient to demonstrate the type of authority that must be exercised to establish title to a historic bay.

In determining whether the enforcement of fish and wildlife management regulations in Cook Inlet was an exercise of authority sufficient to establish title to that body of water as a historic bay, it is necessary to recall the threefold division of the sea recognized in international law. As the Court stated in the *Louisiana Boundary Case:*

> "Under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them. Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were

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"A No.

"Q Were the lines you drew with Mr. Scutter [*sic*] used for law enforcement purposes while you were in Alaska?

"A No." 1 App. 294.

a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether. Beyond the inland waters, and measured from their seaward edge, is a belt known as the marginal, or territorial, sea. Within it the coastal nation may exercise extensive control but cannot deny the right of innocent passage to foreign nations. Outside the territorial sea are the high seas, which are international waters not subject to the dominion of any single nation." 394 U. S., at 22–23 (footnotes omitted).

We also recognized in the *Louisiana Boundary Case* that the exercise of authority necessary to establish historic title must be commensurate in scope with the nature of the title claimed. There the State of Louisiana argued that the exercise of jurisdiction over certain coastal waters for purposes of regulating navigation had given rise to historic title over the waters in question as inland waters. Since the navigation rules in question had allowed the innocent passage of foreign vessels, a characteristic of territorial seas rather than of inland waters, the Court concluded that the exercise of authority was not sufficient in scope to establish historic title over the area as inland waters. *Id.*, at 24–26.

As has been noted, and as the parties agree, Alaska, in order to prevail in this case, must establish historic title to Cook Inlet as inland waters. For this showing, the exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation. The enforcement of fish and wildlife regulations, as found and relied upon by the District Court, was patently insufficient in scope to establish historic title to Cook Inlet as inland waters.

Only one of the fishing regulations relied upon by the court, the Alien Fishing Act, treated foreign vessels any

differently than it did American vessels. That Act, however, did not purport to apply beyond the three-mile limit in Cook Inlet. It simply applied to "the waters of Alaska under the jurisdiction of the United States." 34 Stat. 263. The meaning of that general statutory phrase, as applied to Cook Inlet, can only be surmised, since there was not a single instance of enforcement to suggest that the Act was applicable to foreign vessels in the waters beyond the three-mile limit in lower Cook Inlet. The remainder of the fish and wildlife regulations relied upon by the District Court clearly were enforced throughout lower Cook Inlet for at least much of the territorial period, but these regulations were not commensurate in scope with the claim of exclusive dominion essential to historic title over inland waters. Each afforded foreign vessels the same rights as were enjoyed by American ships. To be sure, there were instances of enforcement in the lower inlet, but in each case the vessels involved were American. These incidents prove very little, for the United States can and does enforce fish and wildlife regulations against its own nationals, even on the high seas. See, *e. g.,* 38 Stat. 692, 16 U. S. C. § 781 (taking commercial sponges in the Gulf of Mexico or the Straits of Florida); 80 Stat. 1091, 16 U. S. C. § 1151 (taking fur seals in the North Pacific Ocean); 86 Stat. 1032, as amended, 16 U. S. C. § 1372 (1970 ed., Supp. III) (taking marine mammals on the high seas). See also *Skiriotes* v. *Florida,* 313 U. S. 69 (1941).

Our conclusion that the fact of enforcement of game and fish regulations in Cook Inlet is inadequate, as a matter of law, to establish historic title to the inlet as inland waters is not based on mere technicality. The assertion of national jurisdiction over coastal waters for purposes of fisheries management frequently differs in geographic extent from the boundaries claimed as inland

or even territorial waters. See, *e. g.,* Presidential Proclamation No. 2668, 59 Stat. 885 (1945). This limited circumscription of the traditional freedom of fishing on the high seas is based, in part, on a recognition of the special interest that a coastal state has in the preservation of the living resources in the high seas adjacent to its territorial sea. Convention on Fishing and Conservation of the Living Resources of the High Seas, Art. 6, ¶ 1, [1966] 1 U. S. T. 138, 141, T. I. A. S. 5969.

Even a casual examination of the facts relied upon by the District Court in this case reveals that the geographic scope of the fish and wildlife enforcement efforts was determined primarily, if not exclusively, by the needs of effective management of the fish and game population involved. Thus, for example, the Gharrett-Scudder line, which the District Court considered "a classic demonstration of the assertion by the United States government of its claim to sovereignty over the whole of Cook Inlet," Pet. for Cert. 37a, was drawn almost solely with reference to the needs of the coastal salmon net fisheries and was never intended to depict the boundaries of the territorial waters of the United States. Indeed, the very method of drawing the fishery boundaries by use of straight baselines conflicted with this country's traditional policy of measuring its territorial waters by the sinuosity of the coast. See *United States* v. *California,* 381 U. S., at 167–169.

Even if we could agree that the boundaries selected for purposes of enforcing fish and wildlife regulations coincided with an intended assertion of territorial sovereignty over Cook Inlet as inland waters, we still would disagree with the District Court's conclusion that historic title was established in the territorial period. The court found that the third essential element of historic title, acquiescence by foreign nations, was satisfied by the fail-

ure of any foreign nation to protest. Scholarly comment is divided over whether the mere absence of opposition suffices to establish title. See Juridical Regime of Historic Waters, Including Historic Bays, 2 Yearbook of the International Law Commission, 1962, pp. 1, 16–19 (U. N. Doc. A/CN.4/143). The Court previously has noted this division but has taken no position in the debate. See *Louisiana Boundary Case,* 394 U. S., at 23–24, n. 27. In this case, we feel that something more than the mere failure to object must be shown. The failure of other countries to protest is meaningless unless it is shown that the governments of those countries knew or reasonably should have known of the authority being asserted. Many assertions of authority are such clear expressions of exclusive sovereignty that they cannot be mistaken by other governments. Other assertions of authority, however, may not be so clear. One scholar notes: "Thus, the placing of lights or beacons may sometimes appear to be an act of sovereignty, while in other circumstances it may have no such significance." Juridical Regime of Historic Waters, *supra,* at 14. We believe that the routine enforcement of domestic game and fish regulations in Cook Inlet in the territorial period failed to inform foreign governments of any claim of dominion. In the absence of any awareness on the part of foreign governments of a claimed territorial sovereignty over lower Cook Inlet, the failure of those governments to protest is inadequate proof of the acquiescence essential to historic title.

C

The District Court stressed two facts as evidence that Alaska had exercised sovereignty over all the waters of Cook Inlet in the recent period of Alaska statehood. First, the court found that since statehood Alaska had enforced fishing regulations in basically the same fashion

as had the United States during the territorial period. Second, the court found that in 1962 Alaska had arrested two vessels of a Japanese fishing fleet in the Shelikof Strait. Since we have concluded that the general enforcement of fishing regulations by the United States in the territorial period was insufficient to demonstrate sovereignty over Cook Inlet as inland waters, we also must conclude that Alaska's following the same basic pattern of enforcement is insufficient to give rise to the historic title now claimed. The Shelikof Strait incident, however, deserves scrutiny because the seizure of a foreign vessel more than three miles from shore manifests an assertion of sovereignty to exclude foreign vessels altogether.

The facts of the incident, for the most part, are undisputed. In early 1962 a private commercial fishing enterprise in Japan, Eastern Pacific Fisheries Company, publicly announced its intention to send a fishing fleet into the waters of Cook Inlet and the Shelikof Strait. Alaska officials learned of the plan through newspaper accounts and requested action by the Federal Government to prevent entry of the fleet into the inlet and the strait. The Federal Government, although thus forewarned of the intrusion, significantly took no action. In March 1962, the mothership *Banshu Maru 31* and five other vessels arrived at the Kodiak fishing grounds. On April 5, the six vessels sailed north of the Barren Islands into the lower portion of Cook Inlet. The vessels left the inlet the next day without incident and sailed southwest into the Shelikof Strait. The vessels fished in the strait for approximately 10 days undisturbed. Then, on April 15, Alaska law enforcement officials boarded two of the vessels in the Shelikof Strait. At the time, at least one of the ships was more than three miles from shore. The officials arrested three of the fleet's captains and charged

them with violating the state fishing regulations applicable to the strait. On April 19, Eastern Pacific Fisheries Company and the State of Alaska entered into an agreement whereby the State released the company's employees and ships in return for a promise from the company that it would not fish in the inlet or in the strait pending judicial resolution of the State's jurisdiction to enforce fishing regulations therein. 2 App. 1186–1188. The Japanese Government did not participate in, or approve of, the agreement between the company and Alaska. Instead, shortly after the agreement was executed, Japan formally protested to the United States Government. Our Government declined to take an official position on the matter pending completion of the judicial proceedings. Ultimately, the judicial proceedings were dismissed without reaching any conclusion on the extent of Alaskan jurisdiction over the strait. The Federal Government took no formal position on the issue after the dismissal of the proceedings.

To the extent that the Shelikof Strait incident reveals a determination on the part of Alaska to exclude all foreign vessels, it must be viewed, to be sure, as an exercise of authority over the waters in question as inland waters. Nevertheless, for several reasons, we find the incident inadequate to establish historic title to Cook Inlet as inland waters. First, the incident was an exercise of sovereignty, if at all, only over the waters of Shelikof Strait. The vessels were boarded in the strait, some 75 miles southwest from the nearest portion of the inlet. Although Alaska officials knew of the fleet's earlier entry into Cook Inlet, no action was taken to force the vessels to leave the inlet, and no charges were filed for the intrusion into those waters. Second, even if the events in Shelikof Strait could constitute an assertion of authority over the waters of Cook Inlet as well

as those of the strait, we are not satisfied that the exercise of authority was sufficiently unambiguous to serve as the basis of historic title to inland waters. The adequacy of a claim to historic title, even in a dispute between a State and the United States, is measured primarily as an international, rather than a purely domestic, claim. See *United States* v. *California,* 381 U. S., at 168; *Louisiana Boundary Case,* 394 U. S., at 77. Viewed from the standpoint of the Japanese Government, the import of the incident in the strait is far from clear. Alaska clearly claimed the waters in question as inland waters, but the United States neither supported nor disclaimed the State's position. Given the ambiguity of the Federal Government's position, we cannot agree that the assertion of sovereignty possessed the clarity essential to a claim of historic title over inland waters. Finally, regardless of how one views the Shelikof Strait incident, it is impossible to conclude that the exercise of sovereignty was acquiesced in by the Japanese Government. Japan immediately protested the incident and has never acceded to the position taken by Alaska. Admittedly, the Eastern Pacific Fisheries Company formally and tentatively agreed to respect the jurisdiction claimed by Alaska but, as we have already noted, the acts of a private citizen cannot be considered representative of a government's position in the absence of some official license or other governmental authority.

In sum, we hold that the District Court's conclusion that Cook Inlet is a historic bay was based on an erroneous assessment of the legal significance of the facts it had found.[17] The judgment of the Court of Appeals,

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[17] The United States has argued that historic title to Cook Inlet is defeated by several United States disclaimers of sovereignty over the waters of lower Cook Inlet. The Court previously has discussed the importance of governmental disclaimers in weighing claims to

accordingly, is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

Mr. Justice Stewart and Mr. Justice Rehnquist would affirm the judgment, believing that the findings of fact made by the District Court and adopted by the Court of Appeals were not clearly erroneous, and that both of those courts applied the correct legal criteria in ruling that Cook Inlet is a historic bay.

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historic title in actions of this kind. *Louisiana Boundary Case,* 394 U. S., at 76–78; *United States* v. *California,* 381 U. S. 139, 175 (1965). The District Court rejected the disclaimers on the grounds that they were ill-advised and, perhaps, self-serving. 352 F. Supp., at 818–819. Inasmuch as we have concluded that none of the facts relied upon by the District Court suffice to establish historic title, we have no occasion to consider whether the disclaimers of the United States could have defeated otherwise sufficient facts.

ERZNOZNIK *v.* CITY OF JACKSONVILLE

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

No. 73-1942. Argued February 26, 1975—Decided June 23, 1975

A Jacksonville, Fla., ordinance making it a public nuisance and a punishable offense for a drive-in movie theater to exhibit films containing nudity, when the screen is visible from a public street or place, *held* facially invalid as an infringement of First Amendment rights. Pp. 208-217.

(a) The ordinance by discriminating among movies solely on the basis of content has the effect of deterring drive-in theaters from showing movies containing any nudity, however innocent or even educational, and such censorship of the content of otherwise protected speech cannot be justified on the basis of the limited privacy interest of persons on the public streets, who if offended by viewing the movies can readily avert their eyes. Pp. 208-212.

(b) Nor can the ordinance be justified as an exercise of the city's police power for the protection of children against viewing the films. Even assuming that such is its purpose, the restriction is broader than permissible since it is not directed against sexually explicit nudity or otherwise limited. Pp. 212-214.

(c) Nor can the ordinance be justified as a traffic regulation. If this were its purpose, it would be invalid as a strikingly underinclusive legislative classification since it singles out movies containing nudity from all other movies that might distract a passing motorist. Pp. 214-215.

(d) The possibility of a narrowing construction of the ordinance appears remote, particularly where appellee city offered several distinct justifications for it in its broadest terms. Moreover, its deterrent effect on legitimate expression in the form of movies is both real and substantial. Pp. 215-217.

288 So. 2d 260, reversed.

Powell, J., delivered the opinion of the Court, in which Douglas, Brennan, Stewart, Marshall, and Blackmun, JJ., joined. Douglas, J., filed a concurring opinion, *post*, p. 218. Burger, C. J., filed a dissenting opinion, in which Rehnquist, J., joined, *post*, p. 218. White, J., filed a dissenting opinion, *post*, p. 224.

William H. Maness argued the cause and filed a brief for appellant.

William Lee Allen argued the cause for appellee. With him on the brief was *Harry Louis Shorstein*.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents a challenge to the facial validity of a Jacksonville, Fla., ordinance that prohibits showing films containing nudity by a drive-in movie theater when its screen is visible from a public street or place.

I

Appellant, Richard Erznoznik, is the manager of the University Drive-In Theatre in Jacksonville. On March 13, 1972, he was charged with violating § 330.313 of the municipal code for exhibiting a motion picture, visible from public streets, in which "female buttocks and bare breasts were shown."[1] The ordinance, adopted January 14, 1972, provides:

> "330.313 *Drive-In Theaters, Films Visible From Public Streets or Public Places.* It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any

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*Briefs of *amici curiae* urging reversal were filed by *James Bouras* for the Motion Picture Association of America, Inc., and by *Irwin Karp* for the Authors League of America, Inc.

[1] The movie, "Class of '74," had been rated "R" by the Motion Picture Association of America. An "R" rating indicates that youths may be admitted only when accompanied by a parent or guardian. See generally Friedman, The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry, 73 Col. L. Rev. 185 (1973). Although there is nothing in the record regarding the content of the movie, the parties agree that it includes pictures of uncovered female breasts and buttocks.

other person connected with or employed by any drive-in theater in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense."

Appellant, with the consent of the city prosecutor, successfully moved to stay his prosecution so that the validity of the ordinance could be tested in a separate declaratory action. In that action appellee, the city of Jacksonville, introduced evidence showing that the screen of appellant's theater is visible from two adjacent public streets and a nearby church parking lot. There was also testimony indicating that people had been observed watching films while sitting outside the theater in parked cars and in the grass.

The trial court upheld the ordinance as a legitimate exercise of the municipality's police power, and ruled that it did not infringe upon appellant's First Amendment rights. The District Court of Appeal, First District of Florida, affirmed, 288 So. 2d 260 (1974), relying exclusively on *Chemline, Inc.* v. *City of Grand Prairie,* 364 F. 2d 721 (CA5 1966), which had sustained a similar ordinance.[2] The Florida Supreme Court denied certiorari, three judges dissenting. 294 So. 2d 93 (1974). We noted probable jurisdiction,[3] 419 U. S. 822 (1974), and now reverse.

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[2] The only other United States Court of Appeals to consider this question reached a contrary result. See *Cinecom Theaters Midwest States, Inc.* v. *City of Fort Wayne,* 473 F. 2d 1297 (CA7 1973).

[3] A local ordinance is deemed a state statute for purposes of invoking this Court's jurisdiction under 28 U. S. C. § 1257 (2). See *King Mfg. Co.* v. *City Council of Augusta,* 277 U. S. 100 (1928).

II

Appellee concedes that its ordinance sweeps far beyond the permissible restraints on obscenity, see *Miller* v. *California,* 413 U. S. 15 (1973), and thus applies to films that are protected by the First Amendment. See *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952); *Jenkins* v. *Georgia,* 418 U. S. 153 (1974). Nevertheless, it maintains that any movie containing nudity which is visible from a public place may be suppressed as a nuisance. Several theories are advanced to justify this contention.

A

Appellee's primary argument is that it may protect its citizens against unwilling exposure to materials that may be offensive. Jacksonville's ordinance, however, does not protect citizens from all movies that might offend; rather it singles out films containing nudity, presumably because the lawmakers considered them especially offensive to passersby.

This Court has considered analogous issues—pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors—in a variety of contexts. See, *e. g., Kovacs* v. *Cooper,* 336 U. S. 77 (1949); *Breard* v. *Alexandria,* 341 U. S. 622, 641-645 (1951); *Cohen* v. *California,* 403 U. S. 15 (1971); *Lehman* v. *City of Shaker Heights,* 418 U. S. 298 (1974). See generally Haiman, Speech v. Privacy: Is There A Right Not To Be Spoken To?, 67 Nw. U. L. Rev. 153 (1972). Such cases demand delicate balancing because:

> "In th[e] sphere of collision between claims of privacy and those of [free speech or] free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society."

Cox Broadcasting Corp. v. *Cohn,* 420 U. S. 469, 491 (1975).

Although each case ultimately must depend on its own specific facts, some general principles have emerged. A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. See *Kovacs* v. *Cooper, supra; Cox* v. *Louisiana,* 379 U. S. 536, 554 (1965); *Adderley* v. *Florida,* 385 U. S. 39 (1966). But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. See, *e. g., Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92 (1972); *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953); *Kovacs* v. *Cooper, supra,* at 97 (Jackson, J., concurring). Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, see *Rowan* v. *Post Office Dept.,* 397 U. S. 728 (1970),[4] or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. See *Lehman* v. *City of Shaker Heights, supra.*[5] As Mr. Justice Harlan cautioned:

"The ability of government, consonant with the

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[4] *Rowan* involved a federal statute that permits a person receiving a "pandering advertisement" which he believes to be "erotically arousing or sexually provocative" to instruct the Postmaster General to inform the sender that such mail is not to be sent in the future. The Court upheld the statute, emphasizing that individual privacy is entitled to greater protection in the home than on the streets and noting that "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." See 397 U. S., at 736–738.

[5] In *Lehman* the Court sustained a municipality's policy of barring political advertisements while permitting nonpolitical advertisements

Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen* v. *California,* 403 U. S., at 21.

The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, "we are inescapably captive audiences for many purposes." *Rowan* v. *Post Office Dept., supra,* at 736. Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above,[6] the burden

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on city buses. The issue was whether the city had created a "public forum" and thereby obligated itself to accept all advertising. While concluding that no public forum had been established, both the plurality and concurring opinions recognized that the degree of captivity and the resultant intrusion on privacy is significantly greater for a passenger on a bus than for a person on the street. See 418 U. S. 298, 302–304 (opinion of BLACKMUN, J.), and *id.,* at 306–308 (DOUGLAS, J., concurring). See also *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 467 (1952) (DOUGLAS, J., dissenting).

[6] It has also been suggested that government may proscribe, by a properly framed law, "the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience." *Rosenfeld* v. *New Jersey,* 408 U. S. 901, 905 (1972) (POWELL, J., dissenting). Cf. *Ginzburg* v. *United States,* 383 U. S. 463 (1966). In such cases the speaker may seek to "force public confrontation with the potentially offensive aspects of the work." *Id.,* at 470. It may not be the content of the speech, as much as the deliberate "verbal [or visual] assault," *Rosenfeld, supra,* at 906, that justifies

normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Cohen* v. *California, supra,* at 21. See also *Spence* v. *Washington,* 418 U. S. 405, 412 (1974).

The Jacksonville ordinance discriminates among movies solely on the basis of content.[7] Its effect is to deter drive-in theaters from showing movies containing any nudity, however innocent or even educational.[8] This

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proscription. See *Redrup* v. *New York,* 386 U. S. 767, 769 (1967). In the present case, however, appellant is not trying to reach, much less shock, unwilling viewers. Appellant manages a commercial enterprise which depends for its success on *paying* customers, not on freeloading passersby. Presumably, where economically feasible, the screen of a drive-in theater will be shielded from those who do not pay.

[7] Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. See *Miller* v. *California,* 413 U. S. 15, 24 (1973); *Kois* v. *Wisconsin,* 408 U. S. 229 (1972). In this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent-exposure laws. See *Roth* v. *United States,* 354 U. S. 476, 512 (1957) (DOUGLAS, J., dissenting) ("No one would suggest that the First Amendment permits nudity in public places"). Cf. *United States* v. *O'Brien,* 391 U. S. 367 (1968).

THE CHIEF JUSTICE's dissent, in response to this point, states that "[u]nlike persons reading books, passersby cannot consider fragments of drive-in movies as a part of the 'whole work' for the simple reason that they *see* but do not *hear* the performance . . . ." *Post,* at 222 (emphasis in original). At issue here, however, is not the viewing rights of unwilling viewers but rather the rights of those who operate drive-in theaters and the public that attends these establishments. The effect of the Jacksonville ordinance is to increase the cost of showing films containing nudity. See n. 8, *infra.* In certain circumstances theaters will avoid showing these movies rather than incur the additional costs. As a result persons who want to see such films at drive-ins will be unable to do so. It is in this regard that a motion picture must be considered as a whole, and not as isolated fragments or scenes of nudity.

[8] Such a deterrent, although it might not result in total suppression of these movies, is a restraint on free expression. See *Speiser*

discrimination cannot be justified as a means of preventing significant intrusions on privacy. The ordinance seeks only to keep these films from being seen from public streets and places where the offended viewer readily can avert his eyes. In short, the screen of a drive-in theater is not "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Redrup* v. *New York,* 386 U. S. 767, 769 (1967). Thus, we conclude that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content.[9]

B

Appellee also attempts to support the ordinance as an exercise of the city's undoubted police power to protect children. Appellee maintains that even though it cannot prohibit the display of films containing nudity to adults, the present ordinance is a reasonable means of protecting minors from this type of visual influence.

It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults. See, *e. g., Ginsberg* v. *New York,* 390 U. S. 629 (1968). Nevertheless, minors are entitled to a significant measure of First Amendment protection, see *Tinker*

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v. *Randall,* 357 U. S. 513, 518–519 (1958). The record does not indicate how much it would cost to block public view of appellant's theater. Such costs generally will vary with circumstances. In one case the expense was estimated at approximately a quarter million dollars. See *Olympic Drive-In Theatre, Inc.* v. *City of Pagedale,* 441 S. W. 2d 5, 8 (Mo. 1969).

[9] We are not concerned in this case with a properly drawn zoning ordinance restricting the location of drive-in theaters or with a nondiscriminatory nuisance ordinance designed to protect the privacy of persons in their homes from the visual and audible intrusions of such theaters.

v. *Des Moines School Dist.,* 393 U. S. 503 (1969), and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them. See, *e. g., Interstate Circuit, Inc.* v. *City of Dallas,* 390 U. S. 676, 1968); *Rabeck* v. *New York,* 391 U. S. 462 (1968).

In this case, assuming the ordinance is aimed at prohibiting youths from viewing the films, the restriction is broader than permissible. The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing *any* uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene even as to minors. See *Ginsberg* v. *New York, supra.*[10] Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks un-

[10] In *Ginsberg* the Court adopted a variation of the adult obscenity standards enunciated in *Roth* v. *United States,* 354 U. S. 476 (1957), and *Memoirs* v. *Massachusetts,* 383 U. S. 413 (1966) (plurality opinion). In *Miller* v. *California, supra,* we abandoned the *Roth-Memoirs* test for judging obscenity with respect to adults. We have not had occasion to decide what effect *Miller* will have on the *Ginsberg* formulation. It is clear, however, that under any test of obscenity as to minors not all nudity would be proscribed. Rather, to be obscene "such expression must be, in some significant way, erotic." *Cohen* v. *California,* 403 U. S. 15, 20 (1971). See *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 106–107 (1973) (BRENNAN, J., dissenting).

suitable for them. In most circumstances,[11] the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors. See *Tinker* v. *Des Moines School Dist., supra.* Cf. *West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624 (1943). Thus, if Jacksonville's ordinance is intended to regulate expression accessible to minors it is overbroad in its proscription.[12]

C

At oral argument appellee, for the first time, sought to justify its ordinance as a traffic regulation. It claimed that nudity on a drive-in movie screen distracts passing motorists, thus slowing the flow of traffic and increasing the likelihood of accidents.

Nothing in the record or in the text of the ordinance suggests that it is aimed at traffic regulation. Indeed, the ordinance applies to movie screens visible from public places as well as public streets, thus indicating that it is not a traffic regulation. But even if this were the purpose of the ordinance, it nonetheless would be invalid. By singling out movies containing even the most fleeting and innocent glimpses of nudity the legislative classification is strikingly underinclusive. There is no reason to think that a wide variety of other scenes in the custom-

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[11] The First Amendment rights of minors are not "co-extensive with those of adults." *Tinker* v. *Des Moines School Dist.,* 393 U. S. 503, 515 (1969) (STEWART, J., concurring). "[A] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Ginsberg* v. *New York,* 390 U. S. 629, 649–650 (1968) (STEWART, J., concurring). In assessing whether a minor has the requisite capacity for individual choice the age of the minor is a significant factor. See *Rowan* v. *Post Office Dept.,* 397 U. S., at 741 (BRENNAN, J., concurring).

[12] See Part III, *infra.*

ary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist.

This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. See, *e. g., Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 488–489 (1955). This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v. *Mosley,* 408 U. S., at 95. Thus, "under the Equal Protection Clause, not to mention the First Amendment itself," *id.,* at 96, even a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions. See also *Cox* v. *Louisiana,* 379 U. S. 559, 581 (1965) (opinion of Black, J.). Cf. *Williams* v. *Rhodes,* 393 U. S. 23 (1968); *Shapiro* v. *Thompson,* 394 U. S. 618 (1969).

Appellee offers no justification, nor are we aware of any, for distinguishing movies containing nudity from all other movies in a regulation designed to protect traffic. Absent such a justification, the ordinance cannot be salvaged by this rationale.[13]

III

Even though none of the reasons advanced by appellee will sustain the Jacksonville ordinance, it remains for us to decide whether the ordinance should be invalidated on

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[13] This is not to say that a narrowly drawn nondiscriminatory traffic regulation requiring screening of drive-in movie theaters from the view of motorists would not be a reasonable exercise of police power. See *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 98 (1972), and cases cited.

its face. This Court has long recognized that a demonstrably overbroad statute or ordinance may deter the legitimate exercise of First Amendment rights. Nonetheless, when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program. In accommodating these competing interests the Court has held that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts, see *Dombrowski* v. *Pfister,* 380 U. S. 479, 497 (1965), and its deterrent effect on legitimate expression is both real and substantial. See *Broadrick* v. *Oklahoma,* 413 U. S. 601, 612-615 (1973). See generally Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

In the present case the possibility of a limiting construction appears remote. Appellee explicitly joined in this test of the facial validity of its ordinance by agreeing to stay appellant's prosecution.[14] Moreover, the ordinance by its plain terms is not easily susceptible of a narrowing construction.[15] Indeed, when the state courts were presented with this overbreadth challenge they made no effort to restrict its application. Compare *Coates* v. *City of Cincinnati,* 402 U. S. 611, 612-613

[14] In this respect the present case arises in a posture that differs from most challenges to a statute or ordinance considered by this Court. Typically in such cases the issue arises in a context where the statute or ordinance has been applied to allegedly unprotected activity. Thus, we are able to consider the constitutionality of the statute "as applied" as well as "on its face."

[15] The only narrowing construction which occurs to us would be to limit the ordinance to movies that are obscene as to minors. Neither appellee nor the Florida courts have suggested such a limitation, perhaps because a rewriting of the ordinance would be necessary to reach that result.

(1971), and *Brandenburg* v. *Ohio,* 395 U. S. 444, 448–449 (1969), with *Cox* v. *New Hampshire,* 312 U. S. 569, 575–576 (1941), and *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572–573 (1942). In these circumstances, particularly where as here appellee offers several distinct justifications for the ordinance in its broadest terms, there is no reason to assume that the ordinance can or will be decisively narrowed. See *Gooding* v. *Wilson,* 405 U. S. 518, 520–527 (1972). Cf. *Grayned* v. *City of Rockford,* 408 U. S. 104, 111–112 (1972); *Time, Inc.* v. *Hill,* 385 U. S. 374, 397 (1967).

Moreover, the deterrent effect of this ordinance is both real and substantial. Since it applies specifically to all persons employed by or connected with drive-in theaters, the owners and operators of these theaters are faced with an unwelcome choice: to avoid prosecution of themselves and their employees they must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable.[16] Cf. *Lake Carriers' Assn.* v. *MacMullan,* 406 U. S. 498, 513 (1972) (POWELL, J., dissenting).

IV

In concluding that this ordinance is invalid we do not deprecate the legitimate interests asserted by the city of Jacksonville. We hold only that the present ordinance does not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression. Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity

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[16] In this case appellant himself is a theater manager. Hence the statute's deterrent effect acts upon him personally; he is not seeking to raise the hypothetical rights of others. See *Breard* v. *Alexandria,* 341 U. S. 622, 641 (1951).

of purpose are essential. These prerequisites are absent here. Accordingly the judgment below is

Reversed.

MR. JUSTICE DOUGLAS, concurring.

I join wholeheartedly in the Court's view that the ordinance in issue here is fatally overinclusive in some respects and fatally underinclusive in others. I do not doubt that under proper circumstances, a narrowly drawn ordinance could be utilized within constitutional boundaries to protect the interests of captive audiences [1] or to promote highway safety. In these days of heavy traffic, it is reasonable to attempt to remove all distractions that might increase accidents. These legitimate interests cannot, however, justify attempts to discriminate among movies on the basis of their content—a "pure" movie is apt to be just as distracting to drivers as an "impure" one, and to be just as intrusive upon the privacy of an unwilling but captive audience. Any ordinance which regulates movies on the basis of content, whether by an obscenity standard [2] or by some other criterion, impermissibly intrudes upon the free speech rights guaranteed by the First and Fourteenth Amendments.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, dissenting.

Although the Court pays lip service to the proposition that "each case ultimately must depend on its own spe-

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[1] See *Lehman* v. *City of Shaker Heights,* 418 U. S. 298, 305 (1974) (DOUGLAS, J., concurring in judgment); *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 467 (1952) (DOUGLAS, J., dissenting).

[2] I adhere to my view that any state or federal regulation of obscenity is prohibited by the Constitution. *Roth* v. *United States,* 354 U. S. 476, 508–514 (1957) (dissenting); *Miller* v. *California,* 413 U. S. 15, 42–47 (1973) (dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (1973) (dissenting).

cific facts," *ante,* at 209, it strikes down Jacksonville City Code § 330.313 by a mechanical application of "general principles" distilled from cases having little to do with either this case or each other. Because I can accept neither that approach nor its result, I dissent.

The Court's analysis seems to begin and end with the sweeping proposition that, regardless of the circumstances, government may not regulate any form of "communicative" activity on the basis of its content. Absent certain "special circumstances," we are told, the burden falls upon the public to ignore offensive materials rather than upon their purveyor to take steps to shield them from public view. In four short sentences without reasoned support, *ante,* at 211–212, the Court concludes that Jacksonville's ordinance does not pass muster under its tests, and therefore strikes it down.

None of the cases upon which the Court relies remotely implies that the Court ever intended to establish inexorable limitations upon state power in this area. Many cases upheld the regulation of communicative activity and did not purport to define the limits of the power to do so. *E. g., Lehman* v. *City of Shaker Heights,* 418 U. S. 298 (1974); *Rowan* v. *Post Office Dept.,* 397 U. S. 728 (1970); *Breard* v. *Alexandria,* 341 U. S. 622 (1951); *Kovacs* v. *Cooper,* 336 U. S. 77 (1949). Other cases relied upon by the Court were either expressly or impliedly decided upon equal protection grounds and, although recognizing that First Amendment interests were involved, turned upon "the crucial question . . . whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 95 (1972). See also *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953). Such a standard necessarily requires particularized review. Finally, yet other of the cases cited by the Court were

decided on vagueness and overbreadth. *E. g., Cox* v. *Louisiana,* 379 U. S. 536 (1965). Again, application of these doctrines requires scrutiny of the specific statute and activity involved rather than reliance upon generalizations. See, *e. g., id.,* at 544–558.

In short, nothing in this Court's prior decisions justifies disregard of the admonition that "the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the [First] Amendment to the speech in question." *Lehman* v. *City of Shaker Heights, supra,* at 302–303 (plurality opinion of BLACKMUN, J.). Rather, in applying this principle in contexts similar to the instant case, members of this Court have cautioned that every medium of communication "is a law unto itself," *Kovacs* v. *Cooper, supra,* at 97 (Jackson, J., concurring), and that the "tyranny of absolutes" should not be relied upon "to meet the problems generated by the need to accommodate the diverse interests affected by the motion pictures in compact modern communities." *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 518 (1952) (Frankfurter, J., concurring).

A careful consideration of the diverse interests involved in this case illustrates, for me, the inadequacy of the Court's rigidly simplistic approach. In the first place, the conclusion that only a limited interest of persons on the public streets is at stake here can be supported only if one completely ignores the unique visual medium to which the Jacksonville ordinance is directed. Whatever validity the notion that passersby may protect their sensibilities by averting their eyes may have when applied to words printed on an individual's jacket, see *Cohen* v. *California,* 403 U. S. 15 (1971), or a flag hung from a second-floor apartment window, see *Spence* v. *Washington,* 418 U. S. 405 (1974), it distorts reality to

apply that notion to the outsize screen of a drive-in movie theater. Such screens are invariably huge;[1] indeed, photographs included in the record of this case show that the screen of petitioner's theater dominated the view from public places including nearby residences and adjacent highways. Moreover, when films are projected on such screens the combination of color and animation against a necessarily dark background is designed to, and results in, attracting and holding the attention of all observers. See Note, Motion Pictures and the First Amendment, 60 Yale L. J. 696, 707–708 (1951). Similar considerations led Mr. Justice Brandeis, writing for the Court in *Packer Corp.* v. *Utah,* 285 U. S. 105 (1932), to conclude that there is a public interest in regulating billboard displays which may not apply to other forms of advertising:

> "'Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisment in a position to be classified so that regulations or prohibitions may be imposed upon all within the class.'" *Id.,* at 110.

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[1] For example, in a case similar to this one the screen measured 35 feet by 70 feet and stood 54 feet above the ground. *Bloss* v. *Paris Township,* 380 Mich. 466, 157 N. W. 2d 260 (1968).

So here, the screen of a drive-in movie theater is a unique type of eye-catching display that can be highly intrusive and distracting. Public authorities have a legitimate interest in regulating such displays under the police power; for example, even though traffic safety may not have been the only target of the ordinance in issue here, I think it not unreasonable for lawmakers to believe that public nudity on a giant screen, visible at night to hundreds of drivers of automobiles, may have a tendency to divert attention from their task and cause accidents.

No more defensible is the Court's conclusion that Jacksonville's ordinance is defective because it regulates only nudity. The significance of this fact is explained only in a footnote:

> "Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. . . . In this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent-exposure laws." *Ante,* at 211 n. 7.

Both the analogy and the distinction are flawed. Unlike persons reading books, passersby cannot consider fragments of drive-in movies as a part of the "whole work" for the simple reason that they *see* but do not *hear* the performance, cf. Note, *supra,* 60 Yale L. J., at 707, and n. 27; nor do drivers and passengers on nearby highways see the whole of the visual display. The communicative value of such fleeting exposure falls somewhere in the range of slight to nonexistent. Moreover, those persons who legitimately desire to consider the "work as a whole" are not foreclosed from doing so. The record shows that the film from which appellant's prosecution arose was exhibited in several indoor theaters in the Jacksonville area. And the owner of a drive-in movie theater is not prevented from exhibiting nonobscene films involving

nudity so long as he effectively shields the screen from public view. Thus, regardless of whether the ordinance involved here can be loosely described as regulating the content of a certain type of display, it is not a restriction of any "message." Cf. *Police Dept. of Chicago* v. *Mosley, supra,* at 95–96; *Grayned* v. *City of Rockford,* 408 U. S. 104, 115 (1972). The First Amendment interests involved in this case are trivial at best.

On the other hand, assuming *arguendo* that there could be a play performed in a theater by nude actors involving genuine communication of ideas, the same conduct in a public park or street could be prosecuted under an ordinance prohibiting indecent exposure. This is so because the police power has long been interpreted to authorize the regulation of nudity in areas to which all members of the public have access, regardless of any incidental effect upon communication. A nudist colony, for example, cannot lawfully set up shop in Central Park or Lafayette Park, places established for the public generally. Cf. *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 67 (1973); *Roth* v. *United States,* 354 U. S. 476, 512 (1957) (DOUGLAS, J., dissenting). Whether such regulation is justified as necessary to protect public mores or simply to insure the undistracted enjoyment of open areas by the greatest number of people—or for traffic safety—its rationale applies *a fortiori* to giant displays which through technology are capable of revealing and emphasizing the most intimate details of human anatomy.

In sum, the Jacksonville ordinance involved in this case, although no model of draftsmanship, is narrowly drawn to regulate only certain unique public exhibitions of nudity; it would be absurd to suggest that it operates to suppress expression of *ideas.* By conveniently ignoring these facts and deciding the case on the basis of

absolutes the Court adds nothing to First Amendment analysis and sacrifices legitimate state interests. I would affirm the judgment of the Florida Court of Appeal.[2]

MR. JUSTICE WHITE, dissenting.

The Court asserts that the State may shield the public from selected types of speech and allegedly expressive conduct, such as nudity, only when the speaker or actor invades the privacy of the home or where the degree of captivity of an unwilling listener is such that it is impractical for him to avoid the exposure by averting his eyes. The Court concludes "that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content." *Ante*, at 212. If this broadside is to be taken literally, the State may not forbid "expressive" nudity on the public streets, in the public parks, or any other public place since other persons in those places at that time have a "limited privacy interest" and may merely look the other way.

I am not ready to take this step with the Court. Moreover, by the Court's own analysis, the step is an unnecessary one. If, as the Court holds in Part II–B of its opinion, the ordinance is unconstitutionally overbroad even as an exercise of the police power to protect children, it is fatally overbroad as to the population generally. Part II–A is surplusage. I therefore dissent.

[2] On my view of this case it is not necessary to deal with the issues discussed in Parts II–B, II–C, and III of the Court's opinion.

UNITED STATES v. NOBLES

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

No. 74-634. Argued April 23, 1975—Decided June 23, 1975

During respondent's federal criminal trial, which resulted in a conviction, defense counsel sought to impeach the credibility of key prosecution witnesses by testimony of a defense investigator regarding statements previously obtained from the witnesses by the investigator. When the investigator was called as a witness, the District Court stated that a copy of the investigator's report, inspected and edited by the court *in camera* so as to excise references to matters not relevant to such statements, would have to be submitted to the prosecution for inspection at the completion of the investigator's testimony. When defense counsel said he did not intend to produce the report, the court ruled that the investigator could not testify about his interviews with the witnesses. The Court of Appeals, considering such ruling to be reversible error, held that both the Fifth Amendment and Fed. Rule Crim. Proc. 16 prohibited the disclosure condition imposed. *Held:*

1. In a proper case, the prosecution, as well as the defense, can invoke the federal judiciary's inherent power to require production of previously recorded witness statements that facilitate full disclosure of all the relevant facts. Here the investigator's report might provide critical insight into the issues of credibility that the investigator's testimony would raise and hence was highly relevant to such issues. Pp. 230-232.

2. The Fifth Amendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial. In this instance the fact that the statements of third parties were elicited by a defense investigator on respondent's behalf does not convert them into respondent's personal communications, and requiring their production would in no sense compel respondent to be a witness against himself or extort communications from him. Pp. 233-234.

3. Rule 16, whose language and history both indicate that it addresses only pretrial discovery, imposes no constraint on the

District Court's power to condition the impeachment testimony of respondent's witness on the production of the relevant portions of his report. The fact that the Rule incorporates the Jencks Act limitation shows no contrary intent and does not convert the Rule into a general limitation on the trial court's broad discretion as to evidentiary questions at trial. Pp. 234–236.

4. The qualified privilege derived from the attorney work-product doctrine is not available to prevent disclosure of the investigative report, since respondent, by electing to present the investigator as a witness, waived the privilege with respect to matters covered in his testimony. Pp. 236–240.

5. It was within the District Court's discretion to assure that the jury would hear the investigator's full testimony rather than a truncated portion favorable to respondent, and the court's ruling, contrary to respondent's contention, did not deprive him of the Sixth Amendment rights to compulsory process and cross-examination. That Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system and cannot be invoked as a justification for presenting what might have been a half-truth. Pp. 240–241.

501 F. 2d 146, reversed.

Powell, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, Stewart, Marshall, and Blackmun, JJ., joined, and in parts II, III, and V of which White and Rehnquist, JJ., joined. White, J., filed a concurring opinion, in which Rehnquist, J., joined, *post*, p. 242. Douglas, J., took no part in the consideration or decision of the case.

Paul L. Friedman argued the cause for the United States. With him on the briefs were *Solicitor General Bork, Acting Assistant Attorney General Keeney, Deputy Solicitor General Frey, Sidney M. Glazer,* and *Ivan Michael Schaeffer.*

Nicholas R. Allis argued the cause for respondent. With him on the brief was *John K. Van de Kamp.**

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*Briefs of *amici curiae* urging affirmance were filed by *John J. Cleary* for the California Public Defenders Assn. et al., and by the Federal Public Defender of New Jersey.

Mr. Justice Powell delivered the opinion of the Court.

In a criminal trial, defense counsel sought to impeach the credibility of key prosecution witnesses by testimony of a defense investigator regarding statements previously obtained from the witnesses by the investigator. The question presented here is whether in these circumstances a federal trial court may compel the defense to reveal the relevant portions of the investigator's report for the prosecution's use in cross-examining him. The United States Court of Appeals for the Ninth Circuit concluded that it cannot. 501 F. 2d 146. We granted certiorari, 419 U. S. 1120 (1975), and now reverse.

I

Respondent was tried and convicted on charges arising from an armed robbery of a federally insured bank. The only significant evidence linking him to the crime was the identification testimony of two witnesses, a bank teller and a salesman who was in the bank during the robbery.[1] Respondent offered an alibi but, as the Court of Appeals recognized, 501 F. 2d, at 150, his strongest defense centered around attempts to discredit these eyewitnesses. Defense efforts to impeach them gave rise to the events that led to this decision.

In the course of preparing respondent's defense, an investigator for the defense interviewed both witnesses and preserved the essence of those conversations in a written report. When the witnesses testified for the prosecution, respondent's counsel relied on the report in conducting their cross-examination. Counsel asked the bank

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[1] The only other evidence introduced against respondent was a statement made at the time of arrest in which he denied that he was Robert Nobles and subsequently stated that he knew that the FBI had been looking for him.

teller whether he recalled having told the investigator that he had seen only the back of the man he identified as respondent. The witness replied that he did not remember making such a statement. He was allowed, despite defense counsel's initial objection, to refresh his recollection by referring to a portion of the investigator's report. The prosecutor also was allowed to see briefly the relevant portion of the report.[2] The witness thereafter testified that although the report indicated that he told the investigator he had seen only respondent's back, he in fact had seen more than that and continued to insist that respondent was the bank robber.

The other witness acknowledged on cross-examination that he too had spoken to the defense investigator. Respondent's counsel twice inquired whether he told the investigator that "all blacks looked alike" to him, and in each instance the witness denied having made such a statement. The prosecution again sought inspection of the relevant portion of the investigator's report, and respondent's counsel again objected. The court declined to order disclosure at that time, but ruled that it would be required if the investigator testified as to the witnesses' alleged statements from the witness stand.[3] The

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[2] Counsel for the Government complained that the portion of the report produced at this time was illegible. The witness' testimony indicates, however, that he had no difficulty reading it.

[3] The essence of the District Court's order was as follows:

"[If the investigator] is allowed to testify it would be necessary that those portions of [the] investigative report which contain the statements of the impeached witness will have to be turned over to the prosecution; nothing else in that report.

. . . . .

"If he testifies in any way about impeaching statements made by either of the two witnesses, then it is the Court's view that the government is entitled to look at his report and only those portions of that report which contain the alleged impeaching statements . . . of the witnesses." App. 31.

court further advised that it would examine the investigator's report *in camera* and would excise all reference to matters not relevant to the precise statements at issue.

After the prosecution completed its case, respondent called the investigator as a defense witness. The court reiterated that a copy of the report, inspected and edited *in camera,* would have to be submitted to Government counsel at the completion of the investigator's impeachment testimony. When respondent's counsel stated that he did not intend to produce the report, the court ruled that the investigator would not be allowed to testify about his interviews with the witnesses.[4]

The Court of Appeals for the Ninth Circuit, while acknowledging that the trial court's ruling constituted a "very limited and seemingly judicious restriction," 501 F. 2d, at 151, nevertheless considered it reversible

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[4] Athough the portion of the report containing the bank teller's alleged statement previously was revealed and marked for identification, it was not introduced into evidence. When the discussion of the investigator's testimony subsequently arose, counsel for the Government noted that he had only a limited opportunity to glance at the statement, and he then requested disclosure of that portion of the report as well as the statement purportedly made by the salesman.

As indicated above, the bank teller did not deny having made the statement recorded in the investigator's report. It is thus possible that the investigator's testimony on that point would not have constituted an impeachment of the statements of that witness within the contemplation of the court's order and would not have given rise to a duty of disclosure. Counsel did not pursue this point, however, and did not seek further clarification of the issue. Respondent does not, and in view of the failure to develop the issue at trial could not, urge this as a ground for reversal. Nor does respondent maintain that the initial disclosure of the bank teller's statement sufficed to satisfy the court's order. We therefore consider each of the two alleged statements in the report to be impeaching statements that would have been subject to disclosure if the investigator had testified about them.

error. Citing *United States* v. *Wright,* 160 U. S. App. D. C. 57, 68, 489 F. 2d 1181, 1192 (1973), the court found that the Fifth Amendment prohibited the disclosure condition imposed in this case. The court further held that Fed. Rule Crim. Proc. 16, while framed exclusively in terms of pretrial discovery, precluded prosecutorial discovery at trial as well. 501 F. 2d, at 157; accord, *United States* v. *Wright, supra,* at 66–67, 489 F. 2d, at 1190–1191. In each respect, we think the court erred.

II

The dual aim of our criminal justice system is "that guilt shall not escape or innocence suffer," *Berger* v. *United States,* 295 U. S. 78, 88 (1935). To this end, we have placed our confidence in the adversary system, entrusting to it the primary responsibility for developing relevant facts on which a determination of guilt or innocence can be made. See *United States* v. *Nixon,* 418 U. S. 683, 709 (1974); *Williams* v. *Florida,* 399 U. S. 78, 82 (1970); *Elkins* v. *United States,* 364 U. S. 206, 234 (1960) (Frankfurter, J., dissenting).

While the adversary system depends primarily on the parties for the presentation and exploration of relevant facts, the judiciary is not limited to the role of a referee or supervisor. Its compulsory processes stand available to require the presentation of evidence in court or before a grand jury. *United States* v. *Nixon, supra; Kastigar* v. *United States,* 406 U. S. 441, 443–444 (1972); *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 93–94 (1964) (White, J., concurring). As we recently observed in *United States* v. *Nixon, supra,* at 709:

> "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both

fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."

Decisions of this Court repeatedly have recognized the federal judiciary's inherent power to require the prosecution to produce the previously recorded statements of its witnesses so that the defense may get the full benefit of cross-examination and the truth-finding process may be enhanced. See, *e. g., Jencks* v. *United States,* 353 U. S. 657 (1957);[5] *Gordon* v. *United States,* 344 U. S. 414 (1953); *Goldman* v. *United States,* 316 U. S. 129 (1942); *Palermo* v. *United States,* 360 U. S. 343, 361 (1959) (BRENNAN, J., concurring in result). At issue here is whether, in a proper case, the prosecution can call upon that same power for production of witness statements that facilitate "full disclosure of all the [relevant] facts." *United States* v. *Nixon, supra,* at 709.

In this case, the defense proposed to call its investigator to impeach the identification testimony of the prosecution's eyewitnesses. It was evident from cross-examination that the investigator would testify that each witness' recollection of the appearance of the individual identified as respondent was considerably less clear at

[5] The discretion recognized by the Court in *Jencks* subsequently was circumscribed by Congress in the so-called Jencks Act, 18 U. S. C. § 3500. See generally *Palermo* v. *United States,* 360 U. S. 343 (1959).

an earlier time than it was at trial. It also appeared that the investigator and one witness differed even as to what the witness told him during the interview. The investigator's contemporaneous report might provide critical insight into the issues of credibility that the investigator's testimony would raise. It could assist the jury in determining the extent to which the investigator's testimony actually discredited the prosecution's witnesses. If, for example, the report failed to mention the purported statement of one witness that "all blacks looked alike," the jury might disregard the investigator's version altogether. On the other hand, if this statement appeared in the contemporaneously recorded report, it would tend strongly to corroborate the investigator's version of the interview and to diminish substantially the reliability of that witness' identification.[6]

It was therefore apparent to the trial judge that the investigator's report was highly relevant to the critical issue of credibility. In this context, production of the report might substantially enhance "the search for truth," *Williams* v. *Florida,* 399 U. S., at 82. We must determine whether compelling its production was precluded by some privilege available to the defense in the circumstances of this case.

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[6] Rule 612 of the new Federal Rules of Evidence entitles an adverse party to inspect a writing relied on to refresh the recollection of a witness while testifying. The Rule also authorizes disclosure of writings relied on to refresh recollection before testifying if the court deems it necessary in the interests of justice. The party obtaining the writing thereafter can use it in cross-examining the witness and can introduce into evidence those portions that relate to the witness' testimony. As the Federal Rules of Evidence were not in effect at the time of respondent's trial, we have no occasion to consider them or their applicability to the situation here presented.

III

A

The Court of Appeals concluded that the Fifth Amendment renders criminal discovery "basically a one-way street." 501 F. 2d, at 154. Like many generalizations in constitutional law, this one is too broad. The relationship between the accused's Fifth Amendment rights and the prosecution's ability to discover materials at trial must be identified in a more discriminating manner.

The Fifth Amendment privilege against compulsory self-incrimination is an "intimate and personal one," which protects "a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." *Couch* v. *United States,* 409 U. S. 322, 327 (1973); see also *Bellis* v. *United States,* 417 U. S. 85, 90–91 (1974); *United States* v. *White,* 322 U. S. 694, 698 (1944). As we noted in *Couch, supra,* at 328, the "privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him." [7]

In this instance disclosure of the relevant portions of the defense investigator's report would not impinge on the fundamental values protected by the Fifth Amendment. The court's order was limited to statements

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[7] "The purpose of the relevant part of the Fifth Amendment is to prevent compelled self-incrimination, not to protect private information. Testimony demanded of a witness may be very private indeed, but unless it is incriminating and protected by the Amendment or unless protected by one of the evidentiary privileges, it must be disclosed." *Maness* v. *Meyers,* 419 U. S. 449, 473–474 (1975) (WHITE, J., concurring in result). Moreover, the constitutional guarantee protects only against forced individual disclosure of a "testimonial or communicative nature," *Schmerber* v. *California,* 384 U. S. 757, 761 (1966); see also *United States* v. *Wade,* 388 U. S. 218, 222 (1967); *Gilbert* v. *California,* 388 U. S. 263 (1967).

allegedly made by third parties who were available as witnesses to both the prosecution and the defense. Respondent did not prepare the report, and there is no suggestion that the portions subject to the disclosure order reflected any information that he conveyed to the investigator. The fact that these statements of third parties were elicited by a defense investigator on respondent's behalf does not convert them into respondent's personal communications. Requiring their production from the investigator therefore would not in any sense compel respondent to be a witness against himself or extort communications from him.

We thus conclude that the Fifth Amendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial. The Court of Appeals' reliance on this constitutional guarantee as a bar to the disclosure here ordered was misplaced.

B

The Court of Appeals also held that Fed. Rule Crim. Proc. 16 deprived the trial court of the power to order disclosure of the relevant portions of the investigator's report.[8] Acknowledging that the Rule appears to control pretrial discovery only, the court nonetheless determined

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[8] Rule 16 (c), which establishes the Government's reciprocal right of pretrial discovery, excepts "reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys." That Rule therefore would not authorize pretrial discovery of the investigator's report. The proposed amendments to the Federal Rules of Criminal Procedure leave this subsection substantially unchanged. See Proposed Rule 16 of Criminal Procedure, 62 F. R. D. 271, 305–306 (1974).

that its reference to the Jencks Act, 18 U. S. C. § 3500, signaled an intention that Rule 16 should control trial practice as well. We do not agree.

Both the language and history of Rule 16 indicate that it addresses only pretrial discovery. Rule 16 (f) requires that a motion for discovery be filed "within 10 days after arraignment or . . . such reasonable later time as the court may permit," and further commands that it include all relief sought by the movant. When this provision is viewed in light of the Advisory Committee's admonition that it is designed to encourage promptness in filing and to enable the district court to avoid unnecessary delay or multiplication of motions, see Advisory Committee's Notes on Rule 16, 18 U. S. C. App., p. 4494, the pretrial focus of the Rule becomes apparent. The Government's right of discovery arises only after the defendant has successfully sought discovery under subsections (a)(2) or (b) and is confined to matters "which the defendant intends to produce at the trial." Fed. Rule Crim. Proc. 16 (c). This hardly suggests any intention that the Rule would limit the court's power to order production once trial has begun.[9] Finally, the Advisory Committee's Notes emphasize its pretrial character. Those notes repeatedly characterize the Rule as a provision governing pretrial disclosure, never once suggesting that it was intended to constrict a district court's

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[9] Rule 16 (g) imposes a duty to notify opposing counsel or the court of the additional materials previously requested or inspected that are subject to discovery or inspection under the Rule, and it contemplates that this obligation will continue during trial. The obligation under Rule 16 (g) depends, however, on a previous request for or order of discovery. The fact that this provision may have some effect on the parties' conduct during trial does not convert the Rule into a general limitation on the court's inherent power to control evidentiary matters.

control over evidentiary questions arising at trial. 18 U. S. C. App., pp. 4493–4495.

The incorporation of the Jencks Act limitation on the pretrial right of discovery provided by Rule 16 does not express a contrary intent. It only restricts the defendant's right of pretrial discovery in a manner that reconciles that provision with the Jencks Act limitation on the trial court's discretion over evidentiary matters. It certainly does not convert Rule 16 into a general limitation on the trial court's broad discretion as to evidentiary questions at trial. Cf. *Giles* v. *Maryland,* 386 U. S. 66, 101 (1967) (Fortas, J., concurring in judgment).[10] We conclude, therefore, that Rule 16 imposes no constraint on the District Court's power to condition the impeachment testimony of respondent's witness on the production of the relevant portions of his investigative report. In extending the Rule into the trial context, the Court of Appeals erred.

IV

Respondent contends further that the work-product doctrine exempts the investigator's report from disclosure at trial. While we agree that this doctrine applies to criminal litigation as well as civil, we find its protection unavailable in this case.

The work-product doctrine, recognized by this Court in *Hickman* v. *Taylor,* 329 U. S. 495 (1947), reflects the strong "public policy underlying the orderly prosecution

[10] We note also that the commentators who have considered Rule 16 have not suggested that it is directed to the court's control of evidentiary questions arising at trial. See, *e. g.,* Nakell, Criminal Discovery for the Defense and the Prosecution—the Developing Constitutional Considerations, 50 N. C. L. Rev. 437, 494–514 (1972); Rezneck, The New Federal Rules of Criminal Procedure, 54 Geo. L. J. 1276, 1279, 1282 n. 19 (1966); Note, Prosecutorial Discovery Under Proposed Rule 16, 85 Harv. L. Rev. 994 (1972).

and defense of legal claims." *Id.,* at 510; see also *id.,* at 514–515 (Jackson, J., concurring). As the Court there observed:

> "Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.,* at 510–511.

The Court therefore recognized a qualified privilege for

certain materials prepared by an attorney "acting for his client in anticipation of litigation." *Id.*, at 508.[11] See generally 4 J. Moore, Federal Practice ¶ 26.63 (2d ed. 1974); E. Cleary, McCormick on Evidence 204–209 (2d ed. 1972); Note, Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 1027–1046 (1961).

Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.[12]

At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as

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[11] As the Court recognized in *Hickman* v. *Taylor,* 329 U. S., at 508, the work-product doctrine is distinct from and broader than the attorney-client privilege.

[12] A number of state and federal decisions have recognized the role of the work-product doctrine in the criminal law, and have applied its protections to the files of the prosecution and the accused alike. See, *e. g., State* v. *Bowen,* 104 Ariz. 138, 449 P. 2d 603, cert. denied, 396 U. S. 912 (1969); *State ex rel. Polley* v. *Superior Ct. of Santa Cruz County,* 81 Ariz. 127, 302 P. 2d 263 (1956); *Peel* v. *State,* 154 So. 2d 910 (Fla. App. 1963); *In re Grand Jury Proceedings* (*Duffy* v. *United States*), 473 F. 2d 840 (CA8 1973); *In re Terkeltoub,* 256 F. Supp. 683 (SDNY 1966).

well as those prepared by the attorney himself.[13] Moreover, the concerns reflected in the work-product doctrine do not disappear once trial has begun. Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of his case. We need not, however, undertake here to delineate the scope of the doctrine at trial, for in this instance it is clear that the defense waived such right as may have existed to invoke its protections.

The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived. Here respondent sought to adduce the testimony of the investigator and contrast his recollection of the contested statements with that of the prosecution's witnesses. Respondent, by electing to present the investigator as a witness, waived the privilege with respect to matters covered in his testimony.[14] Respond-

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[13] The sole issue in *Hickman* related to materials prepared by an attorney, and courts thereafter disagreed over whether the doctrine applied as well to materials prepared on his behalf. See Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F. R. D. 487, 501 (1970); 4 J. Moore, Federal Practice ¶ 26.63 [8] (2d ed. 1974). Necessarily, it must. This view is reflected in the Federal Rules of Civil Procedure, see Rule 26 (b) (3), and in Rule 16 of the Criminal Rules as well, see Rules 16 (b) and (c); cf. E. Cleary, McCormick on Evidence 208 (2d ed. 1972).

[14] What constitutes a waiver with respect to work-product materials depends, of course, upon the circumstances. Counsel necessarily makes use throughout trial of the notes, documents, and other internal materials prepared to present adequately his client's case, and often relies on them in examining witnesses. When so used, there normally is no waiver. But where, as here, counsel attempts to make a testimonial use of these materials the normal rules of evidence come into play with respect to cross-examination and production of documents.

ent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination. See, *e. g.*, *McGautha* v. *California*, 402 U. S. 183, 215 (1971).[15]

V

Finally, our examination of the record persuades us that the District Court properly exercised its discretion in this instance. The court authorized no general "fishing expedition" into the defense files or indeed even into the defense investigator's report. Cf. *United States* v. *Wright*, 160 U. S. App. D. C. 57, 489 F. 2d 1181 (1973). Rather, its considered ruling was quite limited in scope, opening to prosecution scrutiny only the portion of the report that related to the testimony the investigator would offer to discredit the witnesses' identification testimony. The court further afforded respondent the maxi-

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[15] We cannot accept respondent's contention that the disclosure order violated his Sixth Amendment right to effective assistance of counsel. This claim is predicated on the assumption that disclosure of a defense investigator's notes in this and similar cases will compromise counsel's ability to investigate and prepare the defense case thoroughly. Respondent maintains that even the limited disclosure required in this case will impair the relationship of trust and confidence between client and attorney and will inhibit other members of the "defense team" from gathering information essential to the effective preparation of the case. See American Bar Association Project on Standards for Criminal Justice, The Defense Function § 3.1 (a) (App. Draft 1971). The short answer is that the disclosure order resulted from respondent's voluntary election to make testimonial use of his investigator's report. Moreover, apart from this waiver, we think that the concern voiced by respondent fails to recognize the limited and conditional nature of the court's order.

mum opportunity to assist in avoiding unwarranted disclosure or to exercise an informed choice to call for the investigator's testimony and thereby open his report to examination.

The court's preclusion sanction was an entirely proper method of assuring compliance with its order. Respondent's argument that this ruling deprived him of the Sixth Amendment rights to compulsory process and cross-examination misconceives the issue. The District Court did not bar the investigator's testimony. Cf. *Washington* v. *Texas,* 388 U. S. 14, 19 (1967). It merely prevented respondent from presenting to the jury a partial view of the credibility issue by adducing the investigator's testimony and thereafter refusing to disclose the contemporaneous report that might offer further critical insights. The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth. Deciding, as we do, that it was within the court's discretion to assure that the jury would hear the full testimony of the investigator rather than a truncated portion favorable to respondent, we think it would be artificial indeed to deprive the court of the power to effectuate that judgment. Nor do we find constitutional significance in the fact that the court in this instance was able to exclude the testimony in advance rather than receive it in evidence and thereafter charge the jury to disregard it when respondent's counsel refused, as he said he would, to produce the report.[16]

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[16] Respondent additionally argues that certain statements by the prosecution and the District Court's exclusion of purported expert testimony justify reversal of the verdict, and that the Court of Appeals' decision should be affirmed on those grounds. The Court of

The judgment of the Court of Appeals for the Ninth Circuit is therefore

Reversed.

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

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, concurring.

I concur in the judgment and in Parts II, III, and V of the opinion of the Court. I write only because of misgivings about the meaning of Part IV of the opinion. The Court appears to have held in Part IV of its opinion only that whatever protection the defense investigator's notes of his interviews with witnesses might otherwise have had, that protection would have been lost when the investigator testified about those interviews. With this I agree also. It seems to me more sensible, however, to decide what protection these notes had in the first place before reaching the "waiver" issue. Accordingly, and because I do not believe that the work-product

Appeals rejected respondent's challenge to the exclusion of the testimoney of the proffered expert, 501 F. 2d, at 150–151. Respondent did not present this issue or the question involving the challenged prosecutorial statements to this Court in a cross-petition for certiorari. Without questioning our jurisdiction to consider these alternative grounds for affirmance of the decision below, cf. *Langnes* v. *Green,* 282 U. S. 531, 538 (1931); *Dandridge* v. *Williams,* 397 U. S. 471, 475–476, n. 6 (1970); see generally Stern, When to Cross-Appeal or Cross-Petition—Certainty or Confusion?, 87 Harv. L. Rev. 763 (1974), we do not consider these contentions worthy of consideration. Each involves an issue that is committed to the trial court's discretion. In the absence of a strong suggestion of an abuse of that discretion or an indication that the issues are of sufficient general importance to justify the grant of certiorari we decline to entertain them.

doctrine of *Hickman* v. *Taylor,* 329 U. S. 495 (1947), can be extended wholesale from its historic role as a limitation on the nonevidentiary material which may be the subject of pretrial discovery to an unprecedented role as a limitation on the trial judge's power to compel production of evidentiary matter at trial, I add the following.

I

Up until now the work-product doctrine of *Hickman* v. *Taylor, supra,* has been viewed almost exclusively as a limitation on the ability of a party to obtain pretrial discovery. It has not been viewed as a "limitation on the trial court's broad discretion as to evidentiary questions at trial." *Ante,* at 236. The problem discussed in *Hickman* v. *Taylor* arose precisely because, in addition to accelerating the time when a party could obtain evidentiary matter from his adversary,[1] the new Federal Rules of Civil Procedure greatly expanded the nature of the material subject to pretrial disclosure.[2]

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[1] Under criminal discovery rules the *time* factor is not as great as might otherwise appear. Federal Rule Crim. Proc. 16 permits discovery through the time of trial; and under Fed. Rule Crim. Proc. 17 (c), evidentiary matter may be obtained pursuant to subpoena in advance of trial in the discretion of the trial judge.

[2] Prior to the Federal Rules, requests for witness statements were granted or denied on the basis of whether they were evidence and nonprivileged. In the main, production was denied, either because witness statements were not evidence (they are inadmissible hearsay until and unless the witness testifies); because a party is not entitled to advance knowledge of his adversary's case; or because the statements were made by the client or his agent to his attorney and thus covered by the attorney-client privilege. 4 J. Moore, Federal Practice ¶ 26.63 [3] (2d ed. 1974), and cases cited therein. The cases did not hold that witness statements were generally privileged, if they *were* evidentiary, and had no cause to decide whether a work-product notion should protect them from discovery, since they were nondiscoverable anyway under applicable discovery rules. But see *Walker* v. *Struthers,* 273 Ill. 387, 112 N. E. 961 (1916).

Under the Rules, a party was, for the first time, entitled to know in advance his opponent's evidence and was entitled to obtain from his opponent nonprivileged "information as to the existence or whereabouts of facts" relevant to a case even though the "information" was not itself evidentiary. *Hickman* v. *Taylor, supra,* at 501. Utilizing these Rules, the plaintiff in *Hickman* v. *Taylor* sought discovery of statements obtained by defense counsel from witnesses to the events relevant to the lawsuit, not for evidentiary use but only "to help *prepare* himself to examine witnesses and to make sure that he ha[d] overlooked nothing." 329 U. S., at 513 (emphasis added). In concluding that these statements should not be produced, the Court treated the matter entirely as one involving the plaintiff's entitlement to pretrial discovery under the new Federal Rules,[3] and carefully limited its opinion accordingly. The relevant Rule in the Court's view, Rule 26, on its face required production of the witness statements unless they were privileged. Nonetheless, the Court expressly stated that the request for witness statements was to be denied "not because the subject matter is privileged" (although noting that a work-product "privilege" applies in England, 329 U. S., at 510 n. 9) as that concept was used in the Rules, but because the request "falls outside the arena of *discovery.*" *Id.,* at 510 (emphasis added). The Court stated that it is essential that a lawyer work with a certain degree of privacy, and concluded that the effect of giving one lawyer's work (particularly his strategy, legal theories, and mental impressions) to another would have a "demoralizing" effect on the legal profession. The Court then noted that wit-

[3] Mr. Justice Jackson's concurrence is even more express on this point. It states: "[T]he question is simply whether such a demand is authorized by the rules relating to various aspects of 'discovery.'" 329 U. S., at 514.

ness statements might be admissible in evidence under some circumstances and might be usable to impeach or corroborate a witness. However, it concluded that in the case before it the plaintiff wanted the statements for preparation only and had shown no reason why he could not obtain everything he sought by doing his own work rather than utilizing that of his adversary.

The conclusion that the work product of a lawyer is not "privileged" made it much more difficult for the Court to support its result. Nothing *expressed* in the Rule supported its result, and the Court was forced to explain its decision by stating:

> "When Rule 26 and the other *discovery* rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were *thereby* opened to the free scrutiny of their adversaries." *Id.*, at 514. (Emphasis added.)

I am left with the firm conviction that the Court avoided the easier route to its decision for a reason. To have held an attorney's work product to be "privileged" would have been to limit its use at trial as evidence in those cases in which the work product qualified as evidence, see Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F. R. D. 433, 460 (1946), and, as Mr. Justice Jackson stated in his concurring opinion, a party is entitled to anything which is "evidence in his case." 329 U. S., at 515.[4]

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[4] Mr. Justice Jackson also emphasized that the witness statements involved in *Hickman* v. *Taylor* were neither evidence nor privileged. *Id.*, at 516. Indeed, most of the material described by the Court as falling under the work-product umbrella does not qualify as evidence. A lawyer's mental impressions are almost never evidence and

Since *Hickman* v. *Taylor, supra,* Congress, the cases, and the commentators have uniformly continued to view the "work product" doctrine solely as a limitation on pretrial discovery and not as a qualified evidentiary privilege. In 1970, Congress became involved with the problem for the first time in the civil area. It did so solely by accepting a proposed amendment to Fed. Rule Civ. Proc. 26, which incorporated much of what the Court held in *Hickman* v. *Taylor, supra,* with respect to pretrial discovery. See Advisory Committee's explanatory statement, 28 U. S. C. App., p. 7778. In the criminal area, Congress has enacted 18 U. S. C. § 3500 and accepted Fed. Rule Crim. Proc. 16 (c). The former prevents pretrial discovery of witness statements from the Government; the latter prevents pretrial discovery of witness statements from the defense. Neither limits the power of the trial court to order production as evidence of prior statements of witnesses who have testified at trial.[5]

With the exception of materials of the type discussed in Part II, *infra,* research has uncovered no application of the work-product rule in the lower courts since *Hickman* to prevent production of evidence—impeaching or

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out-of-court statements of witnesses are generally inadmissible hearsay. Such statements become evidence only when the witness testifies at trial, and are then usually impeachment evidence only. This case, of course, involves a situation in which the relevant witness was to testify and thus presents the question—not involved in *Hickman* v. *Taylor*—whether prior statements should be disclosed under the trial judge's power over evidentiary matters at trial.

[5] In n. 13 of its opinion, the Court cites Fed. Rule Crim. Proc. 16 (c), as containing the work-product rule. In n. 10, the Court correctly notes that Rule 16 (c) is not "directed to the court's control of evidentiary questions arising at trial." It seems to me that this supplies a better ground for the Court's decision than "waiver."

otherwise—at trial; [6] and there are several examples of cases rejecting such an approach.[7]

Similarly, the commentators have all treated the attorney work-product rule solely as a limitation on pretrial discovery, *e. g.*, 4 J. Moore, Federal Practice ¶¶ 26.-63–26.64 (2d ed. 1974); 8 C. Wright & A. Miller, Federal Practice and Procedure § 2026 (1970); 2A W. Barron & A. Holtzoff, Federal Practice and Procedure § 652 (Wright ed. 1961), and some have expressly stated that it does not apply to evidentiary matter. F. James, Civil Procedure 211 n. 13 (1965); 4 J. Moore, Federal Practice ¶ 16.23 [8.–4] (1963).

The reasons for largely confining the work-product rule to its role as a limitation on pretrial discovery are compelling. First of all, the injury to the factfinding

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[6] The majority does cite one case, *In re Terkeltoub,* 256 F. Supp. 683 (SDNY 1966), in which the court referred to the work-product doctrine in preventing the Government from inquiring of a lawyer before the grand jury whether he had participated in suborning perjury of a prospective witness while preparing a criminal case for trial. In any event, a grand jury investigation is in some respects similar to pretrial discovery. Compare *In re Grand Jury Proceedings* (*Duffy* v. *United States*), 473 F. 2d 840 (CA8 1973), with *Schwimmer* v. *United States,* 232 F. 2d 855 (CA8), cert. denied, 352 U. S. 833 (1956). The proper scope of inquiry is as broad, and it can be used as a way of preparing for the later criminal trial. There is for example a split of authority on whether the work-product rule applies to IRS tax investigations. Compare *United States* v. *McKay,* 372 F. 2d 174 (CA5 1967), with *United States* v. *Brown,* 478 F. 2d 1038 (CA7 1973).

[7] *Shaw* v. *Wuttke,* 28 Wis. 2d 448, 454–456, 137 N. W. 2d 649, 652–653 (1965); *State ex rel. State Highway Comm'n* v. *Steinkraus,* 76 N. M. 617, 620–621, 417 P. 2d 431, 432–433 (1966); *E. I. du Pont de Nemours & Co.* v. *Phillips Petroleum Co.*, 24 F. R. D. 416 (Del. 1959); *United States* v. *Matles,* 154 F. Supp. 574 (EDNY 1957); *United States* v. *Sun Oil Co.,* 16 F. R. D. 533 (ED Pa. 1954); *United States* v. *Gates,* 35 F. R. D. 524 (Colo. 1964).

process is far greater where a rule keeps *evidence* from the factfinder than when it simply keeps advance disclosure of evidence from a party or keeps from him *leads* to evidence developed by his adversary and which he is just as well able to find by himself. In the main, where a party seeks to discover a statement made to an opposing party in order to *prepare* for trial, he can obtain the "substantial equivalent . . . by other means," Fed. Rule Civ. Proc. 26 (b)(3), *i. e.*, by interviewing the witness himself. A prior inconsistent statement in the possession of his adversary, however, when sought for evidentiary purposes—*i. e.*, to impeach the witness after he testifies—is for that purpose unique. By the same token, the danger perceived in *Hickman* that each party to a case will decline to prepare in the hopes of eventually using his adversary's preparation is absent when disclosure will take place only at trial. Indeed, it is very difficult to articulate a reason why statements on the same subject matter as a witness' testimony should not be turned over to an adversary after the witness has testified. The statement will either be consistent with the witness' testimony, in which case it will be useless and disclosure will be harmless; or it will be inconsistent and of unquestioned value to the jury. Any claim that disclosure of such a statement would lead the trial into collateral and confusing issues was rejected by this Court in *Jencks* v. *United States*, 353 U. S. 657 (1957), and by Congress in the legislation which followed.

The strong negative implication in *Hickman* v. *Taylor*, *supra*, that the work-product rule does not apply to evidentiary requests at trial became a holding in *Jencks* v. *United States*, *supra*. There a defendant in a criminal case sought production by the Government at trial of prior statements made by its witnesses on the same subject matter as their testimony. The Govern-

ment argued, *inter alia,* that production would violate the "'legitimate interest that each party—including the Government—has in safeguarding the privacy of its files.'" 353 U. S., at 670. The Court held against the Government. The Court said that to deny disclosure of prior statements which might be used to impeach the witnesses was to "deny the accused *evidence* relevant and material to his defense," *id.,* at 667 (emphasis added). Also rejected as unrealistic was any rule which would require the defendant to demonstrate the impeachment value of the prior statements *before* disclosure,[8] and the Court held that entitlement to disclosure for use in cross-examination is "established when the reports are shown to relate to the testimony of the witness." *Id.,* at 669. Thus, not only did the Court reject the notion that there was a "work product" limitation on the trial judge's discretion to order production of evidentiary matter at trial, but it was affirmatively held that prior statements of a witness on the subject of his testimony are the kind of evidentiary matter to which an adversary is entitled.

Indeed, even in the pretrial discovery area in which the work-product rule does apply, work-product notions have been thought insufficient to prevent discovery of *evidentiary and impeachment* material. In *Hickman* v. *Taylor,* 329 U. S., at 511, the Court stated:

> "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-

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[8] The Court in *Jencks* quoted the language of Mr. Chief Justice Marshall in *United States* v. *Burr,* 25 F. Cas. 187, 191 (Va. 1807):

"'Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents?'" 353 U. S., at 668 n. 12.

privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be *admissible in evidence* or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of *impeachment* or *corroboration*." (Emphasis added.)

Mr. Justice Jackson, in concurring, was even more explicit on this point. See *supra*, at 245. Pursuant to this language, the lower courts have ordered *evidence* to be turned over pretrial even when it came into being as a result of the adversary's efforts in preparation for trial.[9] A member of a defense team who witnesses an out-of-court statement of someone who later testifies at trial in a contradictory fashion becomes at that moment a witness to a relevant and admissible event, and the cases cited above would dictate disclosure of any reports he

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[9] *Cummings* v. *Bell Telephone Co. of Pennsylvania*, 47 F. R. D. 373 (ED Pa. 1968); *Marks* v. *Gas Service Co.*, 168 F. Supp. 487 (WD Mo. 1958); *Maginnis* v. *Westinghouse Electric Corp.*, 207 F. Supp. 739 (ED La. 1962); *Julius Hyman & Co.* v. *American Motorists Ins. Co.*, 17 F. R. D. 386 (Colo. 1955); *Parrett* v. *Ford Motor Co.*, 47 F. R. D. 22 (WD Mo. 1968); *Scuderi* v. *Boston Ins. Co.*, 34 F. R. D. 463, 468 (Del. 1964) (each involving a situation in which a member of a litigation team witnessed an event or scene in the course of preparing a case for trial and the court ordered disclosure of his report of the event); *Bourget* v. *Government Employees Ins. Co.*, 48 F. R. D. 29 (Conn. 1969); *McCullough Tool Co.* v. *Pan Geo Atlas Corp.*, 40 F. R. D. 490 (SD Tex. 1966); *O'Boyle* v. *Life Ins. Co. of North America*, 299 F. Supp. 704 (WD Mo. 1969). Cf. *LaRocca* v. *State Farm Mutual Automobile Ins. Co.*, 47 F. R. D. 278 (WD Pa. 1969), and *Kennedy* v. *Senyo*, 52 F. R. D. 34 (WD Pa. 1971) (in each of which the preparation for trial was the subject of the suit); see also *Natta* v. *Hogan*, 392 F. 2d 686, 693 (CA10 1968); F. James, Civil Procedure 211 (1965).

may have written about the event.[10] Since prior statements are inadmissible hearsay until the witness testifies, there is no occasion for ordering reports of such statements produced as evidence *pretrial.* However, some courts have ordered witness statements produced pretrial in the likelihood that they will *become* impeachment evidence.[11] Moreover, where access to witnesses or to their information is unequal, discovery of their statements is often granted solely to help a party *prepare* for trial regardless of any eventual evidentiary value of the out-of-court statements. See Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F. R. D., at 501.

Accordingly, it would appear that with one exception to be discussed below, the work-product notions of *Hickman* v. *Taylor, supra,* impose no restrictions on the trial judge's ordering production of evidentiary matter at trial; that these notions apply in only a very limited way, if at all, to a party's efforts to obtain *evidence* pretrial pursuant to available discovery devices; and that these notions supply only a qualified discovery immunity with respect to witness statements in any event.[12]

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[10] The holding in *Jencks* v. *United States,* 353 U. S. 657 (1957), would put to rest any claim that such prior statement would be disclosable only if the adversary established its evidentiary value ahead of time by specific proof that it was inconsistent.

[11] *Vetter* v. *Lovett,* 44 F. R. D. 465 (WD Tex. 1968); *McDonald* v. *Prowdley,* 38 F. R. D. 1 (WD Mich. 1965); *Tannenbaum* v. *Walker,* 16 F. R. D. 570 (ED Pa. 1954); *Fulton* v. *Swift,* 43 F. R. D. 166 (Mont. 1967); *Republic Gear Co.* v. *Borg-Warner Corp.,* 381 F. 2d 551, 557–558 (CA2 1967) (*in camera* inspection). Cf. *Goosman* v. *A. Duie Pyle, Inc.,* 320 F. 2d 45 (CA4 1963). For cases contra see 4 J. Moore, Federal Practice ¶ 26.64 [3] n. 14 (2d ed. 1974).

[12] The majority states:

"Moreover, the concerns reflected in the work-product doctrine do not disappear once trial has begun. Disclosure of an attorney's

II

In one of its aspects, the rule of *Hickman* v. *Taylor*, *supra,* has application to evidentiary requests at trial. Both the majority and the concurring opinions in *Hickman* v. *Taylor* were at pains to distinguish between production of statements written by the witness and in the possession of the lawyer, and those statements which were made orally by the witness and written down by the lawyer. Production and use of oral statements written down by the lawyer would create a substantial risk that the lawyer would have to testify.[13] The majority said that this would "make the attorney much less an officer

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efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of his case. We need not, however, undertake here to delineate the scope of the doctrine at trial, for in this instance it is clear that the defense waived such right as may have existed to invoke its protections." *Ante,* at 239.

As noted above, the important question is not when the document in issue is created or even when it is to be produced. The important question is whether the document is sought for evidentiary or impeachment purposes or whether it is sought for preparation purposes only. Of course, a party should not be able to discover his opponent's legal memoranda or statements of witnesses not called whether his request is at trial or before trial. Insofar as such a request is made under the applicable discovery rules, it is within the rule of *Hickman* v. *Taylor* even though made at trial. Insofar as the request seeks to invoke the trial judge's discretion over evidentiary matters at trial, the rule of *Hickman* v. *Taylor* is unnecessary, since no one could ever suggest that legal memoranda or hearsay statements are evidence. If this is all the majority means by the above-quoted language, I agree.

[13] If the witness does not acknowledge making an inconsistent statement to the lawyer—even though the lawyer recorded it—the cross-examiner may not offer the document in evidence without at least calling the lawyer as a witness to authenticate the document and otherwise testify to the prior statement.

of the court and much more an ordinary witness." 329 U. S., at 513. Mr. Justice Jackson, in concurring, stated:

> "Every lawyer dislikes to take the witness stand and will do so only for grave reasons. This is partly because it is not his role; he is almost invariably a poor witness. But he steps out of professional character to do it. He regrets it; the profession discourages it. But the practice advocated here is one which would force him to be a witness, not as to what he has seen or done but as to other witnesses' stories, and not because he wants to do so but in self-defense." *Id.*, at 517.

The lower courts, too, have frowned on any practice under which an attorney who tries a case also testifies as a witness, and trial attorneys have been permitted to testify only in certain circumstances.[14]

The remarks of the Court in *Hickman* v. *Taylor, supra,* while made in the context of a request for pretrial discovery have application to the evidentiary use of lawyers' memoranda of witness interviews at trial. It is unnecessary, however, to decide in this case whether the policies against putting in issue the credibility of the lawyer who will sum up to the jury outweigh the jury's interest in obtaining all relevant information; and whether *Jencks* v. *United States, supra,* and 18 U. S. C.

[14] *United States* v. *Porter,* 139 U. S. App. D. C. 19, 429 F. 2d 203 (1970); *United States* v. *Fiorillo,* 376 F. 2d 180 (CA2 1967); *Gajewski* v. *United States,* 321 F. 2d 261 (CA8 1963), cert. den., 375 U. S. 968 (1964); *United States* v. *Newman,* 476 F. 2d 733 (CA3 1973); *Travelers Ins. Co.* v. *Dykes,* 395 F. 2d 747 (CA5 1968); *United States* v. *Alu,* 246 F. 2d 29 (CA2 1957); *United States* v. *Chiarella,* 184 F. 2d 903, modified on rehearing, 187 F. 2d 12 (CA2 1950), vacated as to one petitioner, 341 U. S. 946, cert. denied as to other petitioner *sub nom. Stancin* v. *United States,* 341 U. S. 956 (1951); *United States* v. *Clancy,* 276 F. 2d 617 (CA7 1960), rev'd on other grounds, 365 U. S. 312 (1961).

§ 3500 are to be viewed as expressing a preference for disclosure of all facts.[15] In this case, the creator of the memorandum was not the trial lawyer but an investigator [16] and he was, in any event, to be called as a witness by the defense. Accordingly, I would reverse the judgment below because, quite apart from waiver, the work-product rule of *Hickman* v. *Taylor, supra,* has no application to the request at trial for evidentiary and impeachment material made in this case.

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[15] The cases have held records of witness statements made by prosecutors to be disclosable under 18 U. S. C. § 3500, *United States* v. *Hilbrich,* 341 F. 2d 555 (CA7), cert. den., 381 U. S. 941, reh. den., 382 U. S. 874 (1965), and 384 U. S. 1028 (1966); *United States* v. *Aviles,* 315 F. 2d 186 (CA2 1963); *Saunders* v. *United States,* 114 U. S. App. D. C. 345, 316 F. 2d 346 (1963); *United States* v. *Smaldone,* 484 F. 2d 311 (CA10 1973), cert. den., 415 U. S. 915 (1974). Cf. *Canaday* v. *United States,* 354 F. 2d 849 (CA8 1966). In *State* v. *Bowen,* 104 Ariz. 138, 449 P. 2d 603 (1969), the court reached a contrary result under state law.

[16] A conflict arose among lower federal courts over the question whether the work product of members of a litigation team other than the lawyer was protected from discovery by the rule of *Hickman* v. *Taylor, supra.* Ghent, Development, Since Hickman v. Taylor, of Attorney's "Work Product" Doctrine, 35 A. L. R. 3d 438-440 (§§ 7 [a] and [b]) and 453-455 (§§ 15 [a] and [b]) (1971); Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F. R. D. 487, 501-502 (1970). With respect to discovery in civil cases under Fed. Rule Civ. Proc. 26, the conflict was resolved in the 1970 amendments by affording protection to documents by a party's "representative," whether a lawyer or not. Where the purpose of the rule protecting the work product is to remove the incentive a party might otherwise have to rely solely on his opponent's preparation, it is sensible to treat preparation by an attorney and an investigator alike. However, the policy against lawyers testifying applies only to the lawyer who tries the case.

Syllabus

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL. v. ROBERTSON ET AL.

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

No. 74-450. Argued April 15, 1975—Decided June 24, 1975

Respondents requested the Federal Aviation Administration (FAA) to make available Systems Worthiness Analysis Program (SWAP) Reports which consist of the FAA's analyses of the operation and maintenance performance of commercial airlines. Section 1104 of the Federal Aviation Act of 1958 permits the FAA Administrator, upon receiving an objection to public disclosure of information in a report, to withhold disclosure when, in his judgment, it would adversely affect the objecting party's interest and is not required in the public's interest. The Administrator declined to make the reports available upon receiving an objection from the Air Transport Association, which claimed that confidentiality was necessary to the effectiveness of the program. Respondents sued in the District Court seeking, *inter alia,* the requested documents. The District Court held that the documents were "as a matter of law, public and non-exempt" within the meaning of the Freedom of Information Act (FOIA). The Court of Appeals affirmed the judgment of the District Court "insofar as appellants rely upon Exemption (3)" of the FOIA. *Held:* The SWAP Reports are exempt from public disclosure under Exemption 3 of the FOIA as being "specifically exempted from disclosure by statute." Pp. 261-267.

(a) Exemption 3 contains no "built-in" standard as do some of the exemptions under the FOIA and the language is sufficiently ambiguous to require resort to the legislative history. That history reveals that Congress was "aware of the necessity to deal expressly with inconsistent laws," and, as indicated in its committee report, did not intend, in enacting the FOIA, to modify the numerous statutes "which restrict public access to specific Government records." Respondents can prevail only if the FOIA is read to repeal by implication all such statutes. To interpret "specific" as used in such committee reference as meaning that Exemption 3 applies only to precisely named or described documents, would be asking Congress to perform an impossible task

and would imply that Congress had undertaken to reassess every delegation of authority to withhold information that it had made before the passage of the FOIA in 1966, a task that the legislative history clearly shows it did not undertake. Pp. 261–266.

(b) The broad discretion vested by Congress in the FAA under § 1104 to withhold information from the public is not necessarily inconsistent with Congress' intent in enacting the FOIA to replace the broad standard of the public disclosure section of the Administrative Procedure Act. Congress could appropriately conclude that the public interest in air transport safety was better served by guaranteeing confidentiality of information necessary to secure from the airlines the maximum amount of information relevant to safety, and Congress' wisdom in striking such a balance is not open to judicial scrutiny. Pp. 266–267.

162 U. S. App. D. C. 298, 498 F. 2d 1031, reversed.

Burger, C. J., delivered the opinion of the Court, in which White, Blackmun, Powell, and Rehnquist, JJ., joined. Stewart, J., filed an opinion concurring in the judgment, in which Marshall, J., joined, *post*, p. 268. Douglas and Brennan, JJ., filed a dissenting statement, *post*, p. 268.

Deputy Solicitor General Friedman argued the cause for petitioners. On the brief were *Solicitor General Bork, Assistant Attorney General Hills, Allan Abbot Tuttle, Leonard Schaitman,* and *Thomas G. Wilson.*

Alan B. Morrison argued the cause and filed a brief for respondents.

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

We granted certiorari [1] in this case in order to determine whether Exemption 3 of the Freedom of Information Act, 5 U. S. C. § 552 (b)(3),[2] permits nondisclosure

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[1] 419 U. S. 1067 (1974).

[2] The Act was amended in 1974, Pub. L. 93–502, 88 Stat. 1561, to read in pertinent part:

. . . . .

to respondents of certain reports in the files of the Federal Aviation Administration. This exemption provides that material need not be disclosed if "specifically exempted from disclosure by statute." The reports are known as Systems Worthiness Analysis Program (SWAP) Reports.[3] They consist of analyses made by representatives of the FAA concerning the operation and maintenance performance of commercial airlines. Oversight and regulation of air travel safety is the responsibility of the FAA, § 601 of the Federal Aviation Act of 1958, 72 Stat. 775, as amended, 49 U. S. C. § 1421. The FAA claims the documents are protected from disclosure

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

. . . . .

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U. S. C. § 552 (a) (3) (1970 ed., Supp. IV).

Exemption 3, which was not amended in 1974, is provided by 5 U. S. C. § 552 (b) (3), which reads as follows:

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

. . . .

"(3) specifically exempted from disclosure by statute."

Prior to the 1974 amendments, § 552 (a) (3) read, in pertinent part: "Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. . . ." 5 U. S. C. § 552 (a) (3).

[3] The SWAP is set forth in the Federal Aviation Administration's Systemworthiness Analysis Program Handbook, 8000.3B (reprinted Nov. 1970) (App. 44–111). A revised version of the SWAP Handbook is contained in FAA Order 8000.3C, Apr. 14, 1972. (With subsequent changes.) See also affidavit of FAA Administrator Shaffer, App. 40.

by virtue of § 1104 of the Federal Aviation Act of 1958, 49 U. S. C. § 1504.[4]

The facts of the case, in its present posture,[5] are quite simple. During the summer of 1970, in connection with a study of airline safety being conducted by them, the respondents, associated with the Center for the Study of Responsive Law, requested that the FAA make available certain SWAP Reports. The FAA declined to produce the documents. In accordance with established procedures adopted by the FAA, the respondents then filed timely notice of administrative appeal in August 1970. Several months later, while this administrative appeal was pending, the Air Transport Association, on behalf of its air-

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[4] Section 1104 provides:

"Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provisions of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law: *Provided,* That nothing in this section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of the Congress."

[5] The respondents had also sought disclosure of Mechanical Reliability Reports, which are daily reports of mechanical malfunctions submitted to the FAA by the aircraft companies. On January 11, 1972, the Administrator determined that he would permit the disclosure of such documents received after April 18, 1972. The District Court's subsequent order in this case, on November 8, 1972, ordered disclosure of these documents received prior to that date. The Administrator has not contested this aspect of the District Court's order either on appeal to the Court of Appeals or in his petition for writ of certiorari to this Court.

line members, requested that the FAA make no public disclosure of the SWAP Reports. The Association noted that, in a prior memorandum of its own staff, the FAA had pointed out that " '[t]he SWAP Program requires a cooperative effort on both the part of the company and FAA if it is to work effectively,' " and argued that "[t]he present practice of non-public submissions, which includes even tentative findings and opinions as well as certain factual material, encourages a spirit of openness on the part of airline management which is vital to the promotion of aviation safety—the paramount consideration of airlines and government alike in this area." In February 1971, the FAA formally denied respondents' request for the SWAP Reports. It took the position that the reports are exempt from public disclosure under 5 U. S. C. § 552 (b)(3), the section at issue here. As previously noted, that section provides that such material need not be disclosed under the Freedom of Information Act when the material is specifically exempted from disclosure by statute. The FAA noted that § 1104 of the Federal Aviation Act of 1958 permits the Administrator to withhold information, public disclosure of which, in his judgment, would adversely affect the interests of the objecting party and is not required to be disclosed in the interest of the public. The FAA also based its denial of these data on the exemption for intra-agency memoranda (5 U. S. C. § 552 (b)(5)), the exemption for investigatory files compiled for law enforcement purposes (§ 552 (b)(7)), and, finally, the exemption for documentation containing trade secrets and commercial or financial information of a privileged or confidential nature (§ 552 (b)(4)). The FAA's answer also explained its view of the need for confidentiality in SWAP Reports:

> "The effectiveness of the in-depth analysis that is the essence of SWAP team investigation depends, to

a great extent, upon the full, frank and open cooperation of the operator himself during the inspection period. His assurance by the FAA that the resulting recommendations are in the interest of safety and operational efficiency and will not be disclosed to the public are the major incentives impelling the operator to hide nothing and to grant free access to procedures, system of operation, facilities, personnel, as well as management and operational records in order to exhibit his normal course of operations to the SWAP inspectors."

Respondents then sued in the District Court, seeking, *inter alia,* the requested documents. The District Court held that "the documents sought by plaintiffs . . . are, as a matter of law, public and non-exempt within the meaning of 5 United States Code [§] 552, and plaintiffs are entitled to judgment . . . as a matter of law."

A divided Court of Appeals affirmed the judgment of the District Court "insofar as appellants rely upon Exemption (3)," but remanded the case for consideration of other exemptions which the FAA might wish to assert. 162 U. S. App. D. C. 298, 498 F. 2d 1031 (1974). Examining first what it felt was the ordinary meaning of the language of Exemption 3, the Court of Appeals held that its language required the exempting statute relied on to specify or categorize the particular documents it authorizes to be withheld. Because § 1104 delegated "broad discretionary authority" under a "public interest" standard, it was held not within the scope of Exemption 3. The Court of Appeals distinguished this Court's decision in *EPA* v. *Mink,* 410 U. S. 73 (1973), on the ground that the exemption involved in that case was construed to be a specific reference by Congress to a definite class of documents, namely those that must be kept secret " 'in the

interest of the national defense or foreign policy,'" 162 U. S. App. D. C., at 300, 498 F. 2d, at 1033. The Court of Appeals read the Act as providing a comprehensive guide to congressional intent. One of the Act's major purposes was seen as intending to eliminate what it characterized as vague phrases such as "in the public interest" or "for good cause" as a basis for withholding information. Under these circumstances, the court concluded that § 1104 cannot be considered a specific exemption by statute within the meaning of Exemption 3 of the Freedom of Information Act.

This case involves no constitutional claims, no issues regarding the nature or scope of "executive privilege," but simply the scope and meaning of one of the exemptions of the Freedom of Information Act, 5 U. S. C. § 552. *EPA* v. *Mink, supra,* at 94 (STEWART, J., concurring). The Act has two aspects. In one, it seeks to open public records to greater public access; in the other, it seeks to preserve the confidentiality undeniably essential in certain areas of Government operations. It is axiomatic that all parts of an Act "if at all possible, are to be given effect." *Weinberger* v. *Hynson, Westcott & Dunning,* 412 U. S. 609, 633 (1973). Accord, *Kokoszka* v. *Belford,* 417 U. S. 642, 650 (1974).

We have construed the Freedom of Information Act recently in *NLRB* v. *Sears, Roebuck & Co.,* 421 U. S. 132 (1975); *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.,* 421 U. S. 168 (1975); *Renegotiation Board* v. *Bannercraft Clothing Co.,* 415 U. S. 1 (1974); *EPA* v. *Mink, supra.* In *Mink,* the Court set out the general nature and purpose of the Act, recognizing, as did the Senate committee report, that it is not "'an easy task to balance the opposing interests . . .'" and "'provid[e] a workable formula which encompasses, balances,

and protects all interests . . . .' " 410 U. S., at 80, quoting from S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). Nothing in the Act or its legislative history gives any intimation that all information in all agencies and in all circumstances is to be open to public inspection. Because it considered the public disclosure section of the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. § 1002 (1964 ed.), inadequate, Congress sought to permit access to certain kinds of official information which it thought had unnecessarily been withheld and, by the creation of nine explicitly exclusive exemptions, to provide a more workable and balanced formula that would make available information that ought to be public and, at the same time, protect certain information where confidentiality was necessary to protect legitimate governmental functions that would be impaired by disclosure. The exemptions provided by the Act, one of which we deal with here, represent the congressional judgment as to certain kinds of "information that the Executive Branch must have the option to keep confidential, if it so chooses," 410 U. S., at 80. The language of Exemption 3 contains no "built-in" standard as in the case of some of the other exemptions. The variety of constructions given its language by the Courts of Appeals,[6] is ample evidence

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[6] In *Evans* v. *Department of Transportation,* 446 F. 2d 821 (CA5 1971), the court held that 49 U. S. C. § 1504, the FAA statute in question here, was within the scope of Exemption 3. 446 F. 2d, at 824. The same Court of Appeals, however, in an unpublished opinion, *Serchuk* v. *Weinberger,* affirmance reported at 493 F. 2d 663 (1974), followed the Third Circuit in *Stretch* v. *Weinberger,* 495 F. 2d 639 (1974), in holding that 53 Stat. 1398, as amended, 42 U. S. C. § 1306 (a)—requiring the confidentiality of all material obtained by the Secretary of Health, Education, and Welfare "except as the Secretary . . . may by regulations prescribe"—was not within the scope of Exemption 3 because it neither "identifies some class or category

that the relevant portions of the exemption are unclear and ambiguous, compelling resort to the legislative history. See *United States* v. *Donruss Co.,* 393 U. S. 297, 303 (1969). Cf. *United States* v. *Oregon,* 366 U. S. 643, 648 (1961).

That history must be read in light of the legislation in existence when the Act was passed; that history reveals "clear evidence that Congress was aware of the necessity to deal expressly with inconsistent laws." *Regional Rail Reorganization Act Cases,* 419 U. S. 102, 129 (1974). Congress was aware, as it undertook a painstaking review, during several sessions, of the right of the public to information concerning the public business; it was aware that it was acting not only against the backdrop of the 1946 Administrative Procedure Act, *supra,* but also on the basis of a significant number of earlier congressional decisions that confidentiality was essential in certain departments and agencies in order to protect the public interest. No distinction seems to have been made on

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of items that Congress considers appropriate for exemption," 495 F. 2d, at 640, nor at least "sets out legislatively prescribed standards of guidelines that the Secretary must follow in determining what matter shall be exempted from disclosure." *Ibid.* Accord, *Schechter* v. *Weinberger,* 165 U. S. App. D. C. 236, 238, 506 F. 2d 1275, 1277 (1974) (MacKinnon, J., dissenting) (citing his prior dissenting opinion in the same case, 162 U. S. App. D. C. 282, 498 F. 2d 1015 (1974)). In *California* v. *Weinberger,* 505 F. 2d 767 (1974), the Ninth Circuit reached a contrary result in regard to 42 U. S. C. § 1306 (a) on the ground that the general nondisclosure mandate constituted "words of congressional exemption," 505 F. 2d, at 768, and thus the material was "specifically exempted . . . by statute." The Secretary merely had the authority "to relax the absolute prohibition established by Congress." *Ibid.* Cf. *Sears* v. *Gottschalk,* 502 F. 2d 122 (CA4 1974), finding sufficient specificity in the term "[a]pplications for patents" of 35 U. S. C. § 122 and in Rules 14 (a) and (b) of the Patent Office to satisfy even the objections of the *Stretch* court and to bring 35 U. S. C. § 122 within the scope of Exemption 3.

the basis of the standards articulated in the exempting statute or on the degree of discretion which it vested in a particular Government officer. When the continued vitality of these specialized exempting statutes was raised by the views of various agencies,[7] the members of the committee consistently expressed the clear intention that these statutes would remain unaffected by the new Act. During the 1963 hearings, for example, Senator Long, Chairman of the Senate Subcommittee stated: "It should be made clear that this bill in no way limits statutes specifically written with the congressional intent of curtailing the flow of information as a supplement necessary to the proper functioning of certain agencies." [8] Indeed, some provisions [9] of bills which were not enacted could well have been construed as repealing all earlier legislation,[10] but such provisions were not included in the bill that was finally enacted. More specifically, when the Civil Aeronautics Board brought § 1104 to the attention of both the House and Senate hearings of 1965, and expressed the agency interpretation that the provision was encompassed within Exemption 3,[11] no question was

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[7] Note, Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill, 40 Notre Dame Law. 417, 453 n. 254 (1965).

[8] Hearings on S. 1666 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess., 6 (1963) (statement of Senator Long, Chairman of the Subcommittee and sponsor of § 1666, which was not changed, in pertinent part, in the final enactment). See also Hearings on H. R. 5012 et al. before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess., 14 (1965) (statement of Rep. Moss, Subcommittee Chairman).

[9] *Id.*, at 3: "All laws or part of laws inconsistent with the amendment made by the first section of this Act are hereby repealed."

[10] *Id.*, at 14, 20, 53.

[11] *Id.*, at 237. See also Hearings on S. 1160 et al. before the Subcommittee on Administrative Practice and Procedure of the Senate

raised or challenge made to the agency view of the impact of that exemption. When the House Committee on Government Operations focused on Exemption 3, it took note that there are "nearly 100 statutes or parts of statutes which restrict public access to specific Government records. *These would not be modified* by the public records provisions of S. 1160." H. R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966). (Emphasis added.)

The respondents can prevail only if the Act is to be read as repealing by implication all existing statutes "which restrict public access to specific Government records." *Ibid.* The term "specific" as there used cannot be read as meaning that the exemption applies only to documents specified, *i. e.,* by naming them precisely or by describing the category in which they fall. To require this interpretation would be to ask of Congress a virtually impossible task. Such a construction would also imply that Congress had undertaken to reassess every delegation of authority to withhold information which it had made before the passage of this legislation—a task which the legislative history shows it clearly did not undertake.

Earlier this Term, MR. JUSTICE BRENNAN, speaking for the Court in the *Regional Rail Reorganization Act Cases, supra,* noted that "repeals by implication are disfavored,"

Committee on the Judiciary, 89th Cong., 1st Sess., 366 (1965). The statute's predecessor (49 U. S. C. § 674) also was specifically listed on an exhibit of "exempt statutes" submitted during the 1958 Hearing on S. 921 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess., pt. 2, pp. 985–987, 997. Subsequent lists—specifically not claiming to be exhaustive—include similar statutes. See House Committee on Government Operations, Federal Statutes on the Availability of Information, 86th Cong., 2d Sess., 213, 209 (Comm. Print Mar. 1960), listing 26 U. S. C. § 6104 (a) and 15 U. S. C. § 78x (b). See generally K. Davis, Administrative Law Treatise § 3A.18 (1970 Supp.).

419 U. S., at 133, and that, when courts are confronted with statutes " 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.' " *Id.*, at 133–134, quoting *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974). As we have noted, here, as in the *Regional Rail Reorganization Act Cases, supra*, there is "clear evidence that Congress was aware of the necessity to deal expressly with inconsistent laws," 419 U. S., at 129. To spell out repeal by implication of a multitude of statutes enacted over a long period of time, each of which was separately weighed and considered by Congress to meet an identified need, would be a more unreasonable step by a court than to do so with respect to a single statute such as was involved in the *Regional Rail Reorganization Act Cases, supra*. Congress' response was to permit the numerous laws then extant allowing confidentiality to stand; it is not for us to override that legislative choice.

The discretion vested by Congress in the FAA, in both its nature and scope, is broad. There is not, however, any inevitable inconsistency between the general congressional intent to replace the broad standard of the former Administrative Procedure Act and its intent to preserve, for air transport regulation, a broad degree of discretion on what information is to be protected in the public interest in order to insure continuing access to the sources of sensitive information necessary to the regulation of air transport. Congress could not reasonably anticipate every situation in which the balance must tip in favor of nondisclosure as a means of insuring that the primary, or indeed sole, source of essential information would continue to volunteer information needed to develop and maintain safety standards. The public interest is served by assuring a free flow of relevant information to the regulatory

authorities from the airlines. Congress could appropriately conclude that the public interest was better served by guaranteeing confidentiality in order to secure the maximum amount of information relevant to safety. The wisdom of the balance struck by Congress is not open to judicial scrutiny.

It was inescapable that some regulatory authorities be vested with broad, flexible discretion, the exercise of which was made subject to continuing scrutiny by Congress. Following passage of the Act, "[g]eneral oversight into the administration of the Freedom of Information Act [was] exercised by the [House] Foreign Operations and Government Information Subcommittee and the Senate Subcommittee on Administrative Practice and Procedure." H. R. Rep. No. 92-1419, pp. 3-4 (1972). It is not insignificant that this overall scrutiny of the Act in 1972 brought no change in Exemption 3. Indeed, when Congress amended the Freedom of Information Act in 1974, it reaffirmed the continued vitality of this particular exemption, covering statutes vesting in the agencies wide authority. S. Conf. Rep. No. 93-1200, p. 12 (1974); H. R. Conf. Rep. No. 93-1380, p. 12 (1974).

Moreover, Congress amended the Act in 1974 to require that all agencies submit to each House, on an annual basis, "the number of determinations made by such agency not to comply with requests for records . . . and the reasons for each such determination." 88 Stat. 1564, 5 U. S. C. § 552 (d)(1) (1970 ed., Supp. IV). In light of this continuing close scrutiny, we are bound to assume that Congress exercised an informed judgment as to the needs of the FAA and that it was persuaded as to the necessity, or at least of the practical compatibility, of both statutes.

Reversed.

MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN dissent for the reasons given in Judge Fahy's opinion for the Court of Appeals, 162 U. S. App. D. C. 298, 498 F. 2d 1031 (1974).

MR. JUSTICE STEWART, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

Exemption 3 of the Freedom of Information Act, 5 U. S. C. § 552 (b)(3), provides for nondisclosure of "matters that are . . . specifically exempted from disclosure by statute." Section 1104 of the Federal Aviation Act of 1958, 72 Stat. 797, 49 U. S. C. § 1504, specifically provides that when "[a]ny person" objects to the public disclosure of certain information, "the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public." The Court today rules that information may be withheld under § 1104 by reason of Exemption 3.

Legislation of unusually broad scope often reflects reconciliation of conflicting values and policies. On occasion, therefore, particular provisions of such legislation may seem at odds with its basic purpose. But when the statutory language is relatively clear and the legislative history casts no serious doubt, the only appropriate judicial course is to give effect to the evident legislative intent.

So it is here. The Freedom of Information Act was enacted in order to impose objective and easily applicable statutory disclosure standards in place of relatively amorphous standards such as the "public interest," behind which the most self-serving motives for nondisclosure of information could be concealed. *EPA* v. *Mink*, 410 U. S. 73, 79 (1973); and see, *e. g.*, S. Rep. No. 813,

89th Cong., 1st Sess., 3 (1965). But it seems equally clear that Congress intended to leave largely undisturbed existing statutes dealing with the disclosure of information by specific agencies. See, *e. g.*, H. R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966).

Simply stated, the respondents' position is that to allow administrative discretion under a general "public interest" standard to determine whether information shall be disclosed to the public is inconsistent with the general thrust of the Freedom of Information Act. For this Court to accept that position, it must accept its inevitable corollary: that by enacting the Freedom of Information Act, Congress intended to repeal, by implication alone, those statutes that make disclosure a matter of agency discretion.[1] It simply is impossible fairly to discern any such intention on the part of Congress. There is no evidence of such an intention in either the statutory language or the legislative history, and there are strong intimations to the contrary. See *ante*, at 263–265.

Our role is to interpret statutory language, not to revise it. As matters now stand, when an agency asserts a right to withhold information based on a specific

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[1] A substantial number of statutes leave disclosure of various documents to the discretion of an administrative officer. Examples are 52 Stat. 1398, as amended, 42 U. S. C. § 1306 (a), which prohibits disclosure of "any . . . report . . . obtained at any time by the Secretary of Health, Education, and Welfare . . . except as the Secretary . . . may by regulations prescribe"; 35 U. S. C. § 122, which provides that information in patent applications cannot be made public by the Patent Office "unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner"; and 38 U. S. C. § 3301, which states that all files, records, and other papers pertaining to any claim under any law administered by the Veterans' Administration are not to be disclosed, except that "[t]he Administrator may release information . . . when in his judgment such release would serve a useful purpose."

statute of the kind described in Exemption 3, the only question "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."[2] *EPA* v. *Mink, supra,* at 95 n. (STEWART, J., concurring).

On this basis, I concur in the judgment of the Court.

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[2] It should be noted, however, as the Solicitor General has pointed out, that under 49 U. S. C. § 1486, judicial review of an order of nondisclosure under 49 U. S. C. § 1104 is available in the courts of appeals.

Syllabus

UNITED STATES *v.* AMERICAN BUILDING MAINTENANCE INDUSTRIES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 73-1689. Argued April 22, 1975—Decided June 24, 1975

The Government brought this civil antitrust action against appellee, one of the largest suppliers of janitorial services in the country, with 56 branches serving more than 500 communities in the United States and Canada, and providing about 10% of such service sales in Southern California, contending that appellee's acquisition of two Southern California janitorial service firms (the Benton companies), which supplied about 7% of such services in Southern California, violated § 7 of the Clayton Act. That section provides that "[n]o corporation engaged in commerce shall acquire . . . the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire . . . 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." The Benton companies, some of whose customers engaged in interstate operations, performed all their services within California, locally recruited labor (which accounted for their major expenses) and locally purchased incidental equipment and supplies. The District Court granted appellee's motion for summary judgment, holding that there had been no § 7 violation. The Government contends that "engaged in commerce" as used in § 7 encompasses corporations like the Benton companies engaged in intrastate activities that substantially affect interstate commerce, and that in any event the Benton companies' activities were sufficiently interstate to come within § 7. *Held:*

1. The phrase "engaged in commerce" as used in § 7 of the Clayton Act means engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the federal commerce power; hence, the phrase does not encompass corporations engaged in intrastate activities substantially affecting interstate commerce, and § 7 can be applicable only when both the acquiring corporation and the ac-

quired corporation are engaged in interstate commerce. Pp. 275–283.

(a) The jurisdictional requirements of § 7 cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities *affect* commerce. *Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U. S. 186; *FTC* v. *Bunte Bros.,* 312 U. S. 349. Pp. 276–277.

(b) The precise "in commerce" language of § 7 is not coextensive with the reach of power under the Commerce Clause and is thus not to be equated with § 1 of the Sherman Act which reaches the impact of intrastate conduct on interstate commerce. Pp. 277–279.

(c) When Congress re-enacted § 7 in 1950 with the same "engaged in commerce" limitation, the phrase had long since become a term of art, indicating a limited assertion of federal jurisdiction, and prior to that time Congress had frequently distinguished between activities "in commerce" and broader activities "affecting commerce." Pp. 279–281.

(d) Limiting § 7 to its plain meaning comports with the enforcement policies that the FTC and the Justice Department have consistently pursued. Pp. 281–282.

2. Since the Benton companies did not participate directly in the sale, purchase, or distribution of goods or services in interstate commerce, they were not "engaged in commerce" within the meaning of § 7. And neither supplying local services to corporations engaged in interstate commerce nor using locally bought supplies manufactured outside California sufficed to satisfy § 7's "in commerce" requirement. Pp. 283–286.

401 F. Supp. 1005, affirmed.

Stewart, J., delivered the opinion of the Court, in which Burger, C. J., and Marshall, Powell, and Rehnquist, JJ., joined, and in all but Part III of which White, J., joined. White, J., filed a concurring opinion, *post,* p. 286. Douglas, J., filed a dissenting opinion, in which Brennan, J., joined, *post,* p. 286. Blackmun, J., filed a dissenting opinion, *post,* p. 287.

Deputy Assistant Attorney General Wilson argued the cause for the United States. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Kauper, William L. Patton, Carl D. Lawson,* and *Lee I. Weintraub.*

Marcus Mattson argued the cause for appellee. With him on the brief was *Anthonie M. Voogd*.

MR. JUSTICE STEWART delivered the opinion of the Court.

The Government commenced this civil antitrust action in the United States District Court for the Central District of California, contending that the appellee, American Building Maintenance Industries, had violated § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 18, by acquiring the stock of J. E. Benton Management Corp., and by merging Benton Maintenance Co. into one of the appellee's wholly owned subsidiaries. Following discovery proceedings and the submission of memoranda and affidavits by both parties, the District Court granted the appellee's motion for summary judgment, holding that there had been no violation of § 7 of the Clayton Act. The Government brought an appeal to this Court, and we noted probable jurisdiction. 419 U. S. 1104.[1]

I

The appellee, American Building Maintenance Industries, is one of the largest suppliers of janitorial services in the country, with 56 branches serving more than 500 communities in the United States and Canada. It is also the single largest supplier of janitorial services in southern California (the area comprising Los Angeles, Orange, San Bernardino, Riverside, Santa Barbara, and Ventura Counties), providing approximately 10% of the sales of such services in that area.

[1] The Government appealed directly to this Court pursuant to § 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29. The Government's notice of appeal was filed on February 7, 1974, before the effective date of the recent amendments to the Act. See Antitrust Procedures and Penalties Act, Pub. L. 93-528, § 7, 88 Stat. 1710.

Both of the acquired companies, J. E. Benton Management Corp. and Benton Maintenance Co., also supplied janitorial services in Southern California.[2] Together their sales constituted approximately 7% of the total janitorial sales in that area. Although both Benton companies serviced customers engaged in interstate operations, all of their janitorial and maintenance contracts with those customers were performed entirely within California. Neither of the Benton companies advertised nationally, and their use of interstate communications facilities to conduct business was negligible.[3]

The major expense of providing janitorial services is the cost of the labor necessary to perform the work. The Benton companies recruited the unskilled workers needed to supply janitorial services entirely from the local labor market in Southern California. The incidental equipment and supplies utilized in providing those janitorial services, except in concededly insignificant amounts, were purchased from local distributors.[4]

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[2] At the time of the acquisition and merger, Jess E. Benton, Jr., owned all the stock of J. E. Benton Management Corp., and 85% of the stock of Benton Maintenance Co. In addition to supplying janitorial services, Benton Management conducted some real estate business and provided building management services entirely within the Southern California area. Benton Maintenance was engaged exclusively in providing janitorial services. The Government has made no claim that the nonjanitorial activities of Benton Management Corp. have any bearing on the issues presented by this case.

[3] The District Court found that the Benton companies made only 10 out-of-state telephone calls related to business activities during the 18-month period prior to the challenged acquisition and merger. The charges for those calls were $19.78. During the same period the Benton companies sent or received only some 200 interstate letters, a number of which were either directed to or received from governmental agencies such as the Internal Revenue Service.

[4] Although many of the janitorial supplies were manufactured outside of California, the District Court found that Benton's direct

It is unquestioned that the appellee, American Building Maintenance Industries, was and is actively engaged in interstate commerce. But on the basis of the above facts the District Court concluded that at the time of the challenged acquisition and merger neither Benton Management Corp. nor Benton Maintenance Co. was "engaged in commerce" within the meaning of § 7 of the Clayton Act. Accordingly, the District Court held that there had been no violation of that law.

The Government's appeal raises two questions: First, does the phrase "engaged in commerce" as used in § 7 of the Clayton Act encompass corporations engaged in intrastate activities that substantially affect interstate commerce? Second, if the language of § 7 requires proof of actual engagement in the flow of interstate commerce, were the Benton companies' activities sufficient to satisfy that standard?

II

Section 7 of the Clayton Act, 15 U. S. C. § 18, provides in pertinent part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Under the explicit reach of § 7, therefore, not only must the acquiring corporation be "engaged in commerce," but

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interstate purchases for the 16-month period prior to the challenged acquisition and merger amounted to a total of less than $140.

the corporation or corporations whose stock or assets are acquired must be "engaged also in commerce." [5]

The distinct "in commerce" language of § 7, the Court observed earlier this Term, "appears to denote only persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer. If this is so, the jurisdictional requirements of [§ 7] cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities *affect* commerce." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 195. But even more unambiguous support for this construction of the narrow "in commerce" language enacted by Congress in § 7 of the Clayton Act is to be found in an earlier decision of this Court, *FTC* v. *Bunte Bros.*, 312 U. S. 349.

In *Bunte Bros.* the Court was required to determine the scope of § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45, which authorized the Commission to proceed only against "unfair methods of competition in commerce." The Court squarely held that the Commission's § 5 jurisdiction was limited to unfair methods of competition occurring in the flow of interstate commerce. The contention that "in commerce" should be read as if it meant "affecting interstate commerce" was emphatically rejected: "The construction of § 5 urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. . . . An inroad upon local

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[5] "Commerce," as defined by § 1 of the Clayton Act, 15 U. S. C. § 12, means "trade or commerce among the several States and with foreign nations . . . ." The phrase "engaged in commerce" is not defined by the Act.

conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress." 312 U. S., at 354–355.[6]

The phrase "in commerce" does not, of course, necessarily have a uniform meaning whenever used by Congress. See, *e. g., Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 520–521. But the *Bunte Bros.* construction of § 5 of the Federal Trade Commission Act is particularly relevant to a proper interpretation of the "in commerce" language in § 7 of the Clayton Act since both sections were enacted by the 63d Congress, and both were designed to deal with closely related aspects of the same problem—the protection of free and fair competition in the Nation's marketplaces. See *FTC* v. *Raladam Co.,* 283 U. S. 643, 647–648.

The Government argues, however, that despite its basic identity to § 5 of the Federal Trade Commission Act, the phrase "engaged in commerce" in § 7 of the Clayton Act should be interpreted to mean engaged in any activity that is subject to the constitutional power of Congress over interstate commerce. The legislative history of the Clayton Act, the Government contends, demonstrates that the "in commerce" language of § 7 was intended to be coextensive with the reach of congressional power under the Commerce Clause. Moreover, the argument continues, § 7 was designed to supplement the

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[6] Congress recently acted to provide such a "clearer mandate," amending the Federal Trade Commission Act by replacing the phrase "in commerce" with "in or affecting commerce" in §§ 5, 6, and 12 of the Act. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, § 201, 88 Stat. 2193, 15 U. S. C. § 45 (1970 ed., Supp. IV). The amendments were specifically designed to expand the Commission's jurisdiction beyond the limits defined by *Bunte Bros.* and to make it coextensive with the constitutional power of Congress under the Commerce Clause. See H. R. Rep. No. 93–1107, pp. 29–31 (1974).

Sherman Act and to arrest the creation of trusts or monopolies in their incipiency, *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U. S. 586, 589, and it would be anomalous, in light of this history and purpose, to hold that the Clayton Act's jurisdictional scope is more restricted than that of the Sherman Act.

It is certainly true that the Court has held that in the Sherman Act, "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . . ." *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533, 558. Accordingly, the Sherman Act has been applied to local activities which, although not themselves within the flow of interstate commerce, substantially affect interstate commerce. See, *e. g., Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U. S. 219; *United States* v. *Employing Plasterers Assn.,* 347 U. S. 186. But the Government's argument that § 7 should likewise be read to reach intrastate corporations affecting interstate commerce is not persuasive.

Unlike § 7, with its precise "in commerce" language, § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, prohibits every contract, combination, or conspiracy "in restraint of trade or commerce among the several States . . . ." "The jurisdictional reach of § 1 thus is keyed directly to effects on interstate markets and the interstate flow of goods." *Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U. S., at 194. No similar concern for the impact of intrastate conduct on interstate commerce is evident in § 7's "engaged in commerce" requirements.

The Government's contention that it would be anomalous for Congress to have strengthened the antitrust laws by curing perceived deficiencies in the Sherman Act and at the same time to have limited the jurisdictional scope of those remedial provisions founders also on the express

language of § 7. Thus, although the Sherman Act proscribes *every* contract, combination, or conspiracy in restraint of trade or commerce, whether entered into by a natural person, partnership, corporation, or other form of business organization, § 7 of the Clayton Act is explicitly limited to *corporate* acquisitions. Yet it surely could not be seriously argued that this "anomaly" must be ignored, and § 7 extended to reach an allegedly anticompetitive acquisition of partnership assets.[7] There is no more justification for concluding that the equally explicit "in commerce" limitation on § 7's reach should be disregarded.

More importantly, whether or not Congress in enacting the Clayton Act in 1914 intended to exercise fully its power to regulate commerce, and whatever the understanding of the 63d Congress may have been as to the extent of its Commerce Clause power, the fact is that

[7] The Federal Trade Commission has held that such acquisitions may be challenged under § 5 of the Federal Trade Commission Act, which forbids unfair methods of competition on the part of persons and partnerships, as well as corporations. *Beatrice Foods Co.*, 67 F. T. C. 473, 724–727. It is, of course, well established that the Commission has broad power to apply § 5 to reach transactions which violate the standards of the Clayton Act, although technically not subject to the Act's prohibitions. See, *e. g.*, *FTC* v. *Brown Shoe Co.*, 384 U. S. 316, 320–321; cf. *FTC* v. *Sperry & Hutchinson Co.*, 405 U. S. 233. We have no occasion in the case now before us to decide whether application of § 5 to assets acquisitions by or from noncorporate business entities constitutes an appropriate exercise of that power; nor need we consider whether the acquisition of the stock or assets of an intrastate corporation that affected interstate commerce could be challenged by the Commission under the recent jurisdictional amendments to § 5. See n. 6, *supra*. See generally Oppenheim, Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts, 59 Mich. L. Rev. 821; Reeves, Toward a Coherent Antitrust Policy: The Role of Section 5 of the Federal Trade Commission Act in Price Discrimination Regulation, 16 B. C. Ind. & Com. L. Rev. 151, 167–171.

when § 7 was re-enacted in 1950, the phrase "engaged in commerce" had long since become a term of art, indicating a limited assertion of federal jurisdiction. In *Schechter Corp.* v. *United States,* 295 U. S. 495, for example, the Court had drawn a sharp distinction between activities in the flow of interstate commerce and intrastate activities that affect interstate commerce. *Id.,* at 542–544. Similarly, the Court's opinion in *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, two years later, had emphasized that congressional authority to regulate commerce was not limited to activities actually "in commerce," but extended as well to conduct that substantially affected interstate commerce. And the *Bunte Bros.* decision in 1941 had stressed the distinction between unfair methods of competition "in commerce" and those that "affected commerce," in limiting the scope of the Commission's authority under the "in commerce" language of § 5 of the Federal Trade Commission Act.

Congress, as well, in the years prior to 1950 had repeatedly acknowledged its recognition of the distinction between legislation limited to activities "in commerce," and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce. Section 10 (a) of the National Labor Relations Act, 49 Stat. 453, as amended, 29 U. S. C. § 160 (a), for example, empowered the National Labor Relations Board to prevent any person from engaging in an unfair labor practice "affecting commerce." Section 2 (7) of the Act, 49 Stat. 450, as amended, 29 U. S. C. § 152 (7), in turn, defined "affecting commerce" to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce . . . ." Similarly, the Bituminous Coal Act of 1937, c. 127, 50 Stat. 72, providing for the fixing of prices for bituminous coal, the proscription of unfair trade practices, and the establishment of marketing procedures,

applied to sales and transactions "in or directly affecting interstate commerce in bituminous coal." 50 Stat. 76.

In marked contrast to the broad "affecting commerce" jurisdictional language utilized in those statutes, however, Congress retained the narrower "in commerce" formulation when it amended and re-enacted § 7 of the Clayton Act in 1950. The 1950 amendments were designed in large part to "plug the loophole" that existed in § 7 as initially enacted in 1914, by expanding its coverage to include acquisitions of assets, as well as acquisitions of stock. In addition, other language in § 7 was amended to make plain the full reach of the section's prohibitions. See *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 311–323. Yet, despite the sweeping changes made to effectuate those purposes, and despite decisions of this Court, such as *Bunte Bros.,* that had limited the reach of the phrase "in commerce" in similar regulatory legislation, Congress preserved the requirement that both the acquiring and the acquired companies be "engaged in commerce."

This congressional action cannot be disregarded, as the Government would have it, as simply a result of congressional inattention, for Congress was fully aware in enacting the 1950 amendments that both the original and the newly amended versions of § 7 were limited to corporations "engaged in commerce." See, *e. g.,* H. R. Rep. No. 1191, 81st Cong., 1st Sess., 5–6. Rather, the decision to re-enact § 7 with the same "in commerce" limitation can be rationally explained only in terms of a legislative intent, at least in 1950, not to apply the rather drastic prohibitions of § 7 of the Clayton Act to the full range of corporations potentially subject to the commerce power.

Finally, the Government's contention that a limitation of the scope of § 7 to its plain meaning would undermine

the section's remedial purpose is belied by the past enforcement policy of the Federal Trade Commission and the Department of Justice—the two governmental agencies charged with enforcing the section's prohibitions. Clayton Act §§ 11, 15, 15 U. S. C. §§ 21 (a), 25. The Federal Trade Commission has repeatedly held that § 7 applies only to an acquisition in which both the acquired and the acquiring companies are engaged directly in interstate commerce. *E. g., Foremost Dairies, Inc.,* 60 F. T. C. 944, 1068–1069; *Beatrice Foods Co.,* 67 F. T. C. 473, 730–731; *Mississippi River Fuel Corp.,* 75 F. T. C. 813, 918. And while the Government explains that it has never taken a formal position that § 7 does not apply to intrastate firms affecting interstate commerce, it does concede that previous § 7 cases brought by the Department of Justice have invariably involved firms clearly engaged in the flow of interstate commerce.[8] In light of this consistent enforcement practice, it is difficult to credit the argument that § 7's remedial purpose would be frustrated by construing literally § 7's twice-enacted "in commerce" requirement.

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[8] Despite this concession, the Government somewhat inconsistently argues that the present case does not in fact involve a substantial departure from the previous § 7 enforcement pattern. In the past, the Government asserts, the United States has challenged acquisitions of "essentially local businesses that affected interstate commerce." *United States* v. *Von's Grocery Co.,* 384 U. S. 270, is cited as an example of such a challenge. But the District Court in that case expressly found that both of the merging grocery chains directly participated in the flow of interstate commerce because each purchased more than 51% of its supplies from outside of California. See 233 F. Supp. 976, 978. And in *United States* v. *County National Bank,* 339 F. Supp. 85, the only other case cited by the Government to support its contention that the case now before us does not involve a departure from previous enforcement policy, the sole question was quite different from that here in issue—whether the "Bennington area" was a "section of the country" within the meaning of § 7 of the Clayton Act.

In sum, neither the legislative history nor the remedial purpose of § 7 of the Clayton Act, as amended and re-enacted in 1950, supports an expansion of the scope of § 7 beyond that defined by its express language. Accordingly, we hold that the phrase "engaged in commerce" as used in § 7 of the Clayton Act means engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the federal commerce power.

III

The Government alternatively argues that even if § 7 applies only to corporations engaged in the flow of interstate commerce, the Benton companies' activities at the time of the acquisition and merger placed them in that flow. To support this contention the Government relies primarily on the fact that the Benton companies performed a substantial portion of their janitorial services for enterprises which were themselves clearly engaged in selling products in interstate and international markets and in providing interstate communication facilities.[9] But simply supplying localized services to a corporation engaged in interstate commerce does not satisfy the "in commerce" requirement of § 7.

To be engaged "in commerce" within the meaning of § 7, a corporation must itself be directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce. See *Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U. S., at 195. At the time of the acquisition and merger, however, the Benton companies were completely insulated from any direct participation

[9] The Benton companies derived 80% to 90% of their revenues from performance of janitorial service contracts for the Los Angeles facilities of interstate and international corporations such as Mobil Oil Corp., Rockwell International Corp., Teledyne, Inc., and Pacific Telephone & Telegraph Co.

in interstate markets or the interstate flow of goods or services. The firms' activities were limited to providing janitorial services within Southern California to corporations that made wholly independent pricing decisions concerning their own products. Consequently, whether or not their effect on interstate commerce was sufficiently substantial to come within the ambit of the constitutional power of Congress under the Commerce Clause, in providing janitorial services the Benton companies were not themselves "engaged in commerce" within the meaning of § 7. Cf. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S., at 227–235.[10]

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[10] The Government notes that this Court has held that maintenance workers servicing buildings in which goods are produced for interstate markets are covered by Fair Labor Standards Act provisions applicable to employees engaged in the production of goods for commerce. See, *e. g.*, *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Martino* v. *Michigan Window Cleaning Co.*, 327 U. S. 173. In *Kirschbaum* the Court reasoned: "Without light and heat and power the tenants could not engage, as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is indispensable to that activity." 316 U. S., at 524. Similarly, the Government argues, in the present case the Benton janitorial services were so essential to the interstate operations of their customers that they, too, should be considered part of the flow of commerce.

The Fair Labor Standards Act, however, is not confined, as is § 7 of the Clayton Act, to activities that are actually "in commerce." At the time of the decisions relied upon by the Government, the Act provided that "an employee shall be deemed to have been engaged in the production of goods [for interstate commerce] if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any process or occupation necessary to the production thereof* . . . ." Fair Labor Standards Act of 1938, § 3 (j), 52 Stat. 1061, as amended, 29 U. S. C. § 203 (j) (1946 ed.) (emphasis added). Congress thus expressly intended to reach not only those employees who directly participated in the production of goods for interstate markets, but

Similarly, although the Benton companies used janitorial equipment and supplies manufactured in large part outside of California, they did not purchase them directly from suppliers located in other States. Cf. *Foremost Dairies, Inc.,* 60 F. T. C., at 1068–1069. Rather, those products were purchased in intrastate transactions from local distributors. Once again, therefore, the Benton companies were separated from direct participation in interstate commerce by the pricing and other marketing decisions of independent intermediaries. By the time the Benton companies purchased their janitorial supplies, the flow of commerce had ceased. See *Schechter Corp.* v. *United States,* 295 U. S., at 542–543.[11]

In short, since the Benton companies did not participate directly in the sale, purchase, or distribution of goods or services in interstate commerce, they were not "engaged in commerce" within the meaning of § 7 of the Clayton Act.[12] The District Court, therefore, properly

also those employees outside the flow of commerce but nonetheless necessary to it. Although Congress in 1950 could constitutionally have extended § 7 of the Clayton Act to reach comparable activity, it chose not to do so. See *supra,* at 279–281.

[11] The Government does not suggest that the purchase of janitorial equipment and supplies from local distributors placed the Benton companies in the flow of commerce, although it does argue that because of those purchases the firms had a substantial effect on interstate commerce—an issue not relevant in light of our construction of the reach of § 7 of the Clayton Act.

[12] The Government contends that the sale of janitorial services "necessarily" involves interstate communications, solicitations, and negotiations, and that such interstate activity should be viewed as part of the flow of interstate commerce. The merits of that argument need not be considered, however, since the record before the District Court does not support a finding that any of the Benton janitorial service contracts were obtained through interstate solicitation or negotiation.

concluded that the acquisition and merger in this case were not within the coverage of § 7 of the Clayton Act.

The judgment of the District Court is affirmed.

It is so ordered.

MR. JUSTICE WHITE, concurring.

I concur in the judgment and in Parts I and II of the Court's opinion. I do not join Part III, for I doubt that the interposition of a California wholesaler or distributor between the Benton companies and out-of-state manufacturers of janitorial supplies necessarily requires that the Benton companies be found not to be "in commerce" merely because they buy *directly* from out-of-state suppliers only a negligible amount of their supplies. For the purposes of § 7 of the Clayton Act, a remedial statute, the regular movement of goods from out-of-state manufacturer to local wholesaler and then to retailer or institutional consumer is at least arguably sufficient to place the latter in the stream of commerce, particularly where it appears that when the complaint was filed, cf. *United States* v. *Penn-Olin Co.,* 378 U. S. 158, 168 (1964), the "local" distributor from which supplies were being purchased was a wholly owned subsidiary of the acquiring company, a national concern admittedly in commerce. In this case, however, the United States makes no such contention and appellee's motion for summary judgment was not opposed by the Government on that theory. It is therefore inappropriate to address the issue at this time; and on this record, I concur in the judgment that the Benton companies were not in commerce.

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

For the reasons set forth in my dissenting opinion in *Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U. S. 186, 204–

207 (1974), decided earlier this Term, I cannot agree that the "in commerce" language of § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 18, was intended to give that statute a narrower jurisdictional reach than the "affecting commerce" standard which we have read into the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1 *et seq.* On the record in this case, it is beyond question that the activities of the acquired firms have a substantial effect on interstate commerce. I would therefore reverse the summary judgment granted below and remand for further proceedings in the District Court.

MR. JUSTICE BLACKMUN, dissenting.

I believe that the scope of the Clayton Act should be held to extend to acquisitions and sales having a substantial effect on interstate commerce. I therefore dissent. For me, the reach of § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 18, is as broad as that of the Sherman Act, and should not be given the narrow construction we properly have given, just this Term, to the Robinson-Patman Act. *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186 (1974).

For more than a quarter of a century the Court has held that the Sherman Act should be construed broadly to reach the full extent of the commerce power, and to proscribe those restraints that substantially affect interstate commerce. See, *e. g., Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 234 (1948); *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 558 (1944). The Clayton Act was enacted to supplement the Sherman Act, and to "arrest in its incipiency" any restraint or substantial lessening of competition. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 589 (1957). To ascribe

to Congress the intent to exercise less than its full commerce power in the Clayton Act, which has as its purpose the supplementation of the protections afforded by the Sherman Act, is both highly anomalous and, it seems to me, unwarranted. Section 7 should not be limited, as the Court limits it today, to corporations engaged in interstate commerce, but should be held to include those intrastate activities substantially affecting interstate commerce.

Syllabus

ABERDEEN & ROCKFISH RAILROAD CO. ET AL. *v.* STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (SCRAP) ET AL.

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

No. 73-1966. Argued March 26, 1975—Decided June 24, 1975*

In December 1971, the Nation's railroads, citing sharply increasing costs and decreasing or negative profits, collectively proposed to file tariffs increasing their freight rates by a temporary surcharge across the board. The Interstate Commerce Commission (ICC), in the ensuing general revenue proceeding, finding that the railroads had a critical and immediate need for revenue, declined to exercise its power to suspend proposed rate increases, and the surcharge became effective in February 1972. The railroads shortly filed for larger, selective rate increases, but in April 1972 the ICC suspended the effectiveness of these increases pending its investigation of their lawfulness, the ICC the previous month having served a brief draft environmental impact statement on all parties to the investigation, discussing the environmental consequences of rate increases with respect to recyclables in general terms and concluding that there was no basis yet to believe that the environment would be substantially affected thereby. Thereafter, appellee SCRAP and other environmental groups filed suit alleging that the ICC had decided not to suspend the surcharge pending its investigation—which decision would have a substantial effect on the environment—without preparing an environmental impact statement or considering environmental issues as required by the National Environmental Policy Act (NEPA); that the pre-existing rate structure discriminated against recyclables and in favor of virgin materials; and that the surcharge exacerbated this situation with the unfortunate consequence to the environment that use of recyclable materials would be inhibited and use of virgin materials encouraged. A three-judge District Court was convened under 28 U. S. C. § 2325 (now repealed), which required that an injunction restraining the enforcement, operation, or

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*Together with No. 73-1971, *United States et al.* v. *Students Challenging Regulatory Agency Procedures (SCRAP) et al.*, also on appeal from the same court.

execution of an ICC order would not be granted unless the application therefor was heard and determined by a three-judge court, and relief was granted. On direct appeal, this Court reversed in *United States* v. *SCRAP*, 412 U. S. 669 (*SCRAP I*), holding that § 15 (7) of the Interstate Commerce Act lodges in the ICC *exclusive* power to suspend rate increases pending final determination of their lawfulness. Meanwhile, in October 1972, after an oral hearing, the ICC issued a final report declining to declare the selective rate increases unlawful, terminating the previously entered suspension order, canceling the surcharge that had been subsumed in the selective increases, and ordering a ceiling on rate increases with respect to some but not all recyclables. The report stated that having given extensive consideration to environmental factors, the ICC would not file a separate, formal impact statement under the NEPA, and pointed out that the ICC had begun a separate investigation into the entire rate structure focusing on whether it interfered with the Government's environmental program. However, in November 1972, the ICC reopened its investigation into the lawfulness of selective rate increases to reconsider the environmental effects of the new rates on recyclables, such rates being suspended for an additional period with the railroads' consent. In March 1973 the ICC served an expanded draft impact statement, and in May 1973 issued a final impact statement, concluding that its order of October 1972 had been correct, and finally terminating its investigation without declaring any of the proposed rates unlawful except as previously provided in the October 1972 order. In May 1973, shortly before the increased rates on recyclables were to become effective, appellees SCRAP and Environmental Defense Fund (EDF) filed a motion for a preliminary injunction to restrain the implementation of increased rates on recyclables, and the three-judge court granted the motion. The railroads and the ICC appealed, and in June 1973, The Chief Justice stayed the order on the railroads' motion, and the full Court declined to vacate the stay, 413 U. S. 917, with the result that the increased rates on recyclables went into, and remain in, effect. In November 1973 this Court vacated the preliminary injunction and remanded the cases for reconsideration, 414 U. S. 1035. Meanwhile, appellees had filed motions for summary judgment in the three-judge court. Finding that the ICC had failed to comply with the NEPA, in that, *inter alia*, it failed to hold an oral hearing before adopting the final impact statement, having previously held such a hearing (presumptively

an "existing agency review process") before issuing its October 1972 order, and should have started over again after it decided to issue a final impact statement, that court set aside the ICC order terminating the general revenue proceeding without declaring the rate increases unlawful and ordered the ICC to reopen the proceeding, prepare a new impact statement under the NEPA, hold hearings, and reconsider, in light of the new statement, its determination to declare the rate increases on recyclables lawful. The railroads appealed, claiming that the District Court had no jurisdiction over the case, and that the ICC had, in any event, fully complied with the NEPA, and the ICC and the United States appealed, claiming only that the ICC had so complied with the NEPA. *Held:*

1. This Court has jurisdiction over the appeals under 28 U. S. C. § 1253, which gives this Court jurisdiction to determine appeals from "an order granting or denying . . . an . . . injunction in any civil action . . . required . . . to be heard and determined" by a three-judge district court, since the District Court's order, which not only declared that the ICC had failed to comply with the NEPA but also *directed* the ICC to perform certain acts, was an "injunction" within the meaning of § 1253, and since, moreover, such order restrained "the enforcement, operation or execution" of the ICC order within the meaning of 28 U. S. C. § 2325, and hence could have been issued only by a three-judge court. Pp. 306–309.

2. The District Court had jurisdiction to review the ICC's decision not to declare the increased rates unlawful, notwithstanding such decision was made in a general revenue proceeding. Pp. 310–319.

(a) There is no merit to the railroads' argument that the ICC's decision is just as much an interim decision as a decision not to *suspend* a particular rate pending investigation, and hence is unreviewable under *SCRAP I, supra.* Since the District Court did not enjoin collection of the rates so as to come within the rule barring courts from entering disruptive injunctions against collection of rates not finally declared unlawful by the ICC, the rule of *SCRAP I* is not applicable even if what the railroads say is true. P. 317.

(b) Nor is there any merit to the railroads' argument (1) that, treating the District Court's decision as a review of whether the record supported the ICC's decision not to suspend the rates as to recyclables, the District Court reviewed an issue not yet decided finally by the ICC in violation of the principles of finality

and exhaustion of remedies, and (2) that the District Court's conclusion that the rule against review of general revenue proceedings does not apply to NEPA cases is contrary to the decision in *SCRAP I* that the NEPA does not change pre-existing jurisdictional rules. Here the issue as to whether the ICC had adequately considered under the NEPA environmental factors in the general revenue proceeding, had already been finally decided by the ICC and the relief sought from and granted by the District Court could not have been obtained from the ICC in a subsequent proceeding under § 13 of the Interstate Commerce Act. While the interim nature of a general revenue proceeding may be relevant to the extent of the consideration of environmental factors required, its nature does not prevent review of the question, finally decided by the ICC, whether the environmental impact statement prepared for that proceeding is adequate. When agency consideration of environmental factors in connection with major "federal action" is complete, notions of finality and exhaustion do not bar judicial review of the adequacy of such consideration, even though other aspects of the rate increase are not ripe for review. Pp. 317–319.

3. The District Court erred in deciding that the oral hearing that the ICC held prior to its October 1972 order was an "existing agency review process" during which a final environmental impact statement should have been available. The NEPA provides that a formal impact statement "shall accompany the proposal through the existing agency review processes," and hence does not affect the time when the "statement" must be prepared, but simply provides what must be done with the "statement" once it is prepared. Under *this* provision the time at which the agency must prepare the final "statement" is the time at which it makes a recommendation or report on a *proposal* for federal action. Here, until the October 1972 report, the ICC had made no proposal, and hence the earliest time at which the *statute* required a statement was the time of the October 1972 report—some time after the oral hearing. Pp. 319-321.

4. The District Court also erred in deciding that the ICC should have "started over again" after it decided to propose a formal impact statement, even assuming that the ICC erred in failing to prepare a separate impact statement to accompany its October 1972 report or that the consideration given to environmental factors in that report was inadequate. To the extent that such decision is based on the court's belief that the March 1973 draft

impact statement had to be considered at a hearing, it is incorrect, since it appears that the consultation with environmentally expert agencies required by the NEPA occurred from the outset, that environmental issues pervaded the hearings held, and that all draft impact statements were circulated before the hearings, thus indicating that *procedurally* the NEPA was thoroughly complied with to the time of the October 1972 report. And to the extent that such decision is based on the court's belief that the ICC did not in good faith reconsider its October 1972 order in light of the impact statement, it is without support in the record, since the ICC (as it in fact proceeded to do) was in as good a position to correct a statutory error by integrating environmental factors into its reopened investigation and into its May 1973 decision, as it would have been if the October 1972 report had never been written. Pp. 321–322.

5. The District Court further erred in concluding that the final environmental impact statement was deficient. Pp. 322–328.

(a) As in most general revenue proceedings, the "action" taken by the ICC was in response to the railroads' claim of a financial crisis, and the inquiry was primarily into whether such a crisis—usually entitling the railroads to a general increase—existed, leaving *primarily* to more appropriate future proceedings the task of answering challenges to rates on individual commodities or categories thereof, the latter question—usually involved in a general revenue proceeding only to a limited extent—raising the most serious environmental issues, and the former question raising few such issues, none of which is claimed here to have been inadequately addressed in the impact statement. Pp. 322–324.

(b) There is no merit to the appellees' argument that the environmental consequences flowing from a facially neutral rate increase, which, when superimposed on an underlying rate structure, allegedly discriminates against recyclables, must be explored in an impact statement and can be explored only by analyzing the underlying rate structure; and that, moreover, the ICC has been tardy in complying with the NEPA, was required to analyze the underlying rate structure only once with a view toward environmental consequences, had plenty of time and cause to do so before its general revenue proceeding, and therefore should not have been permitted to terminate that proceeding without having done so. Such argument is not only contrary to the holding in *United States* v. *Louisiana,* 290 U. S. 70, giving the ICC wide discretion to decide what issues to address in a general revenue

proceeding and to postpone comprehensive consideration of discrimination claims, but it also loses force in view of the fact that the ICC had already begun an investigation of the underlying rate structure before commencing its investigation in the general revenue proceeding and had started to consider environmental issues in the former investigation before the District Court's decision. Thus, even if the NEPA were read to require the ICC to address comprehensively the underlying rate structure at least once before approving a facially neutral general rate increase, no purpose could have been served by ordering it to explore the discrimination question in the general revenue proceeding when it was already doing so in a more appropriate proceeding. Pp. 324–325.

(c) The District Court's decision to deem the "federal action" involved in the general revenue proceeding to include an implicit approval of the underlying rate structure was inaccurate and led it to an entirely unwarranted intrusion into an apparently sensible decision by the ICC to take much more limited "action" in that proceeding and to undertake the larger action in a *separate* proceeding better suited to the task. P. 326.

(d) In view of the scope of the "federal action" being taken by the ICC in the general revenue proceeding, the District Court was incorrect in holding that the final impact statement inadequately explored the underlying rate structure and the *extent* to which the use of recyclables will be affected by the rate structure. Pp. 326–328.

371 F. Supp. 1291, reversed.

White, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, Stewart, Marshall, Blackmun, and Rehnquist, JJ., joined, and in Parts I, II, and III of which Douglas, J., joined. Douglas, J., filed an opinion dissenting in part, *post*, p. 328. Powell, J., took no part in the consideration or decision of the cases.

Charles A. Horsky argued the cause for appellants in No. 73–1966. With him on the briefs were *Michael Boudin, Edward A. Kaier,* and *Albert B. Russ, Jr. Deputy Solicitor General Randolph* argued the cause for the United States et al. in No. 73–1971. On the briefs were *Solicitor General Bork, Assistant Attorney General Johnson, Fritz R. Kahn, Betty Jo Christian,* and *Charles H. White, Jr.*

John F. Hellegers argued the cause and filed a brief for appellees Students Challenging Regulatory Agency Procedures et al. in both cases. *Edward L. Merrigan* argued the cause and filed briefs for appellees National Association of Recycling Industries, Inc., et al. in both cases. *E. Bruce Butler* argued the cause for appellee Institute of Scrap Iron and Steel, Inc., in both cases. With him on the brief were *Thomas H. Boggs, Jr., George Blow, Howard Gould,* and *David Reichert.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The Nation's railroads, the United States, and the Interstate Commerce Commission (ICC) appeal from the judgment of a three-judge federal court which set aside an ICC order terminating a general revenue proceeding without declaring unlawful certain rate increases filed by the Nation's railroads with the ICC. The order directed the ICC to reopen the proceeding, prepare a better environmental impact statement under § 102 (2)(C) of the National Environmental Policy Act (NEPA), 83 Stat. 853, 42 U. S. C. § 4332 (2)(C), hold hearings, and reconsider, in light of the new impact statement, its determination not to declare the rate increases applicable to recyclables [1] unlawful.

The impact statement involved is that required by § 102 (2) of NEPA, 42 U. S. C. § 4332 (2), set out in the margin.[2] The judgment was based on the three-judge

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[1] The term recyclables will refer throughout this opinion to materials obtained from products which have already been put to one commercial use—for example, iron or steel obtained from a junked automobile.

[2] "[A]ll agencies of the Federal Government shall—

"(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the

court's view that the 150-printed-page impact statement prepared by the ICC in connection with the general revenue proceeding insufficiently considered certain environmental issues and thus failed to comply with the mandate of subsection (2)(C) of § 102 of NEPA; and that failure of the ICC to hold hearings after preparing a draft of the statement violated the command of the statute that the statement "accompany the proposal

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environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

"(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality . . . , which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes . . . ."

through the existing agency review processes." Because we believe that the District Court erred in several respects, we reverse.

I

This lawsuit has a lengthy history, a brief summary of which is necessary to an understanding of the issues presented by this appeal. In December 1971, citing sharply increasing costs and decreasing or negative profits, substantially all of the Nation's railroads collectively proposed to file tariffs increasing their freight rates by 2.5% across the board. The "surcharge" was stated to be temporary and was to be followed by a filing for larger, somewhat selective rate increases. Finding that the railroads had a critical and immediate need for revenue, the ICC declined to exercise its power to suspend proposed rate increases under 24 Stat. 384, as amended, 49 U. S. C. § 15 (7), and the surcharge became effective on February 5, 1972. On March 17, 1972, the railroads filed their selective-increase proposal, which would result in an average increase across the board of 4.1% over the rates antedating the surcharge—these new selective increases to become effective on May 1, 1972. Meanwhile, the ICC had directed the railroads to file an environmental impact statement with respect to the rate increases and to serve it on interested parties. This was done on January 3, 1972, and those served included appellee SCRAP. Numerous comments were received in response to this statement. On April 24, 1972, the ICC suspended the effectiveness of the selective increases for the maximum allowable seven-month period under 49 U. S. C. § 15 (7), until November 30, 1972, pending its investigation, styled *Ex parte 281,* into their lawfulness. On March 6, 1972, the ICC served a brief draft environmental impact statement of its own on all parties to *Ex parte 281,* including appellees and the Council on Environmental Quality

(CEQ), the Environmental Protection Agency (EPA), and the Department of Transportation. The statement discussed environmental consequences of rate increases with respect to recyclables in general terms and concluded that the ICC had no basis yet to believe that the environment would be substantially affected thereby.

Thereafter, while the selective rates were suspended but the surcharge was being collected, a group of law students—(SCRAP)—and other environmental groups filed the instant lawsuit alleging that the ICC had made a decision not to suspend the 2.5% surcharge pending its investigation—which decision would have a substantial effect on the environment—without preparing an environmental impact statement or considering environmental issues, as required by the NEPA. Appellees claimed that the pre-existing rate structure discriminated against recyclables and in favor of virgin materials, and that the across-the-board rate surcharge exacerbated this situation with the unfortunate consequence to the environment that use of recyclable materials would be inhibited and use of virgin materials encouraged. The complaint sought to compel the ICC to suspend the rate surcharge and to enjoin the railroads from collecting it.

A three-judge court was therefore convened under 28 U. S. C. § 2325, which has since been repealed. Relief was granted. On direct appeal under 28 U. S. C. § 1253, this Court reversed, holding that under the doctrine of *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658 (1963), 49 U. S. C. § 15 (7) lodges in the ICC *exclusive* power to suspend rate increases pending final determination of their lawfulness. *United States* v. *SCRAP*, 412 U. S. 669 (1973) (*SCRAP I*).

Meanwhile, on October 4, 1972, the ICC issued a final report dated September 27, 1972, declining, in the main,

to declare unlawful the selective rate increases, and terminating the suspension order previously entered. The surcharge was canceled, those increases having been subsumed in the selective increases. The report, which was prepared after extensive written responses to the draft environmental impact statement had been submitted by various Government and nongovernment agencies and after oral hearings had been held, covers 92 printed pages, 17 of which deal with the question whether the railroads were in need of additional revenue; 15 of which deal with general environmental consequences which might flow from the increases; and 36 of which deal with the environmental consequences to flow from specific increases in rates on specific recyclable materials.

The report noted that the "principal issue" in a general revenue proceeding is whether the railroads are in need of additional revenue; and concluded that the railroads had demonstrated overwhelmingly that they were. It then stated that there were two possible adverse affects on the environment which might flow from failure to declare the increases unlawful. First, the increase in rail rates might divert traffic to trucks, which are allegedly heavier polluters than trains. Second, the increase in rates for recyclables might discourage their use resulting in increased solid waste—disposal of which creates environmental problems—and an accelerated depletion of the country's natural resources. The danger of diversion to truck traffic was considered insubstantial for several reasons, among which were the fact that truck rates had increased due to similar increases in costs and the fact that the rate increases sought by the railroads were permissive and would not be used with respect to commodities which would be diverted to trucks. Moreover, any danger of diversion was plainly outweighed by

the fact that the railroads needed money and would eventually go out of business without the increases.[3]

With respect to recyclables, the report emphasized that time is of the essence in general revenue proceedings in light of the claim of need by the railroads for immediate revenue and that their entitlement to the overall increase usually follows from a showing of such need. The consideration of other factors is therefore necessarily abbreviated and their further analysis is postponed to specialized proceedings more appropriate for their in-depth consideration, such as proceedings incident to individual complaints filed under 49 U. S. C. § 13 (1) asserting that a particular rate or group of rates, such as rates on recyclables, are unjust and unreasonable, too high in relation to other rates, or otherwise illegal under the applicable law. Indeed, the report pointed out that the ICC had itself begun *Ex parte 270,* a separate comprehensive investigation into the entire rate structure and was there focusing on the question whether the rate pattern interfered with the Government's environmental program. The report noted that there were limits on the extent to which the applicable provisions of the Interstate Commerce Act would permit special rates for recyclables or allow the ICC to require the railroads to subsidize their transportation. Applying standard ratemaking criteria, the report rejected, on the basis of the information then before it, the claim that the underlying rate structure discriminated against recyclables. It also concluded that the use of recyclables, particularly ferrous scrap, was not responsive to rate increases—particularly when accompanied by similiar rate increases applicable to competing virgin materials. The ICC ordered a 3% ceiling on increases with respect to some, but not all,[4] recyclables,

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[3] None of the appellees nor the court below fault the ICC's analysis of this problem. It has, therefore, dropped out of the case.

[4] The increases with respect to ferrous scrap were not held down.

and concluded that there was no reason for finally determining in the context of a general revenue proceeding whether the rate structure, with or without the scheduled increases, was unjust and unreasonable or illegally discriminatory. The report also stated that having given extensive consideration to environmental factors, *SCRAP I,* 412 U. S., at 683 n. 11, the ICC would not file a separate, formal environmental impact statement under § 102 (2)(C) of the NEPA.

The report indicated that the increases on nonrecyclables would become effective on 15 days' notice from the railroads and that the increases on recyclables would become effective on 35 days' notice. The increased period for recyclables was set so that interested parties would have the opportunity to comment on the report. The ICC issued an order to that effect on October 4, 1972.

In response to comments which were filed by several parties, the ICC reopened *Ex parte 281* on November 7, 1972, to reconsider the environmental effects of the new rates on recyclables in light of a fuller written consideration of these issues. The new rates on recyclables were suspended with the consent of the railroads for an additional seven months until June 10, 1973.

On March 13, 1973, the ICC served an expanded draft environmental impact statement. Comments were thereafter received from the EPA, the CEQ, the Department of Transportation, all of the appellees herein, and others. On May 1, 1973, the ICC issued a final impact statement covering 150 printed pages, with an additional 21-page bibliography. The main difference between the October 4, 1972, report and the impact statement was that the latter substantially expanded on the discussion of the underlying rate structure and the effect of rate increases on each of the recycling industries. With respect to the underlying rate structure, the conclusion, in the light of

the then-available information and under the controlling ratemaking principles, was that it did not discriminate. The statement examined factors affecting the price of each recyclable commodity and factors other than price affecting the demand for such commodities. It was again concluded that freight rate increases affect such demand only negligibly. The ICC re-emphasized that in general revenue proceedings analysis might fall short of what might transpire in other kinds of proceedings under 49 U. S. C. § 13 or in the Commission's own *Ex parte 270,* to which attention was again called.[5] The conclusion of the ICC was that its order of October 4 had been correct; *Ex parte 281* was therefore finally terminated without declaring any of the proposed rates unlawful except as previously provided in the October 4 order.[6]

On May 30, 1973, 11 days before the increased rates on recyclables were to become effective, appellees SCRAP and EDF filed a motion—apparently in the context of their earlier filed complaint against the surcharge—for a preliminary injunction restraining the implementation of the freight rate increases with respect to recyclables. On June 7, 1973, the three-judge court entered an order temporarily enjoining the railroads from collecting the rates, declaring, without any explanation whatever, that

[5] Following the form implied by the statute, the statement included separate sections for each of the questions set forth in 42 U. S. C. §§ 4332 (2)(C)(i)–(v). The statement concluded that the ICC's action would have no long-term or irreversible effects. It also concluded that, as an alternative, Congress might choose to subsidize recyclables in ways which did not place the burden of subsidies on the railroads or shippers of virgin materials.

[6] Commissioner Brown felt that the statement gave ample consideration to environmental matters but that the Commission should have decided, on the basis of the statement, to declare all increases on recyclables unlawful. Commissioner Deason also dissented.

such order would "not substantially harm the railroads."[7] The railroads and the ICC filed appeals. On June 8, 1973, THE CHIEF JUSTICE stayed the order upon the railroads' motion. On June 25, 1973, the full Court declined to vacate the stay on motion by appellees SCRAP and EDF, 413 U. S. 917. The increases in recyclables were then placed into effect and continue in effect today. On November 19, 1973, this Court vacated the preliminary injunction and remanded the cases for reconsideration in light of *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade,* 412 U. S. 800 (1973). 414 U. S. 1035.[8]

Meanwhile, appellees had filed motions for summary judgment before the three-judge court seeking (a) a declaration that the ICC's orders declining to declare the rate increases unlawful were themselves unlawful because the environmental impact statement was inadequate, and an order directing the ICC to reconsider its decision in light of a better impact statement; and (b) a permanent injunction restraining collection of the rate increases on recyclables by the railroads. Over a dissent,

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[7] Under the Interstate Commerce Act, increased rates which are suspended will never be collected for the period of the suspension. Increased rates which are collected are subject to refund if later determined to be unlawful. 49 U. S. C. §§ 15 (7), 13.

[8] In *Wichita,* the ICC had approved certain increased charges proposed by the railroad. Finding the reasons given by the ICC for its approval to be inadequate to explain a departure from a longstanding rule which would have invalidated the charges, the District Court vacated the ICC's order, remanded for further proceedings, and enjoined the collection of the increased charges pending such proceedings. Seven Justices of this Court voted to reverse the granting of the injunctive relief, four on the basis of equitable considerations related to the doctrine of primary jurisdiction and three on the ground that such relief is barred by the doctrine of *Arrow Transportation Co.* v. *Southern R. Co.,* 372 U. S. 658 (1963), see discussion, *supra,* at 298, absent a declaration of unlawfulness by the ICC.

the District Court vacated the order of the ICC terminating *Ex parte 281* without declaring the increases unlawful and ordered it to prepare a new impact statement, hold hearings on the statement, and reconsider its decision not to find the rates unlawful. It declined to enjoin collection of the rates in the interim.

The court first rejected the applicability of the line of lower-court cases, beginning with *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487 (ED Va. 1935), holding decisions of the ICC not to declare proposed increased rates unlawful *in general revenue proceedings* to be unreviewable. The court noted that this Court had divided evenly in 400 U. S. 73 (1970) in affirming *Atlantic City Electric Co.* v. *United States,* 306 F. Supp. 338 (SDNY 1969), and *Alabama Power Co.* v. *United States,* 316 F. Supp. 337 (DC 1970), and that the rule against reviewability of general revenue proceedings was therefore of questionable vitality—especially where the issue presented for review is not the reasonableness of a particular rate but the general question whether the railroads' revenue needs justify environmental costs. However, the court rested its holding on the ground that this is a NEPA case. It said that unlike shippers, who may properly be made to exhaust their remedies under 49 U. S. C. §§ 13 and 15 by seeking refunds, environmental groups *may* not have such remedies. Moreover, environmental issues are better considered at a single general revenue proceeding than at countless individual § 13 proceedings and their resolution must be reviewed promptly in order to avoid irreparable damage to the environment. Environmental degradation occurring while a § 13 proceeding is pending is irreparable, unlike injury to shippers which can be cured by reparations.

The court then found that the ICC had failed to comply with NEPA in two respects. First, no oral hearing

had been held after circulation of the second draft impact statement on March 13, 1973, and before the preparation of the final impact statement. The court conceded that NEPA does not require the holding of hearings which the agency does not otherwise hold; and that the ICC is not required to hold hearings in a general revenue proceeding, *United States* v. *Florida East Coast R. Co.,* 410 U. S. 224 (1973). However, it ruled that since the ICC held an oral hearing before adopting its October 4, 1972, report, such a hearing was therefore presumptively an "existing agency review process" and one should have been held before adopting the final environmental impact statement on May 1, 1973. Moreover, the ICC had simply reconsidered its October 4, 1972, decision in light of the impact statement, instead of starting all over again from the beginning. In order to start over again, it had to consider its impact statement at an oral hearing. Second, the court concluded that the report did not give "good faith" consideration to environmental factors. The court viewed the tone of the impact statement as "combative, defensive and advocatory"; it criticized the ICC for refusing to find in NEPA a congressional expression that it should invalidate rates otherwise just and reasonable on the ground that the rates would negatively affect the environment; and it criticized the ICC for refusing to change its analysis even after other Government agencies commented unfavorably on the statement. It held the statement deficient in two respects. First, it held that the statement did not sufficiently analyze the underlying rate structure and that the ICC had instead considered *only* the impact of the increase involved in *Ex parte 281*. Second, the ICC should have more extensively explored the quantitative response of recycling businesses to freight rates by conducting a "rigorous price sensitivity study" and by analyzing whether industry

would develop new technology to utilize secondary materials if encouraged to do so by lower transportation costs.

The court then vacated the orders of the ICC, which had terminated *Ex parte 281* without declaring the rate increases unlawful, and ordered the ICC to prepare a new impact statement analyzing the underlying rate structure, the elasticity of demand for recyclables, and the probability of encouraging new technology in the use of scrap. It ordered the ICC to hold hearings after circulating the new impact statement and to fully consider anew in light of the new statement and the hearing whether the increased rates should be declared unlawful. The court declined to enjoin the collection of the rates, while claiming that it could have, and probably should have done so, notwithstanding *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade, supra.*[9]

The railroads appeal, claiming that the District Court had no jurisdiction over this case, and that the ICC had, in any event, fully complied with NEPA. The ICC and the United States appeal, claiming only that the ICC has fully complied with NEPA. We noted probable jurisdiction in both cases. 419 U. S. 822 (1974).

II

At the outset we face a challenge to our appellate jurisdiction. Under 28 U. S. C. § 2325, now repealed,[10] a

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[9] In light of the fact that the court remanded to the ICC for further proceedings as to the lawfulness of the increase, injunctive relief was precluded by *SCRAP I,* which held that the district courts are without power to suspend rates *pending* a determination of lawfulness *by the ICC.*

[10] After February 28, 1975, review of ICC orders other than orders for the payment of money or in connection with suits to *enforce* ICC orders will be by courts of appeals. Pub. L. 93–584, § 5, 88 Stat. 1917.

three-judge court was required to grant "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission." Title 28 U. S. C. § 1253 gives us jurisdiction to determine appeals from "an order granting or denying . . . an . . . injunction in any civil action . . . required . . . to be heard and determined by a district court of three judges." All parties agree that the action below was a civil action required to be heard and determined by a three-judge court, for appellees sought an injunction restraining collection of the increased rates which the ICC had refused to declare unlawful.

The question under the statutory language is whether the order being appealed from is an "injunction" within the meaning of that word as used in § 1253. Appellees claim that since the court below declined to restrain collection of the increased rates, its order was not an injunction but a declaratory judgment not appealable under § 1253, *e. g., Mitchell* v. *Donovan,* 398 U. S. 427 (1970); *Gunn* v. *University Committee,* 399 U. S. 383 (1970). But the District Court's order not only declared that the ICC had failed to comply with NEPA, it also *directed* the ICC to perform certain acts. The order was plainly cast in injunctive terms. The order "directs" the ICC to reopen *Ex parte 281* and to conduct further proceedings which "must" include preparation of an impact statement dealing with enumerated issues. In declining to restrain collection of the rates, the court said it was declining to grant "to plaintiffs *additional* injunctive relief" (emphasis added). Were the order of the District Court left undisturbed, the ICC would hardly be free to decline to prepare a new impact statement or to conduct further proceedings. The order would have as coercive an effect on the ICC, its members, and its

staff, as could any order of a district court in a proceeding to review an order of the ICC. This is enough to bring the order of the court below within the meaning of the word "injunction," as used in § 1253.[11]

It is also apparent that the District Court's injunction restrained "the enforcement, operation or execution" of the order of the ICC within the meaning of § 2325 and could therefore have been issued only by a three-judge court. The ICC order of October 4, 1972, reaffirmed on May 1, 1973, declined to declare the general rate increase unlawful, or with minor exceptions to interfere with its collection. That order terminated *Ex parte 281*. The District Court, although it did not enjoin collection of the increased rates, emasculated the ICC order in major respects. Contrary to the order of the ICC, *Ex parte 281* was to be reopened and further proceedings had with respect to the legality of the increased rates. Contrary to the ICC order, the environmental impact statement of the ICC was declared insufficient and a new statement ordered prepared. The District Court's order, as we

[11] Appellees argue that the order of the court below is not an injunction because it is not enforceable by contempt. They cite nothing to support this claim and we reject it. The court ordered the ICC, *inter alia,* to prepare another impact statement. Were the ICC to refuse to do so, the court would have no way of enforcing its order other than contempt, and it could not permit its order to be ignored. Moreover, we have repeatedly exercised jurisdiction under § 1253 over appeals from orders, unlike the one entered in this case, not cast in injunctive language but which by their terms simply "set aside" or declined to "set aside" orders of the ICC. *Chicago, M., St. P. & P. R. Co.* v. *United States,* 366 U. S. 745, 746 (1961); *Ayrshire Collieries Corp.* v. *United States,* 331 U. S. 132, 141 (1947); *Electronic Industries Assn.* v. *United States,* 310 F. Supp. 1286 (DC 1970), aff'd, 401 U. S. 967 (1971). Indeed, in *Electronic Industries,* we requested separate briefs on the question whether there was a jurisdictional difference in ICC cases between "injunctions" and orders "setting aside" ICC determinations and concluded that we had jurisdiction over the appeal.

have said, was in injunctive terms; and it is not tenable to assert that it did not interfere with the operative effect of the ICC order of May 1, 1973.[12]

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[12] The soundness of this conclusion appears even more clearly from the legislative history of 28 U. S. C. § 2325. Before 1948, review of ICC orders was governed by the Urgent Deficiencies Appropriations Act of 1913. 38 Stat. 220. It provided in part:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, *or setting aside,* in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be *heard and determined by three judges,* of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application . . . and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply." (Emphasis added.)

As can be seen, the three-judge requirement applied to orders "setting aside" an order of the ICC without in terms requiring as a prerequisite that the enforcement, operation, or execution of the order be restrained. In 1948, as part of the revision and codification of Title 28 and its enactment into positive law, the Urgent Deficiencies Appropriations Act was replaced by 28 U. S. C. §§ 2321–2325. The reviser's notes, which are authoritative in the construction of the 1948 revision, *United States* v. *National City Lines,* 337 U. S. 78, 81–82 (1949); *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368, 376 n. 12 (1949), state, with respect to 28 U. S. C. § 2325, simply that it derives from "title 28, U. S. C., 1940 ed., § 47 (Oct. 22, 1913, ch. 32, 38 Stat. 220)," which is the Urgent Deficiencies Appropriations Act. Under the longstanding principle of *United States* v. *Ryder,* 110 U. S. 729, 740 (1884), it "will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed." No such intent is expressed here, and in our view 28 U. S. C. § 2325 required three judges for entering all orders for which they were required under the Urgent Deficiencies Appropriations Act, which includes orders setting aside ICC orders. In other words, an order "setting

III

The railroads, but not the United States or the ICC, argue that the District Court had no jurisdiction to review the decision of the ICC, made in a general revenue proceeding, not to declare the increased rates unlawful. The argument is supported by a long line of District Court decisions; see, *e. g., Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487 (ED Va. 1935); *Koppers Co.* v. *United States,* 132 F. Supp. 159 (WD Pa. 1955); *Florida Citrus Comm'n* v. *United States,* 144 F. Supp. 517 (ND Fla. 1956), aff'd *per curiam,* 352 U. S. 1021 (1957); *Atlantic City Electric Co.* v. *United States,* 306 F. Supp. 338 (SDNY 1969), and *Alabama Power Co.* v. *United States,* 316 F. Supp. 337 (DC 1969), both aff'd by an equally divided Court, 400 U. S. 73 (1970); *Electronic Industries Assn.* v. *United States,* 310 F. Supp. 1286 (DC 1970), aff'd, 401 U. S. 967 (1971); and its correctness in its application to this case turns in part on an understanding of just what a general revenue proceeding is.

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aside" an ICC order inevitably restrains its "enforcement, operation or execution," within the meaning of § 2325, now repealed.

At oral argument, SCRAP contended that under *United States* v. *Griffin,* 303 U. S. 226, 233 (1938), the Urgent Deficiencies Appropriations Act did not permit review "to set aside every kind of order issued by the Commission" and in particular did not permit review of an order such as the one set aside in this case which simply involved a refusal by the Commission to change the existing status. *Id.,* at 234. Insofar as it rested on the negative-order doctrine of *Procter & Gamble Co.* v. *United States,* 225 U. S. 282 (1912), *Griffin* is no longer the law. *United States* v. *Jones,* 336 U. S. 641, 647 (1949); *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 145 (1939). Insofar as *Griffin* was based on the notion that the Urgent Deficiencies Appropriations Act does not apply to challenges to ICC orders entered under the Railway Mail Pay Act, which are in essence suits for money, see *United States* v. *ICC,* 337 U. S. 426, 442 (1949), against the United States, it has no application to this case.

A

Under the Interstate Commerce Act, the initiative in setting rates remains with the railroads. See *SCRAP I,* 412 U. S., at 672. The ICC has the power, after exercise of this initiative by the railroads, and after an investigation, either upon its own initiative or upon complaint by an interested party, to declare a rate unlawful if it finds that the rate is unjust, unreasonable, preferential, discriminatory, or otherwise in violation of the Act. 49 U. S. C. §§ 13 and 15. The ICC, and only the ICC, *SCRAP I, supra,* also has the power to suspend a new rate for up to seven months pending its determination of lawfulness. 49 U. S. C. § 15 (7).[13] Where the increase initiated by a railroad relates only to a single commodity, and where the ICC conducts an investigation, the investigation will be a thorough inquiry into the justness and reasonableness of that particular rate. However, the reason for increasing a particular rate may be a reason, such as across-the-board cost increases, which dictates an increase in virtually all rates by a large number of railroads. In those cases, the railroads have, in the exercise of their initiative, proposed across-the-board increases applicable to all or nearly all of their rates. This Court in *New England Divisions Case,* 261 U. S. 184, 196–198 (1923), recognizing the practical problems which the ICC faced in such a situation, permitted it to find the new rates lawful after taking proof relating not to any particular rate but to the reasonableness of the in-

[13] Failure to suspend does not always do irreparable harm to shippers who pay the increased rates. Unless the ICC has previously exercised its ancillary power to *set* rates, or prescribe their maxima or minima, *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.,* 284 U. S. 370 (1932), a shipper may always obtain a refund if he establishes that rates collected after refusal to suspend were unlawful. 49 U. S. C. § 13 (1).

creases in general. In *United States* v. *Louisiana,* 290 U. S. 70, 76–78 (1933), this Court approved of an ICC procedure whereby it permitted an across-the-board rate increase to become effective after investigation—by declining to declare it unlawful, and increasing previously set maxima where necessary—*without* a finding that each new rate was lawful and without itself prescribing any of the new rates.[14] This Court, after pointing out the practical impossibility of inquiring into the reasonableness of each rate, stated:

> "[I]n performing the duty broadly to increase carrier revenue, it is enough if the Commission, *in the first instance,* makes such inquiry and investigation as would enable it to say that the prescribed increases when applied to members of the group will *generally* not exceed a reasonable maximum." *Id.,* at 76–77. (Emphasis added.)

The Court went on to say:

> "The extent of this inquiry and the detail of investigation can not be marked by this Court with certainty. The size of the group dealt with, the nature of the traffic, the urgency of the relief demanded, these and other factors should condition the Commission's procedure in each case. But with proper procedure, the ultimate finding that the rates as generally applied are reasonable, supported by evidence and accompanied by suitable reservation of the rights of all interested parties to secure modification of any particular rate which, when challenged, is found to be unjust or unreasonable, complies with the statute. The requirement that increase of rates

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[14] To prescribe the new rates would be to cut off refund claims by injured shippers. *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co., supra.*

> by Commission action is to be in the exercise of its power to prescribe reasonable rates is thus observed but in conformity to the administrative necessities which the proviso contemplates." *Id.,* at 77.

Proceedings, such as that described in *United States* v. *Louisiana,* in which the ICC has been called upon to decide whether to prevent a substantially across-the-board rate increase, have become known as general revenue proceedings. The ICC's inquiry has tended to focus on whether the railroads are really in need of increased revenues and has tended to leave for individual rate or refund proceedings under 49 U. S. C. §§ 13 and 15 the problem of determining just which commodities on which runs should bear the increased burden, and to what extent. The ICC is careful to leave such refund claims open by including in the general revenue order a statement such as the one included here:

> "Thus, we do not attempt to determine whether the particular rates which result from the increases are maximum reasonable rates, nor does the order constitute a prescription of rates within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.,* 284 U. S. 370. If individual rates or groups of rates are believed to be unjust and unreasonable, a shipper or other interested persons has [*sic*] an administrative remedy available in sections 13 and 15 of the Interstate Commerce Act, 49 U. S. C. §§ 13 and 15." *Ex parte No. 281, Increased Freight Rates and Charges, 1972 (Environmental Matters),* 346 I. C. C. 88, 103 (1973).

Of course, the ICC has the power in a general revenue proceeding to declare the new rates unlawful and disapprove the increase. It could also, if it chose, declare some of the rates discriminatory, unreasonable, or otherwise unlawful; and it could itself affirmatively approve

all or some of the rates as just and reasonable. But under the *Louisiana* case, the general rule has been that the ICC may confine its attention in general revenue proceedings almost entirely to the need for revenue and to any other factors that relate to the legality of the general increase as a whole; and it follows *a fortiori* that if attention is given to other issues, that attention may be of a limited nature.

The instant proceeding, in which substantially all of this country's railroads sought increases in substantially all of their rates based upon alleged cost increases which placed them in a financial crisis, plainly qualifies as a general revenue proceeding. Environmental issues aside, the ICC, true to form, devoted most of its investigation to the issue of the railroads' revenue needs, but did inquire to some extent into the reasonableness of the increases as applied to certain broad categories of charges.

In *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487 (ED Va. 1935), shippers of coal sought review in a three-judge court of the decision of the ICC in a general revenue proceeding not to declare the proposed increases unlawful insofar as they applied to coal. The claim was that the increased rates on coal were unjust and unreasonable. The court declined to set aside the rate increases. It pointed out that the ICC's order was permissive only—it simply declined to prevent the rate increases.[15] It then stated that the ICC had not yet decided whether the increased rates on *coal specifically* were just and reasonable but had decided only that the railroad's revenue needs rendered the *general* increase reasonable; and that the plaintiffs had a procedure available to them—a complaint under § 13 seeking a

[15] Insofar as the court's decision rested on the fact that the ICC's decision was a negative one, it is inconsistent with *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125 (1939).

refund and a declaration of unjustness or unreasonableness from the ICC—in which it could cause the ICC to decide whether the new coal rates were just and reasonable. As the ICC had not yet addressed the question presented by the plaintiffs to the court, the court declined to decide it.[16] The court also held that the decision of the ICC was in essence one not to *suspend* the rate increases and that the courts had no power to suspend if the ICC did not do so. *Board of Railroad Comm'rs* v. *Great Northern R. Co.,* 281 U. S. 412 (1930). See also *SCRAP I, supra.*

Since the *Algoma* decision, shippers seeking to undo, with respect to particular commodities, a decision by the ICC in a general revenue proceeding not to declare rate increases unlawful, have been uniformly unsuccessful. In those cases in which the shipper claimed only that the increase on a particular commodity was unjust or unreasonable—without addressing the question whether a general increase of some sort was justified—the courts have declined to rule on the issue posed for the reason that the ICC had not yet addressed it. *Koppers Co.* v. *United States,* 132 F. Supp. 159 (WD Pa. 1955); *Florida Citrus Comm'n* v. *United States,* 144 F. Supp. 517 (ND Fla. 1956); *Electronic Industries Assn.* v. *United States,* 310 F. Supp. 1286 (DC 1970). In those cases in which shippers have attacked the ICC's decision that rate in-

[16] The court declined to term its holding, in this regard, jurisdictional. It also said that it would review a claim that the ICC's order in a general revenue proceeding deprived a plaintiff of an "independent legal right." 11 F. Supp., at 496. Moreover, the court did address on the merits the issue which the ICC *did* decide—namely whether the evidence supported the need for a *general* rate increase. The ICC claims that courts do have jurisdiction to review its decision in this respect notwithstanding the plaintiff's failure previously to seek relief under § 13. We do not decide whether the ICC is correct. See n. 18, *infra.*

creases *in general* were justified, the courts, going beyond the *Algoma* decision, have declined review on the ground that the shipper had not exhausted his administrative remedies under §§ 13 and 15. *Atlantic City Electric Co.* v. *United States,* 306 F. Supp. 338 (SDNY 1969), and *Alabama Power Co.* v. *United States,* 316 F. Supp. 337 (DC 1969), both aff'd by an equally divided Court, 400 U. S. 73 (1970).

B

The railroads claim that the decision of the court below violates the rule of the cases discussed above that decisions by the ICC in general revenue proceedings are unreviewable. First, the railroads argue that the decision in a general revenue proceeding not to *declare rates unlawful* is just as much an interim decision—since it does not finally decide the lawfulness of any particular rate—as is a decision not to *suspend* a particular rate pending investigation. See *Algoma Coal & Coke Co.* v. *United States, supra.* Therefore, review of that decision is squarely banned by the Court's holding in *SCRAP I* that the courts have no power to suspend, or to overturn the ICC's decision not to suspend, rates pending the ICC's final determination of their lawfulness. Second, treating the decision of the court below as though it were a substantive review of the ICC's order—addressed to the question whether the record supported the ICC's decision not to suspend the rates as to recyclables—the railroads contend that the court below reviewed an issue not yet decided finally by the ICC in violation of settled principles of finality and exhaustion of administrative remedies.[17] More generally,

[17] The railroads contend that environmental groups may file complaints under § 13 challenging the justness and reasonableness of rates or groups of rates. The court below tentatively ruled otherwise. In light of our disposition of the issue dealt with in this part, we need not decide which is correct.

the railroads attack the conclusion of the District Court that the rule against review of general revenue proceedings does not apply in "NEPA cases" as being squarely contrary to this Court's decision in *SCRAP I* that NEPA does not effect a change in pre-existing jurisdictional rules. We disagree with each of these arguments.

The railroads' first argument fails because the court below did not enjoin collection of the rates. The rule of *Arrow Transportation Co.* v. *Southern R. Co.,* 372 U. S. 658 (1963), and *SCRAP I* is one barring courts from entering disruptive injunctions against collection of rates not finally declared lawful or unlawful by the ICC. No such injunction is involved here. Thus even if a decision not to declare rates unlawful in a general revenue proceeding is no more final for purposes of the rule of *SCRAP I* than a decision not to suspend an individual rate pending investigation, the rule of *SCRAP I* is not applicable here.

The railroads' second argument fails because, unlike the issue of the reasonableness of a particular rate, and arguably unlike the issue of the reasonableness of a general increase,[18] the issue addressed by the court below had

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[18] The position of the ICC seems to be that its decision that a *general* rate increase is justified by reason of revenue need is a final decision ripe for immediate review and *Algoma Coal & Coke Co.* v. *United States, supra,* would seem to support it. The railroads claim that such a decision is unreviewable absent exhaustion of § 13 remedies and they are supported in this contention by the lower court decisions in *Atlantic City Electric Co.* v. *United States,* 306 F. Supp. 338 (SDNY 1969), and *Alabama Power Co.* v. *United States,* 316 F. Supp. 337 (DC 1969), both aff'd by an equally divided Court, 400 U. S. 73 (1970). We need not resolve this issue.

Part of NEPA provides that "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter," 42 U. S. C. § 4332 (1); and one of the policies of the chapter is to "approach the maximum attainable recycling of depletable resources." The District Court expressly declined to review the question whether the ICC

already been finally decided by the ICC and the relief sought from and granted by the court below could not have been obtained from the ICC in a subsequent § 13 proceeding. The issue decided by the District Court was whether under NEPA the ICC had given adequate consideration to environmental factors in the general revenue proceeding. When the ICC terminated the general revenue proceeding, the one thing which it must certainly have finally decided was that it need give no further *consideration* to environmental factors *in that proceeding;* and no relief of the type sought from the District Court—*i. e.,* further consideration of environmental matters by the agency in that proceeding—could thereafter be obtained from the agency. Whatever issues would remain open at a § 13 proceeding, one which would not remain open—no matter who filed the complaint—is whether or not sufficient consideration had been given to environmental factors at the general revenue proceeding. Of course, the ICC would give attention in the § 13 proceeding to whatever environmental factors it felt NEPA required at *that* proceeding.

Although the railroads claim that a general revenue proceeding is an interim proceeding—the final one being a § 13 proceeding at which particular rates are adjudicated just and reasonable—for ratemaking purposes, they do not claim that it has a similar status for NEPA purposes. All parties now agree that a general revenue proceeding is itself a "major federal action," independent of any later adjudication of the reasonableness of particular rates, requiring its own final environmental

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ultimately "gave insufficient weight to this environmental value" in reaching its conclusion that the general increase was justified. Therefore, this appeal does not involve reviewability of those substantive issues, including environmental issues, decided by the ICC at the general revenue proceeding.

impact statement so long as the proceeding has a substantial effect on the environment. This conclusion is clearly correct. Thus, whatever consideration of environmental matters is necessary or proper at the general revenue proceeding is over and done with when that proceeding terminates. The interim nature of a general revenue proceeding may be relevant to the question of the extent of the consideration of environmental factors required, but its nature does not prevent review of the question, finally decided by the ICC, whether the environmental impact statement prepared for that proceeding is adequate.

Our holding here is in no way inconsistent with our conclusion in *SCRAP I* that NEPA does not repeal by implication any other statute. We do not hold that NEPA supplies the courts with otherwise nonexistent power to prevent collection of rates; and we do not hold that NEPA permits review of the question of the justness or reasonableness of rate increases, either general or specific, at any earlier time than would otherwise have been permissible. NEPA does create a discrete procedural obligation on Government agencies to give written consideration of environmental issues in connection with certain major federal actions and a right of action in adversely affected parties to enforce that obligation. When agency or departmental consideration of environmental factors in connection with that "federal action" is complete, notions of finality and exhaustion do not stand in the way of judicial review of the adequacy of such consideration, even though other aspects of the rate increase are not ripe for review.

IV

We agree with appellants that the District Court erred in deciding that the oral hearing which the ICC chose to

hold prior to its October 4, 1972, order was an "existing agency review process" during which a final draft environmental impact statement (*i. e.,* the one circulated in March 1973) should have been available and that it also erred in deciding that the ICC should have "started over again" after it decided to prepare a formal impact statement.

NEPA provides that "such statement . . . shall accompany *the proposal* through the existing agency review processes" (emphasis added). This sentence does not, contrary to the District Court opinion, affect the time when the "statement" must be prepared. It simply says what must be done with the "statement" once it is prepared—it must accompany the "proposal." The "statement" referred to is the one required to be included "in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment" and is apparently the final impact statement, for no other kind of statement is mentioned in the statute. Under *this* sentence of the statute, the time at which the agency must prepare the final "statement" is the time at which it makes a recommendation or report on a *proposal* for federal action. Where an agency initiates federal action by publishing a proposal and then holding hearings on the proposal, the statute would appear to require an impact statement to be included in the proposal and to be considered at the hearing. Here, however, until the October 4, 1972, report, the ICC had made no proposal, recommendation, or report. The only proposal was the proposed new rates filed by the railroads.[19] Thus, the earliest time at which the *statute* required a statement was the time

[19] The ICC did require the railroads to circulate a draft impact statement shortly after its proposal was made.

of the ICC's report of October 4, 1972—some time after the oral hearing.[20]

The statute also requires that agencies consult with other environmentally expert agencies "prior to making any detailed statement"; and CEQ guidelines provide:

> "To the fullest extent possible, all . . . hearings [on proposed agency action] shall include consideration of the environmental aspects of the proposed action. . . . Agencies should make *any* draft environmental [impact] statements to be issued available to the public at least fifteen (15) days prior to the time of such hearings." 40 CFR § 1500.7 (d). (Emphasis added.)

Such consultation occurred here from the outset; environmental issues pervaded the hearings held—both oral and written; and all draft impact statements in existence were circulated before the hearings. *Procedurally,* NEPA was thus thoroughly complied with through October 4, 1972.

Assuming that the ICC erred in failing to prepare a separate formal environmental impact statement to accompany its October 4, 1972, report or that the consideration given to environmental factors in that report was inadequate, the ICC need *not* have "started over again." To the extent that the District Court's conclusion to the contrary is based on its belief that the draft statement of March 1973 had to be considered at a

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[20] To the extent to which *Calvert Cliffs' Coordinating Committee* v. *AEC,* 146 U. S. App. D. C. 33, 449 F. 2d 1109 (1971); *Greene County Planning Bd.* v. *FPC,* 445 F. 2d 412 (CA2), cert. denied, 409 U. S. 849 (1972); and *Harlem Valley Transportation Assn.* v. *Stafford,* 500 F. 2d 328 (CA2 1974), read the requirement that the statement accompany the proposal through the existing agency review processes differently, they would appear to conflict with the statute.

hearing, it is incorrect for the reasons stated above. To the extent that it is based on the District Court's belief that the ICC did not in good faith reconsider its October 4, 1972, order in light of the impact statement, the District Court's decision is without support in the record. The ICC was in as good a position to correct a statutory error by integrating environmental factors into its reopened *Ex parte 281* and into its decision in May 1973, as it would have been if the October 4, 1972, report had never been written; this it proceeded to do and we perceive no basis for affirming the District Court's decision in this respect.

V

Emphasizing again the nonfinal and limited nature of the decision made by the ICC at a general revenue proceeding, the railroads and the ICC argue that the District Court erred in concluding that the environmental impact statement itself was deficient. They claim that throughout the general revenue proceeding the Commission gave environmental issues the "hard look" which is required by NEPA, *Natural Resources Defense Council, Inc.* v. *Morton,* 148 U. S. App. D. C. 5, 16, 458 F. 2d 827, 838 (1972), and that appellees and the court below simply disagreed with their decision not to prevent the increase on recyclables. They also emphasize the fact that they were giving continuing and more extensive attention to environmental consequences flowing from the rate structure in another proceeding, *Ex parte 270,* which was more appropriate to the task. We substantially agree with this position.

In order to decide what kind of an environmental impact statement need be prepared, it is necessary first to describe accurately the "federal action" being taken. The action taken here was a decision—entirely nonfinal with respect to particular rates—not to declare unlaw-

ful[21] a *percentage increase* which on its face applied equally to virgin and some recyclable materials and which on its face limited the increase permitted on other recyclables. As in most general revenue proceedings, the "action" was taken in response to the railroads' claim of a financial crisis; and the inquiry, true to our decision in *United States* v. *Louisiana, supra,* was primarily into the question whether such a crisis—usually thought to entitle the railroads to the general increase—existed, leaving *primarily* to more appropriate future proceedings the task of answering challenges to rates on individual commodities or categories thereof.[22] The point is that

[21] The decision which the ICC makes in a general revenue proceeding is by law far more confined than, for example, that of an agency deciding whether and where to build a new prison. *E. g., Hanly* v. *Mitchell,* 460 F. 2d 640 (CA2), cert. denied *sub nom. Hanly* v. *Kleindienst,* 409 U. S. 990 (1972). The ICC is permitted to act against proposed rate increases, for more than a seven-month period, only if upon the basis of its investigation it can find that the rates are unlawful, *i. e.,* unjust or unreasonable, or otherwise in violation of the Interstate Commerce Act. The ICC has concluded, and we agree, that the standards of the Act are broad enough to permit consideration of environmental factors, even at general revenue proceedings, *Dayton-Goose Creek R. Co.* v. *United States,* 263 U. S. 456, 480 (1924); *Ex parte 265* and *Ex parte 267, Increased Freight Rates, 1970 and 1971,* 339 I. C. C. 125 and 209 (1971). At the same time, standard ratemaking criteria limit the power of the ICC to force railroads to transport recyclable materials at deficit rates no matter how much the environment would be benefited thereby and no matter how much environmental injury would be caused by not doing so. Under present statutes, for example, the railroads could not be required to reduce rates on recyclables to zero.

[22] Appellants have not argued that consideration of the lawfulness of particular rates on particular recyclables was in no way before the ICC in *Ex parte 281.* We assume for the purposes of this case, therefore, that the "action" taken in *Ex parte 281* included a decision not to declare rates on particular recyclables unlawful on the basis of the very limited inquiry appropriate to a general revenue proceeding.

it is the latter question—usually involved in a general revenue proceeding only to a limited extent—which may raise the most serious environmental issues. The former question—the entitlement of the railroads to some kind of a general rate increase—raises few environmental issues and none which is claimed in this case to have been inadequately addressed in the impact statement.

The appellees insist that the decision not to prevent the facially neutral increases itself involves an impact on the environment when superimposed on an underlying rate structure which discriminates against recyclables.[23] They claim that the underlying rate structure involved here does discriminate against recyclables with serious environmental consequences and that upon more extensive consideration of the issue, the ICC has in some part at least agreed with them and acted accordingly in subsequent general revenue proceedings.[24] Accordingly, it is said, the environmental consequences flowing from a facially neutral increase must be explored in an impact statement and can only be explored by analyzing the underlying rate structure. They further argue with force and some support in the record that the ICC has been tardy in complying with NEPA, that the ICC was re-

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[23] A percentage increase increases a high rate a larger absolute amount than it does a low rate.

[24] The Commission has concluded a thorough investigation, in *Ex parte 270,* of the underlying rate structure as it applies to ferrous scrap and the virgin ores with which it competes. In *Ex parte 295,* a subsequent general revenue proceeding, the Commission concluded on further investigation that the rates on waste paper and nonferrous metal scrap are high in comparison to the virgin materials with which they compete, and it refused to permit increases as to them. It also concluded that the environmental consequences of this situation are small. In *Ex parte 310,* the most recent general revenue proceeding, the ICC declined to permit increases on either ferrous or nonferrous scrap, citing general economic factors which had hurt those industries in particular.

quired to analyze the underlying rate structure only once with a view toward environmental consequences; [25] that it had plenty of time and cause to do so before *Ex parte 281;* and that it should, therefore, not have been permitted to terminate *Ex parte 281* without having done so. This argument, however, stumbles over the holding in *United States* v. *Louisiana, supra,* which gives the ICC wide discretion in deciding what issues to address in a general revenue proceeding and permits it to postpone comprehensive consideration of claims of discrimination. It loses virtually all of its force in light of the fact that the ICC had begun an investigation of the underlying rate structure in *Ex parte 270* before commencing *Ex parte 281* and had started devoting specific attention to environmental issues in that proceeding before the decision of the court below. Thus even if NEPA—in the face of *United States* v. *Louisiana* and the failure of the appellees to initiate a proceeding under § 13 challenging rates on recyclables—were read to require the ICC to address comprehensively the underlying rate structure at least once before approval of a facially neutral general rate increase, no purpose could have been served by ordering it to thoroughly explore the question in the confined and inappropriate context of a railroad proposal for a general rate increase when it was already doing so in a more appropriate proceeding. The rate increases will remain effective in any event until such time as the ICC obtains sufficient information to declare the increase on some commodities lawful or unlawful.[26]

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[25] See CEQ Guidelines, 40 CFR § 1500.6 (d)(1).

[26] The CEQ, on whose opposition to the impact statement appellees heavily rely, apparently recognizing the wisdom of exploring the underlying rate structure in a proceeding commenced expressly for that purpose, acquiesced in consideration of these issues in the context of *Ex parte 270,* provided only that the ICC suspend the

The decision of the lower court, therefore, to deem the "federal action" involved in *Ex parte 281* to include an implicit approval of the underlying rate structure was inaccurate and led it to an entirely unwarranted intrusion into an apparently sensible decision by the ICC to take much more limited "action" in that proceeding and to undertake the larger action in a *separate* proceeding better suited to the task.[27]

Having defined the scope of the "federal action" being taken in *Ex parte 281*, our decision of this case becomes easy. The lower court held that the environmental impact statement inadequately explored the underlying rate structure and the *extent* to which the use of recyclables will be affected by the rate structure. Whatever the result would have been if the ICC had been approving the entire rate structure in *Ex parte 281*,[28] given the nature of the action taken by the ICC, the lower court was plainly incorrect.

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increases on recyclables in the interim. The CEQ overlooked, however, the fact that the ICC was wholly without power to do this.

[27] Apparently recognizing that the ICC's terminating of *Ex parte 281* did not terminate its consideration of environmental issues relating to its rate structure and the consequent pointlessness of forcing the ICC to duplicate its efforts in the context of *Ex parte 281*, all of the appellees, except NARI, have filed suggestions of mootness. The case is not moot. The situation is not substantially different than it was at the time of the lower court's decision; and the ICC is under an order to prepare a new impact statement in *Ex parte 281* and to hold hearings in *Ex parte 281* and to write a final report in *Ex parte 281* after the hearings. The ICC has not yet done so and claims that it should not be required to do so. NARI claims that it should be required to do so. We must decide who is right. However, we agree with the thrust of the suggestions of mootness that the relief granted below was not in the best interests of anyone.

[28] A large portion of each of the briefs in these cases is devoted to the question of the proper scope of review by a court of the adequacy of the treatment of environmental issues in an impact statement. Compare, *e. g., Lathan* v. *Brinegar*, 506 F. 2d 677 (CA9 1974), with

A review of the record discloses that environmental issues pervaded the proceeding. In terms of time, paper, and effort on the part of the Commission, the railroads, other Government agencies, and the appellees, the environmental issues far outweighed the financial issue usually thought controlling at a general revenue proceeding. The various statements, formal and informal, expressly recognized what all agree are the important possible environmental consequences involved—increased solid waste disposal and accelerated depletion of natural resources. The statements implicitly recognized the common-sense proposition that decisions to increase rates on recyclables could deter their use. The reports explored at some length the degree to which rate changes would affect the use of several separate categories of recyclables, looking, *inter alia,* at past responses to rate changes and at various other factors affecting use of recyclables including technological aspects of the different recycling industries. Finally, the statements inquired, preliminarily, into the fairness of the underlying rate structure, concluding that on the basis of the information then available no discrimination could be found. Assuming that some rudimentary examination into the underlying rate structure and into the reasonableness of the new rates on particular recyclables was required, the consideration of environmental factors in connection therewith was more than adequate. Appellees' best argument is that the ICC has acquired more knowledge since *Ex parte 281,* and has changed its mind on a number of matters and acted accordingly. This, however,

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City of New York v. *United States,* 344 F. Supp. 929 (EDNY 1972). However, we need not resolve this question since, in light of the "action" taken, under any standard of review the ICC gave an adequately "hard look" at environmental matters.

simply points up the limited nature of the decision made in *Ex parte 281* and the absence of a need to reopen it.

Reversed.

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

MR. JUSTICE DOUGLAS, dissenting in part.

I agree with Parts I, II, and III of the Court's opinion that the cases are properly here and that the District Court had jurisdiction over appellees' complaint. On the merits, I would, however, affirm.

This litigation presents a history of foot dragging by the ICC, as other parties to proceedings before it, including other federal agencies, have attempted to prod it into compliance with the National Environmental Policy Act (NEPA). The "final impact statement" that the Court holds adequate presents a mélange of statistics that purport to show that an increase on the transportation rates of recyclable materials will not have a significant adverse impact on the environment. The Commission's "analysis" has been thoroughly discredited by the comments of other federal agencies, including not only the Environmental Protection Agency and the Council on Environmental Quality, whose principal concerns are environmental, but also the Department of Commerce and the General Services Administration. The Commission has responded to the adverse comments by papering over the defects they identify, rather than dealing with the substance of the deficiencies.

The environmental effects at stake are described in my opinion when the case was here before. *United States* v. *SCRAP,* 412 U. S. 669, 699–714 (1973). Appellees oppose increases on the rates for recyclables because increases in transportation costs will retard the use of recy-

cled products and thereby contribute to further depletion of our natural resources. The Commission responded initially by asserting that an increase in transportation charges would have *no* effect upon the demand for scrap materials, and cited in support of this proposition statistics showing that during a multiyear period when freight rates were rising, prices of recyclables fluctuated widely and consumption generally increased. See *Increased Freight Rates and Charges, 1972,* 341 I. C. C. 288, 397–402 (1972). The fallacy of the Commission's argument was exposed by the Council on Environmental Quality, commenting on the price of and demand for ferrous metal scrap:

> "[S]crap prices are determined by a number of factors operating simultaneously, among them are the aggregate demand for steel, the price and transportation costs of iron ore, the supply of scrap, as well as the transportation cost of scrap and other factors. It would be surprising indeed, if, in light of the number of factors constantly at work in the scrap market, a close and simple relationship existed between scrap price movements and freight rate changes.
>
> "Nor does data which shows a constantly growing consumption of scrap despite rate increases prove that freight rate decisions are inconsequential. Growth might have been materially higher or lower had . . . rate decisions been different. What is needed in each instance is a multivariate analysis to isolate the effect of transportation costs on scrap prices and the quantity consumed." [1]

Yet the Commission persisted in these assertions, and it failed to make the price sensitivity studies the Council

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[1] Attachment to letter from Russell E. Train, Chairman of Council on Environmental Quality, to ICC, Oct. 30, 1972. App. 572.

recommended. See *Ex parte No. 281, Increased Freight Rates and Charges, 1972,* 346 I. C. C. 88, 145–149 (1973).

Appellees also argued to the Commission that the rate increases for recyclables exacerbated an existing discrimination against these materials in the rate structure. The Commission expressed doubt that any unjustified discrimination existed, arguing that any disparity was probably attributable to differing costs. But a Department of Transportation Study cited in the presentation made by the Environmental Protection Agency had concluded that ratios of revenue to cost were higher for certain recyclable commodities than for their virgin substitutes, causing the former to bear more than their "share" of the cost of service. The Commission's own statistics supported this conclusion to some extent. Comparing the revenue-cost ratios for ferrous scrap and for iron ore, the Commission found that the scrap bore the lesser share of variable costs, but a greater share of all costs—fixed and variable—than did ore. *Id.,* at 124. The Commission did not inquire further into this disparity.

The Court implicitly concedes the shortcomings of the Commission's analysis, relying, as the Commission did, on the prospect that the environmental issues would receive further study in *Ex parte 270,* a proceeding initiated to investigate the entire freight rate structure. But NEPA commands an agency to consider environmental effects before it takes a "major federal action," not to relegate consideration to further proceedings after action is taken, particularly where there is no assurance that a prompt conclusion will be forthcoming. When the Commission terminated its proceedings in *Ex parte 281, Ex parte 270* had been in progress for more than two years. The scope of the investigation had not been fully defined at that time, and the prospect of any

prompt illumination of the environmental issues was certainly remote. The Commission took no particular steps to expedite completion of that phase of the investigation that would embrace the environmental issues controverted in *Ex parte 281*. Instead, the Commission was content to put aside these issues, offering a vague assurance that they would be taken up again in the course of what promised to be a protracted proceeding. Today, nearly two years later, we are not apprised of any conclusions as to environmental issues reached as a result of *Ex parte 270;* we do not even know whether a completion date is in sight. Meanwhile, environmental damage—*irreversible* damage—which appellees alleged with considerable supporting evidence may be continuing, with its magnitude unknown.

NEPA is more than a technical statute of administrative procedure. It is a commitment to the preservation of our natural environment. The statute's language conveys the urgency of that task. The District Court acted responsibly when it refused to accept the Commission's representations that a complete treatment of the environmental issues was beyond its capability and therefore should not be required. One purpose of NEPA was to force agencies to *acquire* expertise in environmental matters, even if attention to parochial matters in the past had not demanded this capability.[2] The Court today excuses the Commission's performance. The District Court, following the spirit of NEPA, told the Commission to do better. I would affirm its judgment.

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[2] Section 102 (2)(A) of NEPA requires all agencies to "utilize a systematic, *interdisciplinary* approach which will *insure* the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment." 42 U. S. C. § 4332 (2)(A). (Emphasis added.)

HICKS, DISTRICT ATTORNEY OF ORANGE COUNTY, ET AL. *v.* MIRANDA, DBA WALNUT PROPERTIES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 74-156. Argued March 24, 1975—Decided June 24, 1975

After the police, pursuant to four separate warrants, had seized four copies of an allegedly obscene film from appellees' theater, misdemeanor charges were filed in Municipal Court against two theater employees, and the California Superior Court ordered appellees to show cause why the film should not be declared obscene. Subsequently, the Superior Court declared the film obscene and ordered seized all copies that might be found at the theater. Rather than appealing from this order, appellees filed suit in Federal District Court against appellant police officers and prosecuting attorneys, seeking an injunction against enforcement of the California obscenity statute and for return of the seized copies of the film, and a judgment declaring the statute unconstitutional. A three-judge court was then convened to consider the constitutionality of the statute. Meanwhile, appellees were added as parties defendant in the Municipal Court criminal proceeding. Thereafter, the three-judge court declared the obscenity statute unconstitutional, ordered return to appellees of all seized copies of the film, and rejected appellants' claim that *Younger* v. *Harris,* 401 U. S. 37, and *Samuels* v. *Mackell,* 401 U. S. 66, required dismissal of the case, holding that no criminal charges were pending against appellees in state court and that in any event the pattern of search warrants and seizures of the film showed bad faith and harassment on the authorities' part. The court then denied appellants' motions for rehearing and relief from the judgment, based, *inter alia,* on this Court's intervening dismissal "for want of a substantial federal question" of the appeal in *Miller* v. *California,* 418 U. S. 915 (*Miller II*), from the California Superior Court's judgment sustaining the constitutionality of the California obscenity statute; reaffirmed its *Younger* v. *Harris* ruling; and, after concluding that it was not bound by the dismissal of *Miller II, supra,* adhered to its judgment that the obscenity statute was unconstitutional, although it amended its

injunction so as to require appellants to seek return of three of the four copies of the film in the Municipal Court's possession. *Held:*

1. This Court has jurisdiction over the appeal under 28 U. S. C. § 1253, and the injunction, as well as the declaratory judgment, is properly before the Court. Pp. 342–348.

(a) Although the constitutional issues presented in *Miller II* and declared insubstantial by this Court, could not be considered substantial and decided otherwise by the District Court, *Miller II* did not require that the three-judge court be dissolved in the circumstances. Since appellees not only challenged the enforcement of the obscenity statute but also sought to enjoin enforcement of the search warrant statutes (necessarily on constitutional grounds) insofar as they might be applied to permit the multiple seizures of the film, and since *Miller II* had nothing to do with the issue of the validity of the multiple seizures, that issue remained in the case and the three-judge court should have remained in session to consider it. Pp. 343–346.

(b) The District Court's injunction, requiring appellants to seek return of three copies of the film in the Municipal Court's possession, plainly interfered with the pending criminal prosecution and with enforcement of the obscenity statute, and hence was an injunction reserved to a three-judge court under 28 U. S. C. § 2281. Pp. 347–348.

2. The District Court erred in reaching the merits of the case despite appellants' insistence that it be dismissed under *Younger* v. *Harris* and *Samuels* v. *Mackell*. Pp. 348–352.

(a) Where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger* v. *Harris* should apply in full force. Here, appellees were charged in the state criminal proceedings prior to appellants' answering the federal case and prior to any proceedings before the three-judge court, and hence the federal complaint should have been dismissed on appellants' motion absent satisfactory proof of those extraordinary circumstances warranting one of the exceptions to the rule of *Younger* v. *Harris* and related cases. Pp. 348–350.

(b) Absent at least some effort by the District Court to impeach the prosecuting officials' entitlement to rely on repeated judicial authorization for seizures of the film, official bad faith and

harassment were not made out, and the District Court erred in holding otherwise. Pp. 350-352.

388 F. Supp. 350, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 352. STEWART, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined, *post*, p. 353.

Oretta D. Sears, pro se, and *Arlo E. Smith,* Assistant Attorney General of California, argued the cause for appellants. With them on the briefs were *Evelle J. Younger,* Attorney General, *Jack R. Winkler,* Chief Assistant Attorney General, *Edward P. O'Brien,* Assistant Attorney General, *Alvin J. Knudson,* Deputy Attorney General, *Cecil Hicks, pro se, Michael R. Capizzi,* and *Ronald H. Bevins.*

Stanley Fleishman and *Sam Rosenwein* argued the cause for appellees. With them on the brief was *David M. Brown.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This case poses issues under *Younger* v. *Harris,* 401 U. S. 37 (1971), *Samuels* v. *Mackell,* 401 U. S. 66 (1971), and related cases, as well as the preliminary question as to our jurisdiction of this direct appeal from a judgment of a three-judge District Court.

I

On November 23 and 24, 1973, pursuant to four separate warrants issued seriatim, the police seized four copies of the film "Deep Throat," each of which had been shown at the Pussycat Theatre in Buena Park, Orange

County, Cal.[1] On November 26 an eight-count criminal misdemeanor charge was filed in the Orange County Municipal Court against two employees of the theater, each film seized being the subject matter of two counts in the complaint. Also on November 26, the Superior Court of Orange County ordered appellees[2] to show cause why "Deep Throat" should not be declared obscene, an immediate hearing being available to appellees, who appeared that day, objected on state-law grounds to the court's jurisdiction to conduct such a proceeding, purported to "reserve" all federal questions, and refused further to participate. Thereupon, on November 27 the Superior Court held a hearing, viewed the film, took evidence, and then declared the movie to be obscene

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[1] The first warrant was issued following a viewing of the film by an Orange County Municipal Court judge. The same judge also issued the other three warrants, the third one after a viewing of the version of the film then showing. The other two warrants were issued on affidavits of police officers who had witnessed exhibition of the film. Each of the warrant affidavits other than the first one indicated that the film to be seized was in some respects different from the first print seized.

In response to claims of bad faith which were later made against them, the four police officer appellants asserted that in October 1973, successive seizures of "Deep Throat" had been made under warrant in Riverside County, Cal. The theater involved in those seizures sought federal relief, which was denied, the seizures being upheld despite challenge under *Heller* v. *New York,* 413 U. S. 483 (1973). It was after this decision, it was asserted, that Buena Park authorities sought warrants for the seizure of "Deep Throat" showing in that city.

[2] The order ran against Vincent Miranda, dba Pussycat Theatre, Walnut Properties, Inc., and theater employees. Actually, Miranda, who owned the land on which the theater was located, did business as Walnut Properties, and Pussycat Theatre Hollywood was a California corporation of which Miranda was president and a stockholder. Nothing has been made by the parties of this confusion in identification.

and ordered seized all copies of it that might be found at the theater. This judgment and order were not appealed by appellees.[3]

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[3] The apparent basis for not pursuing appellate remedies is illuminated in the course of the following colloquy in this case between Judge Ferguson and appellees' counsel which occurred when appellees sought relief, described *infra*, at 340, against the subsequent actions of the Superior Court, Appellate Department.

"THE COURT: Have you taken that order up to the California Court of Appeals?

"MR. BROWN: No, we have not.

"THE COURT: Why not?

"MR. BROWN: Because, your Honor, initially back in November when this first occurred, the day after the hearing we filed the Complaint in this action and one of the bases for relief alleged in the Complaint was the deprivation of the plaintiff's Constitutional rights by virtue of these proceedings and we alleged from the very beginning that those proceedings were violative of California law, clearly, and violative of our Constitutional rights and we asked this Court to give us relief from that specific proceeding. That was the inception of this action, as a matter of fact. Once we had invoked the jurisdiction of this Court properly we sought relief in this Court and we did not press the matter further in the California State Courts.

"THE COURT: Well, how can you go halfway and not go all the way?

"MR. BROWN: Your Honor, at the very first hearing in November we filed the documents with the Superior Court stating that we were reserving all questions of Federal Constitutional law pursuant to the England case. We knew that we may—we had in mind the trap that can be set a litigant in these circumstances. It was our intent from the beginning to allege Federal jurisdiction and to seek relief under the Civil Rights Act for these events and that is why at the very first time we appeared in the Orange County Superior Court we so indicated to the Court that that was the case.

"THE COURT: Yes, but you told me that August the 2nd you appeared before the Superior Court in Orange County and made some kind of a motion—

Instead, on November 29, they filed this suit in the District Court against appellants—four police officers of Buena Park and the District Attorney and Assistant District Attorney of Orange County. The complaint recited the seizures and the proceedings in the Superior Court, stated that the action was for an injunction against the enforcement of the California obscenity stat-

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"MR. BROWN: But again, your Honor—

"THE COURT: Let me finish.

"—to set aside Judge McMillan's order with reference to seizures of these two films. He denied your request and my question to you is a simple one. When you go halfway why shouldn't you be required to go all the way?

. . . . .

"MR. BROWN: It was our purpose in the beginning not to litigate these claims in the State court.

. . . . .

"THE COURT: Well, don't you think that it is only fit and proper that the California courts should be permitted to eradicate any deficiencies that may occur in the lower courts?

. . . . .

"THE COURT: All right. Why don't you take it up before the California Supreme Court? That is my question to you.

"MR. BROWN: Because, your Honor, we could have done so but we also had the right to invoke Federal jurisdiction.

"THE COURT: I understand you have the right. That is not my question, as to the jurisdiction of this Court. My question to you is why haven't you given the California Appellate Courts the right and the forum to correct any deficiencies of the California lower courts that you say exist?

"MR. BROWN: Your Honor, this is a situation in which a litigant has a choice. If there is an unsettled question—

"THE COURT: All right. So your answer is you do not want to. Is that your answer?

"MR. BROWN: That's correct.

"THE COURT: All right.

"MR. BROWN: We did not want to do so because we did not consider the question of State law to be an unsettled question.

"THE COURT: All right."

ute, and prayed for judgment declaring the obscenity statute unconstitutional, and for an injunction ordering the return of all copies of the film, but permitting one of the films to be duplicated before its return.

A temporary restraining order was requested and denied, the District Judge finding the proof of irreparable injury to be lacking and an insufficient likelihood of prevailing on the merits to warrant an injunction.[4] He requested the convening of a three-judge court, however, to consider the constitutionality of the statute. Such a court was then designated on January 8, 1974.[5]

Service of the complaint was completed on January 14, 1974, and answers and motions to dismiss, as well as a motion for summary judgment, were filed by appellants. Appellees moved for a preliminary injunction.[6] None

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[4] Judge Lydick, United States District Judge, to whom the case had been assigned following the initial disqualification of Judge Ferguson, made this ruling. His conclusion was that appellees had "failed totally to make that showing of irreparable damage, lack of an adequate legal remedy and likelihood of prevailing on the merits needed to justify the issuance of a temporary restraining order which would require [the defendants] to disobey the orders of [the state] courts and would restrain the lawful enforcement of a State statute."

[5] Judge Ferguson, but not Judge Lydick, was designated to serve on the three-judge panel. The State of California insists that under 28 U. S. C. § 2284, providing that "[t]he district judge to whom the application for injunction or other relief is presented shall constitute one member" of the three-judge court, Judge Lydick should have been one of the three members. We do not deem the requirement jurisdictional, however; and even though the order appointing the three-judge court called for early filing of any objections to the composition of the court, the issue was never presented to the District Court but is raised here for the first time, and in our view too late.

[6] The motion sought an injunction against the enforcement of California Penal Code § 311 *et seq.* (1970 ed. and Supp. 1975), as well as §§ 1523–1542 (1970 ed. and Supp. 1975). Sections 1523–

of the motions was granted and no hearings held, all of the issues being ordered submitted on briefs and affidavits. The Attorney General of California also appeared and urged the District Court to follow *People* v. *Enskat*, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973) (hearing denied Oct. 24, 1973), which, after *Miller* v. *California*, 413 U. S. 15 (1973) (*Miller I*), had upheld the California obscenity statute.

Meanwhile, on January 15, the criminal complaint pending in the Municipal Court had been amended by naming appellees [7] as additional parties defendant and by adding four conspiracy counts, one relating to each of the seized films. Also, on motions of the defendants in that case, two of the films were ordered suppressed on the ground that the two search warrants for seizing "Deep Throat" last issued, one on November 23 and the other on November 24, did not sufficiently allege that the films to be seized under those warrants differed from each other and from the films previously seized, the final two seizures being said to be invalid multiple seizures.[8] Immediately after this order, which was later appealed and reversed, the defense and the prosecution stipulated that for purposes of the trial, which was expected to be forth-

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1542 constitute Chapter 3 of the Penal Code entitled "Of Search Warrants." The sections provide for the issuance, service, and return of search warrants.

[7] Actually, the amended complaint named as defendants Vincent Miranda and Walnut Properties, Inc. See n. 2, *supra*. In referring to the amended criminal complaint, appellees speak of the amendment of the complaint to "include" the names of the "appellees." Brief for Appellees 43.

[8] The prosecution claimed that each film was different, filed affidavits to this effect, and asserted that the official policy was to seize only one copy of a film unless different versions were exhibited. The court limited its attention to the search warrant affidavits which it said did not expressly allege that the last two copies seized were different.

coming, the four prints of the film would be considered identical and only one copy would have to be proved at trial.[9]

On June 4, 1974, the three-judge court issued its judgment and opinion declaring the California obscenity statute to be unconstitutional for failure to satisfy the requirements of *Miller I* and ordering appellants to return to appellees all copies of "Deep Throat" which had been seized as well as to refrain from making any additional seizures. Appellants' claim that *Younger* v. *Harris,* 401 U. S. 37 (1971), and *Samuels* v. *Mackell,* 401 U. S. 66 (1971), required dismissal of the case was rejected, the court holding that no criminal charges were pending in the state court against appellees and that in any event the pattern of search warrants and seizures demonstrated bad faith and harassment on the part of the authorities, all of which relieved the court from the strictures of *Younger* v. *Harris, supra,* and its related cases.

Appellants filed various motions for rehearing, to amend the judgment, and for relief from judgment, also later calling the court's attention to two developments they considered important: First, the dismissal on July 25, 1974, "for want of a substantial federal question" of the appeal in *Miller* v. *California,* 418 U. S. 915 (*Miller II*), from a judgment of the Superior Court, Appellate Department, Orange County, California, sustaining the constitutionality of the very California obscenity statute which the District Court had declared unconstitutional; second, the reversal by the Superior Court, Appellate Department, of the suppression order which had been issued in the criminal case pending in the Municipal Court, the *per curiam* reversal citing *Aday* v. *Superior*

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[9] The prosecution later asserted that the stipulation did not provide for the return of the suppressed films or of any others. The films were not returned, the suppression order was appealed, and it was reversed. See *infra,* this page.

Court, 55 Cal. 2d 789, 362 P. 2d 47 (1961), and saying the *"requisite prompt adversary determination of obscenity under Heller* v. *New York* . . . has been held."[10]

On September 30, the three-judge court denied appellants' motions, reaffirmed its June 4 *Younger* v. *Harris* ruling and, after concluding it was not bound by the dismissal of *Miller II,* adhered to its judgment that the California statute was invalid under the Federal Consti-

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[10] The showing of "Deep Throat" had meanwhile been resumed by appellees. Soon after *Miller II* and the reversal of the suppression order, the Superior Court of Orange County reaffirmed its order of November 27, 1973, and directed additional seizures of "Deep Throat." Seizures under warrant were also made of the film "The Devil in Miss Jones." At a show-cause proceeding before Judge Ferguson sitting as a single judge, the judge declined to hold appellants in contempt for failing to return the copies of "Deep Throat" covered by the June 4 judgment. His oral ruling was:

"THE COURT: You do not have to argue about that at all any more. Mr. Brown comes before the Court arguing that the contempt occurred because of the failure to turn over three of the films as a result of the November 1973 seizures. The defendants filed a motion to reconsider. An opinion is circulating now among the Three Judge Court with reference to that motion so it would be absurd for me to say that there was a contempt of court for failure to turn over those three films.

. . . . .

"THE COURT: . . .

"Now, with reference to the returning of three of the films, the Court cannot find that there was any contempt in that, either, primarily because that issue of returning the films had been taken under submission by the Three Judge Court and there was no specific order outstanding which required immediate compliance. So the Order to Show Cause with reference to contempt will be vacated."

Judge Ferguson did, however, issue a preliminary injunction against further seizures of the two films. Title 28 U. S. C. §§ 2284 (3) and (5) forbid a single judge to issue an interlocutory injunction in a three-judge-court case. The status of Judge Ferguson's preliminary injunction is not at issue here.

tution. In response to appellants' claim that they were without power to comply with the June 4 injunction, the films being in the possession of the Municipal Court, the court amended the injunctive portion of its order so as to read as follows:

> "The defendants shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs three of the four film prints seized from the plaintiffs on November 23 and 24, 1973, in the City of Buena Park."

Appeals were taken to this Court from both the judgment of June 4 and the amended judgment of September 30. We postponed further consideration of our jurisdiction to the consideration of the merits of the case. 419 U. S. 1018 (1974).[11]

II

We deal first with questions about our jurisdiction over this direct appeal under 28 U. S. C. § 1253.[12] At the

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[11] Because the amended judgment was entered in response to timely motions for rehearing and to amend the June 4 judgment, appellees insist that it is the amended judgment that is before the Court. Appellants filed notices of appeal from the June 4 judgment, despite their pending motions, and some contend that the District Court had no jurisdiction to enter the September 30 order. Some appellants also appealed from the September judgment, however, and we think the appellees have the better view of this issue. The amended judgment is before us.

[12] Section 1253 provides:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Section 2281 requires three-judge courts under certain circumstances:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restrain-

outset, this case was concededly a matter for a three-judge court. Appellees' complaint asserted as much, and they do not now contend otherwise.[13] Furthermore, on June 4 the District Court declared the California obscenity statute unconstitutional and ordered the return of all copies of the film that had been seized. Appellees do not claim that this order, which would have aborted the pending criminal prosecution, was not an injunction within the meaning of § 1253 and was not appealable here. The jurisdictional issues arise from events that occurred subsequent to June 4.

A

The first question emerges from our summary dismissal in *Miller II*. Appellants claimed in the District Court, and claim here, that *Miller II* was binding on the District Court and required that court to sustain the California obscenity statute and to dismiss the case. If appellants are correct in this position, the question arises whether *Miller II* removed the necessity for a three-judge court under the rule of *Bailey* v. *Patterson,* 369 U. S. 31 (1962), in which event our appellate jurisdiction under 28 U. S. C. § 1253 would also evaporate.

We agree with appellants that the District Court was in error in holding that it could disregard the decision in *Miller II*. That case was an appeal from a decision by a

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ing the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

[13] Although only local officers were defendants, they were enforcing a statewide statute and are state officers for the purposes of § 1253. *Spielman Motor Co.* v. *Dodge,* 295 U. S. 89, 91–95 (1935).

state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under 28 U. S. C. § 1257 (2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We were not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one. The three-judge court was not free to disregard this pronouncement. As MR. JUSTICE BRENNAN once observed, "[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . . ," *Ohio ex rel. Eaton* v. *Price,* 360 U. S. 246, 247 (1959); cf. R. Stern & E. Gressman, Supreme Court Practice 197 (4th ed. 1969) ("The Court is, however, deciding a case on the merits, when it dismisses for want of a *substantial* question . . ."); C. Wright, Law of Federal Courts 495 (2d ed. 1970) ("Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits"). The District Court should have followed the Second Circuit's advice, first, in *Port Authority Bondholders Protective Committee* v. *Port of New York Authority,* 387 F. 2d 259, 263 n. 3 (1967), that "unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise"; and, later, in *Doe* v. *Hodgson,* 478 F. 2d 537, 539, cert. denied *sub nom. Doe* v. *Brennan,* 414 U. S. 1096 (1973), that the lower courts are bound by sum-

mary decisions by this Court "'until such time as the Court informs [them] that [they] are not.'"

Although the constitutional issues which were presented in *Miller II* and which were declared to be insubstantial by this Court, could not be considered substantial and decided otherwise by the District Court, we cannot conclude that *Miller II* required that the three-judge court be dissolved in the circumstances of this case.[14] Appellees, as plaintiffs in the District Court, not only challenged the enforcement of the obscenity statute but also sought to enjoin the enforcement of the California search warrant statutes, Penal Code §§ 1523–1542 (1970 ed. and Supp. 1975), insofar as they might be applied, contrary to *Heller* v. *New York*, 413 U. S. 483 (1973), to permit the multiple seizures that occurred in this case. The application for a preliminary injunction made this aim of the suit quite express. The three-judge court in its June 4 decision declared the obscenity statute unconstitutional and ordered four copies of the film returned. Its constitutional conclusion was reaffirmed on September 30, despite *Miller II*, and its injunction was to some extent modified. *Miller II*, however, had nothing to do with the validity of multiple seizures as an issue wholly independent of the validity of the obscenity statutes.

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[14] Of course, *Miller II* would have been decisive here only if the issues in *Miller II* and the present case were sufficiently the same that *Miller II* was a controlling precedent. Thus, had the District Court considered itself bound by summary dismissals of appeals by this Court, its initial task would have been to ascertain what issues had been properly presented in *Miller II* and declared by this Court to be without substance. Ascertaining the reach and content of summary actions may itself present issues of real substance, and in circumstances where the constitutionality of a state statute is at stake, that undertaking itself may be one for a three-judge court. Whether that is the case here we need not decide.

That issue—the validity, in light of *Heller,* of the challenged application of the search warrant statutes—remained in the case after the *Miller II* dismissal. Indeed, although the District Court based its injunctive order on the unconstitutionality of the obscenity statutes, the injunction also interfered with the enforcement of the California search warrant statutes, necessarily on constitutional grounds.[15] With this question in the case, the three-judge court should have remained in session, as it did, and, as it also did, should have dealt with the *Younger* issue before reaching the merits of the constitutional issues presented. That issue, however, as we show in Part III, was not correctly decided.

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[15] In *Aday* v. *Superior Court,* 55 Cal. 2d 789, 362 P. 2d 47 (1961), the California Supreme Court sustained use of a search warrant to effect a massive seizure of obscene books pending outcome of a criminal trial. The court rejected a First Amendment prior-restraint claim, referring to the obscene books as "contraband" and noting that this Court had allowed interim relief to the States in obscenity cases in order to "prevent frustration of judicial condemnation of obscene matter." Later decisions of this Court, *e. g., A Quantity of Books* v. *Kansas,* 378 U. S. 205 (1964), have undermined *Aday* insofar as it permits the State, absent a prior adversary hearing, to block the "distribution or exhibition," *Heller* v. *New York,* 413 U. S. 483, 492 (1973), of films or books by seizing them in greater quantities than is necessary for use as evidence in a criminal case or other judicial proceedings. However, in reversing the Municipal Court's suppression order, see *supra,* at 340–341, we take the Superior Court's reference to *Aday* to mean that the November seizures effected by search warrant were valid under that case and under the state statute once a prompt adversary hearing to determine obscenity is held, which hearing in its view would remove any constitutional objection under *Heller* v. *New York, supra,* to retention of more than one copy of "Deep Throat." The District Court's injunction nevertheless required the return of three of the seized films. We do not, of course, pass upon the merits of the reversal of the suppression order or the views expressed therein.

B

Appellees contend (1) that under *Gonzalez* v. *Automatic Employees Credit Union,* 419 U. S. 90 (1974), and *MTM, Inc.* v. *Baxley,* 420 U. S. 799 (1975), the only injunctions issued by properly convened three-judge courts that are directly appealable here are those that three-judge courts alone may issue and (2) that the injunction finally issued on September 30 was not one that is reserved to a three-judge court under 28 U. S. C. § 2281. Even if appellees' premise is correct, but see *Philbrook* v. *Glodgett,* 421 U. S. 707, 712-713, n. 8 (1975), we cannot agree with the conclusion that the injunction entered here was not appealable. Not only was a state statute declared unconstitutional but also the injunctive order, as amended September 30, 1974, required appellants to seek the return of the three prints of "Deep Throat" which were the subject of nine of the 12 counts of the amended criminal complaint still pending in the Municipal Court. Return of the copies would prohibit their use as evidence and would, furthermore, prevent their retention and probable destruction as contraband should the State prevail in the criminal case. Plainly, the order interfered with the pending criminal prosecution and with the enforcement of a state obscenity statute. In the circumstances here, the injunctive order, issued as it was by a federal court against state authorities, necessarily rested on federal constitutional grounds. Aside from its opinion that the California statute was unconstitutional, the District Court articulated no basis for assuming authority to order the return of the films and in effect to negate not only three of the four seizures under state search warrants, which the Appellate Department of the Superior Court had upheld, but also the proceedings in the Superior Court that had declared the film to be obscene

and seizable.[16] The District Court's June 4 opinion, we think, made its constitutional thesis express:

> "The gravamen of the defendants' justification is, of course, that the property is contraband, both the evidence and the fruit of an illegal activity. Such a justification, however, dissipates in the face of a declaration by this court that the statute is invalid."

We accordingly conclude that the September 30 injunction, as well as the declaratory judgment underlying it, is properly before the Court.

III

The District Court committed error in reaching the merits of this case despite the appellants' insistence that it be dismissed under *Younger* v. *Harris,* 401 U. S. 37 (1971), and *Samuels* v. *Mackell,* 401 U. S. 66 (1971). When they filed their federal complaint, no state criminal proceedings were pending against appellees by name; but two employees of the theater had been charged and four copies of "Deep Throat" belonging to appellees had been seized, were being held, and had been declared to be obscene and seizable by the Superior Court. Appellees had a substantial stake in the state proceedings, so much so that they sought federal relief, demanding that the state statute be declared void and their films be returned to them. Obviously, their interests and those of their employees were inter-

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[16] The District Court noted that prosecution and defense counsel, following the suppression order in the Municipal Court, stipulated that the four copies would be deemed identical and only one copy need be proved. However, the prosecution denied any agreement to return the suppressed films, successfully appealed the suppression order, and asserted that the District Court's order interfered with the prosecution of its case. As we have said, the judgment of the District Court also interfered with the enforcement of the California search warrant statutes.

twined; and, as we have pointed out, the federal action sought to interfere with the pending state prosecution. Absent a clear showing that appellees, whose lawyers also represented their employees, could not seek the return of their property in the state proceedings and see to it that their federal claims were presented there, the requirements of *Younger* v. *Harris* could not be avoided on the ground that no criminal prosecution was pending against appellees on the date the federal complaint was filed. The rule in *Younger* v. *Harris* is designed to "permit state courts to try state cases free from interference by federal courts," 401 U. S., at 43, particularly where the party to the federal case may fully litigate his claim before the state court. Plainly, "[t]he same comity considerations apply," *Allee* v. *Medrano,* 416 U. S. 802, 831 (1974) (BURGER, C. J., concurring), where the interference is sought by some, such as appellees, not parties to the state case.

What is more, on the day following the completion of service of the complaint, appellees were charged along with their employees in Municipal Court. Neither *Steffel* v. *Thompson,* 415 U. S. 452 (1974), nor any other case in this Court has held that for *Younger* v. *Harris* to apply, the state criminal proceedings must be pending on the day the federal case is filed. Indeed, the issue has been left open; [17] and we now hold that where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger* v. *Harris* should apply in full force. Here, appellees were charged

[17] At least some Justices have thought so. *Perez* v. *Ledesma,* 401 U. S. 82, 117 n. 9 (1971) (BRENNAN, J., joined by WHITE and MARSHALL, JJ., concurring and dissenting). Also, *Steffel* v. *Thompson, supra,* did not decide whether an injunction, as well as a declaratory judgment, can be issued when no state prosecution is pending.

on January 15, prior to answering the federal case and prior to any proceedings whatsoever before the three-judge court. Unless we are to trivialize the principles of *Younger* v. *Harris,* the federal complaint should have been dismissed on the appellants' motion absent satisfactory proof of those extraordinary circumstances calling into play one of the limited exceptions to the rule of *Younger* v. *Harris* and related cases.[18]

The District Court concluded that extraordinary circumstances had been shown in the form of official harassment and bad faith, but this was also error. The relevant findings of the District Court were vague and conclusory.[19] There were references to the "pattern of

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[18] Appellees also argue that dismissal under *Younger* v. *Harris* was not required because *People* v. *Enskat,* 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973), had settled the constitutional issue in the state courts with respect to the obscenity statute. But *Younger* v. *Harris* is not so easily avoided. State courts, like other courts, sometimes change their minds. Moreover, *People* v. *Enskat* was the decision of an intermediate appellate court of the State, and the Supreme Court of California could have again been asked to pass upon the constitutionality of the California statute. In any event, the way was open for appellees to present their federal issues to this Court in the event of adverse decision in the California courts.

[19] The June 4 opinion stated:

"Finally, the objective facts set forth in the first part of this opinion clearly demonstrate bad faith and harassment which would justify federal intervention. Any editorializing of those facts would serve no purpose. It is sufficient to note that the pattern of seizures of the plaintiffs' cash receipts and films demonstrate[s] that the police were bent upon a course of action that, regardless of the nature of any judicial proceeding, would effectively exorcise the movie 'Deep Throat' out of Buena Park."

Also, in the supplemental opinion of September 30, 1974, the District Court stated: "[T]he evidence brought to light by the petition for rehearing only serves to strengthen the previous finding of bad faith and harassment," observing only that no explanation had been offered for not instituting criminal proceedings against appellees

seizure" and to "the evidence brought to light by the petition for rehearing"; and the unexplicated conclusion was then drawn that "regardless of the nature of any judicial proceeding," the police were bent on banishing "Deep Throat" from Buena Park. Yet each step in the pattern of seizures condemned by the District Court was authorized by judicial warrant or order; and the District Court did not purport to invalidate any of the four warrants, in any way to question the propriety of the proceedings in the Superior Court,[20] or even to mention the reversal of the suppression order in the Appellate Department of that court. Absent at least some effort by the District Court to impeach the entitlement of the prosecuting officials to rely on repeated judicial authorization for their conduct, we cannot agree that bad faith and harassment were made out. Indeed, such conclusion would not necessarily follow even if it were shown that the state courts were in error on some one or more issues of state or federal law.[21]

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until after the federal complaint was filed against them and that "[w]ithout such an explanation it is reasonable for the court to conclude that the institution of the criminal proceedings was in retaliation for the attempt by plaintiffs to have their constitutional rights judicially determined in this court."

[20] It has been noted that appellees did not appeal the Superior Court's order of November 27, 1973, declaring "Deep Throat" obscene and ordering all copies of it seized. It may be that under *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975), the failure of appellees to appeal the Superior Court order of November 27, 1973, would itself foreclose resort to federal court, absent extraordinary circumstances bringing the case within some exception to *Younger* v. *Harris*. Appellees now assert, seemingly contrary to their prior statement before Judge Ferguson, see n. 3, *supra*, that the November 27 order was not appealable. In view of our disposition of the case, we need not pursue the matter further.

[21] We need not, and do not, ourselves decide or intimate any opinion as to whether the Superior Court proceedings were, as claimed by appellees, unauthorized under California law.

In the last analysis, it seems to us that the District Court's judgment rests almost entirely on its conclusion that the California obscenity statute was unconstitutional and unenforceable. But even assuming that the District Court was correct in its conclusion, the statute had not been so condemned in November 1973, and the District Court was not entitled to infer official bad faith merely because it—the District Court—disagreed with *People* v. *Enskat*. Otherwise, bad faith and harassment would be present in every case in which a state statute is ruled unconstitutional, and the rule of *Younger* v. *Harris* would be swallowed up by its exception. The District Court should have dismissed the complaint before it and we accordingly reverse its judgment.

So ordered.

MR. CHIEF JUSTICE BURGER, concurring.

I join the opinion of the Court but I add a word about the composition of the three-judge District Court and the circumstances under which it was convened. Under 28 U. S. C. § 2284 (1) the district judge to whom the application for relief is presented, and who notifies the chief judge of the need to convene the three-judge court, "shall constitute one member of such court." It is well settled that "shall" means "must," cf. *Merced Rosa* v. *Herrero,* 423 F. 2d 591, 593 n. 2 (CA1 1970), yet the judge who called for the three-judge court here was not named to the panel. However, appellants made no timely objection to the composition of the court. *Ante,* at 338 n. 5. Obviously occasions can arise rendering it impossible for the district judge who initiates the convening of such a court under § 2284 (1) to serve on the court, but, in light of the unqualified mandatory language of the statute, when that occurs there is an obligation to

see to it that the record reveal, at the very least, a statement of the circumstances accounting for the substitution.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

There are many aspects of the Court's opinion that seem to me open to serious challenge. This dissent, however, is directed only to Part III of the opinion, which holds that "[t]he District Court committed error in reaching the merits of this case despite the appellants' insistence that it be dismissed under *Younger* v. *Harris* . . . and *Samuels* v. *Mackell*. . . ."

In *Steffel* v. *Thompson,* 415 U. S. 452, the Court unanimously held that the principles of equity, comity, and federalism embodied in *Younger* v. *Harris,* 401 U. S. 37, and *Samuels* v. *Mackell,* 401 U. S. 66, do not preclude a federal district court from entertaining an action to declare unconstitutional a state criminal statute when a state criminal prosecution is threatened but not pending at the time the federal complaint is filed. Today the Court holds that the *Steffel* decision is inoperative if a state criminal charge is filed at any point after the commencement of the federal action "before any proceedings of substance on the merits have taken place in the federal court." *Ante,* at 349. Any other rule, says the Court, would "trivialize" the principles of *Younger* v. *Harris.* I think this ruling "trivializes" *Steffel,* decided just last Term, and is inconsistent with those same principles of equity, comity, and federalism.[1]

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[1] There is the additional difficulty that the precise meaning of the rule the Court today adopts is a good deal less than apparent. What are "proceedings of substance on the merits"? Presumably, the proceedings must be both "on the merits" and "of substance." Does this mean, then, that months of discovery activity would be insufficient, if no question on the merits is presented to the court

There is, to be sure, something unseemly about having the applicability of the *Younger* doctrine turn solely on the outcome of a race to the courthouse. The rule the Court adopts today, however, does not eliminate that race; it merely permits the State to leave the mark later, run a shorter course, and arrive first at the finish line. This rule seems to me to result from a failure to evaluate the state and federal interests as of the time the state prosecution was commenced.

As of the time when its jurisdiction is invoked in a *Steffel* situation, a federal court is called upon to vindicate federal constitutional rights when no other remedy is available to the federal plaintiff. The Court has recognized that at this point in the proceedings no substantial state interests counsel the federal court to stay its hand. Thus, in *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498, we noted that "considerations of equity practice and comity in our federal system . . . have little force in the absence of a pending state proceeding." *Id.*, at 509. And in *Steffel*, a unanimous Court explained the balance of interests this way:

"When no state criminal proceeding is pending at

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during that time? What proceedings "on the merits" are sufficient is also unclear. An application for a temporary restraining order or a preliminary injunction requires the court to make an assessment about the likelihood of success on the merits. Indeed, in this case, appellees filed an application for a temporary restraining order along with six supporting affidavits on November 29, 1973. Appellants responded on December 3, 1973, with six affidavits of their own as well as additional documents. On December 28, 1973, Judge Lydick denied the request for a temporary restraining order, in part because appellees "have failed totally to make that showing of . . . likelihood of prevailing on the merits needed to justify the issuance of a temporary restraining order." These proceedings, the Court says implicitly, were not sufficient to satisfy the test it announces. Why that should be, even in terms of the Court's holding, is a mystery.

the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles. In addition, while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." 415 U. S., at 462.

Consequently, we concluded that "[r]equiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head." *Id.*, at 472. In such circumstances, "the opportunity for adjudication of constitutional rights in a federal forum, as authorized by the Declaratory Judgment Act, becomes paramount." *Ellis* v. *Dyson*, 421 U. S. 426, 432. See also *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 602–603.

The duty of the federal courts to adjudicate and vindicate federal constitutional rights is, of course, shared with state courts, but there can be no doubt that the federal courts are "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." F. Frankfurter & J. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 65 (1927). The statute under which this action was brought, 42 U. S. C. § 1983, established in our law "the role

of the Federal Government as a guarantor of basic federal rights against state power." *Mitchum* v. *Foster*, 407 U. S. 225, 239. Indeed, "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people." *Id.*, at 242. See also *Zwickler* v. *Koota*, 389 U. S. 241, 245, 248; *McNeese* v. *Board of Education*, 373 U. S. 668; *Monroe* v. *Pape*, 365 U. S. 167. And this central interest of a federal court as guarantor of constitutional rights is fully implicated from the moment its jurisdiction is invoked. How, then, does the subsequent filing of a state criminal charge change the situation from one in which the federal court's dismissal of the action under *Younger* principles "would turn federalism on its head" to one in which *failure* to dismiss would "trivialize" those same principles?

A State has a vital interest in the enforcement of its criminal law, and this Court has said time and again that it will sanction little federal interference with that important state function. *E. g.*, *Kugler* v. *Helfant*, 421 U. S. 117. But there is nothing in our decision in *Steffel* that requires a State to stay its hand during the pendency of the federal litigation. If, in the interest of efficiency, the State wishes to refrain from actively prosecuting the criminal charge pending the outcome of the federal declaratory judgment suit, it may, of course, do so. But no decision of this Court requires it to make that choice.

The Court today, however, goes much further than simply recognizing the right of the State to proceed with the orderly administration of its criminal law; it ousts the federal courts from their historic role as the "primary reliances" for vindicating constitutional freedoms. This is no less offensive to "Our Federalism" than the federal injunction restraining pending state criminal proceedings condemned in *Younger* v. *Harris*. The concept of federalism requires "sensitivity to the legitimate interests

of *both* State and National Governments." 401 U. S., at 44 (emphasis added). *Younger* v. *Harris* and its companion cases reflect the principles that the federal judiciary must refrain from interfering with the legitimate functioning of state courts. But surely the converse is a principle no less valid.

The Court's new rule creates a reality which few state prosecutors can be expected to ignore. It is an open invitation to state officials to institute state proceedings in order to defeat federal jurisdiction.[2] One need not impugn the motives of state officials to suppose that they would rather prosecute a criminal suit in state court than defend a civil case in a federal forum. Today's opinion virtually instructs state officials to answer federal complaints with state indictments. Today, the State must file a criminal charge to secure dismissal of the federal litigation; perhaps tomorrow an action "akin to a criminal proceeding" will serve the purpose, see *Huffman* v. *Pursue, Ltd., supra;* and the day may not be far off when any state civil action will do.

The doctrine of *Younger* v. *Harris* reflects an accommodation of competing interests. The rule announced today distorts that balance beyond recognition.

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[2] The District Court found that the filing of the state criminal complaint, six weeks after the State had appeared to oppose the appellees' application for a temporary restraining order but only a day after service of the complaint was effected, "would seem to supply added justification" for its finding of harassment. The court concluded "that the institution of the criminal proceedings was in retaliation for the attempt by plaintiffs to have their constitutional rights judicially determined in this court."

CITY OF RICHMOND, VIRGINIA *v.* UNITED STATES ET AL.

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

No. 74-201. Argued April 23, 1975—Decided June 24, 1975

In 1969 a Virginia court approved annexation by the city of Richmond, effective January 1, 1970, of an adjacent area in Chesterfield County, which reduced the proportion of Negroes in Richmond from 52% to 42%. The preannexation nine-man city council, which was elected at large, had three members who were endorsed by a Negro civic organization. In a postannexation at-large election in 1970, three of the nine members elected were also endorsed by that organization. Following this Court's holding in *Perkins* v. *Matthews,* 400 U. S. 379, that § 5 of the Voting Rights Act of 1965 (Act) reaches the extension of a city's boundaries through annexation, the city of Richmond unsuccessfully sought the Attorney General's approval of the Chesterfield County annexation. Meanwhile respondent Holt brought an action in federal court in Virginia challenging the annexation on constitutional grounds, and the District Court issued a decision, *Holt* v. *City of Richmond,* 334 F. Supp. 228 (*Holt I*), holding that the annexation had an illegal racial purpose, and ordered a new election. The Court of Appeals reversed. In the interim, Holt had brought another suit (*Holt II*) in the District Court seeking to have the annexation invalidated under § 5 of the Act for lack of the approval required by the Act. As the result of the *Holt II* suit, which was stayed pending the outcome of the instant litigation, further city council elections have been enjoined and the 1970 council has remained in office. Having received no response from the Attorney General to a renewed approval request, the city brought this suit in the District Court for the District of Columbia, seeking approval of the annexation and relying on the Court of Appeals' decision in *Holt I.* Shortly thereafter, the District Court decided *City of Petersburg* v. *United States,* 354 F. Supp. 1021, aff'd, 410 U. S. 962, invalidating another Virginia annexation plan where at-large council elections were the rule before and after annexation but indicating that approval could be obtained if "modifications calculated to neutralize . . .

any adverse effect upon the political participation of black voters are adopted, i. e., that the plaintiff shift from an at-large to a ward system of electing its city councilmen." Richmond thereafter developed and the Attorney General approved a plan for nine wards, four with substantial black majorities, four with substantial white majorities, and the ninth with a 59% white, 41% black division. Following opposition by intervenors, the plan was referred to a Special Master, who concluded that the city had not met its burden of proving that the annexation's purpose was not to dilute the black vote, and that the ward plan did not cure the racially discriminatory purpose. Additionally, he concluded that the annexation's diluting effect had not been dissipated to the greatest extent possible, that no acceptable offsetting economic or administrative benefits had been shown, and that deannexation was the only acceptable remedy for the § 5 violations. Except for the deannexation recommendation, the District Court accepted the Special Master's findings and conclusions. The District Court concluded that "[i]f the proportion of blacks in the new citizenry from the annexed area is appreciably less than the proportion of blacks living within the city's old boundaries, and particularly if there is a history of racial bloc voting in the city, the voting power of black citizens as a class is diluted and thus abridged." The matter of the remedy to be fashioned was left for resolution in the still-pending *Holt II*. *Held:*

1. An annexation reducing the relative political strength of the minority race in the enlarged city as compared with what it was before the annexation does not violate § 5 of the Act as long as the postannexation system fairly recognizes, as it does in this case, the minority's political potential. Pp. 367–372.

(a) Although *Perkins* v. *Matthews*, *supra,* held that boundary changes by annexation have a sufficient potential for racial voting discrimination to require § 5 approval procedures, this does not mean that every annexation effecting a percentage reduction in the Negro population is prohibited by § 5. Though annexation of an area with a white majority, combined with at-large councilmanic elections and racial voting create or enhance the power of the white majority to exclude Negroes totally from the city council, that consequence can be satisfactorily obviated if at-large elections are replaced by a ward system of choosing councilmen, affording Negroes representation reasonably equivalent to their political strength in the enlarged community. Though the black community, if there is racial bloc voting, will have fewer council-

men, a different city council and an enlarged city are involved in the annexation. Negroes, moreover, will not be underrepresented. Pp. 368–371.

(b) The plan here under review does not undervalue the postannexation black voting strength or have the effect of denying or abridging the right to vote within the meaning of § 5. Pp. 371–372.

2. Since § 5 forbids voting changes made for the purpose of denying the vote for racial reasons, further proceedings are necessary to update and reassess the evidence bearing upon the issue whether the city has sound, nondiscriminatory economic and administrative reasons for retaining the annexed area, it not being clear that the Special Master and the District Court adequately considered the evidence in deciding whether there are now justifiable reasons for the annexation that took place on January 1, 1970. Pp. 372–379.

376 F. Supp. 1344, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 379. POWELL, J., took no part in the consideration or decision of the case.

Charles S. Rhyne argued the cause for appellant. With him on the briefs were *David M. Dixon, Daniel T. Balfour, Conrad B. Mattox, Jr., Horace H. Edwards,* and *John S. Davenport III.*

Deputy Solicitor General Wallace argued the cause for the United States et al. in support of the appellant. With him on the brief were *Solicitor General Bork, Assistant Attorney General Pottinger, Keith A. Jones,* and *Brian K. Landsberg.*

Armand Derfner argued the cause for appellees Crusade for Voters of Richmond et al. With him on the brief were *James P. Parker* and *J. Harold Flannery.* *W. H. C. Venable* argued the cause for appellees Holt et al. With him on the brief was *John M. McCarthy.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Under § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c,[1] a State or subdivision thereof subject to the Act may not enforce any

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[1] Section 5, 42 U. S. C. § 1973c, provides:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) based upon determinations made under the first sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the second sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

change in "any voting qualification or prerequisite to voting" unless such change has either been approved by the Attorney General or that officer has failed to act within 60 days after submission to him, or unless in a suit brought by such State or subdivision the United States District Court for the District of Columbia has issued its declaratory judgment that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . ." *Perkins* v. *Matthews*, 400 U. S. 379 (1971), held that § 5 reaches the extension of a city's boundaries through the process of annexation. Here, the city of Richmond annexed land formerly in Chesterfield County, and the issue is whether the city in its declaratory judgment action brought in the District Court for the District of Columbia has carried its burden of proof of demonstrating that the annexation had neither the purpose nor the effect of denying or abridging the right to vote of the Richmond Negro community on account of its race or color.

I

The controlling Virginia statutes [2] permit cities to annex only after obtaining a favorable judgment from a specially constituted three-judge annexation court. In 1962, the city sought judicial approval of two annexation ordinances, one seeking to annex approximately 150 square miles of Henrico County and the other approximately 51 square miles of Chesterfield County. The Henrico case, which was protracted, proceeded first. In 1965, the annexation court authorized the annexation of 16 square miles of Henrico County; but because of a $55 million financial obligation which, as it turned out, annexation would entail, the city council determined

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[2] Va. Code Ann. § 15.1-1032 *et seq.* (1973 and Supp. 1975).

that the annexation was not in the city's best interest. The Henrico case was accordingly dismissed.

The city then proceeded with the Chesterfield case. In May 1969, a compromise line was approved by the city and Chesterfield County and incorporated in a decree of July 12, 1969,[3] which awarded the city approximately 23 square miles of land adjacent to the city in Chesterfield County. The preannexation population of the city as of 1970 was 202,359, of which 104,207 or 52% were black citizens. The annexation added to the city 47,262 people, of whom 1,557 were black and 45,705 were nonblack. The postannexation population of the city was therefore 249,621, of which 105,764 or 42% were Negroes. The annexation became effective on January 1, 1970, and the city has exercised jurisdiction over the area since that time.[4]

Before and immediately after annexation, the city had a nine-man council, which was elected at large. In 1968, three candidates endorsed by the Crusade for Voters of Richmond, a black civic organization, were elected to the council. In the postannexation, at-large election in 1970, three of the nine members elected had also received the endorsement of the Crusade.

On January 14, 1971, a divided Court in *Perkins* v. *Matthews, supra,* held that § 5 of the Voting Rights Act applied to city annexations. On January 28, 1971, the city of Richmond sought the Attorney General's approval of the Chesterfield annexation. On May 7, 1971, after requesting and receiving additional materials from the city, the Attorney General declined to approve the

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[3] A writ of error was refused by the Supreme Court of Appeals of Virginia. *Deerbourne Civic & Recreation Assn.* v. *City of Richmond,* 210 Va. li–lii (1969), cert. denied, 397 U. S. 1038 (1970).

[4] A motion to stay the effective date of the annexation was denied separately by individual Justices of this Court.

voting change, which he deemed the annexation to represent, saying that the annexation substantially increased the proportion of whites and decreased the proportion of blacks in the city and that the annexation "inevitably tends to dilute the voting strength of black voters." 1 App. 24. The Attorney General suggested, however, that "[y]ou may, of course, wish to consider means of accomplishing annexation which would avoid producing an impermissible adverse racial impact on voting, including such techniques as single-member districts." *Ibid.* Following reversal by this Court of the District Court's judgment in *Chavis* v. *Whitcomb,* 305 F. Supp. 1364 (SD Ind. 1969), rev'd, 403 U. S. 124 (1971), a decision on which the Attorney General had relied in disapproving the Chesterfield annexation, the city's request for reconsideration was denied by the Attorney General on September 30, 1971, again with the suggestion that "single-member, non-racially drawn councilmanic districts" would be "one means of minimizing the racial effect of the annexation . . . ." 1 App. 32.

Meanwhile on February 4, 1971, respondent Curtis Holt brought an action (*Holt I*) in the United States District Court for the Eastern District of Virginia, asserting that the annexation denied Richmond Negroes their rights under the Fifteenth Amendment. In November 1971, the District Court ruled in that suit that the annexation had had an illegal racial purpose and ordered a new election of the city council, seven councilmen to be elected at large from the old city and two primarily from the annexed area. *Holt* v. *City of Richmond,* 334 F. Supp. 228. The Court of Appeals for the Fourth Circuit, sitting en banc, reversed on May 3, 1972, 459 F. 2d 1093, cert. denied, 408 U. S. 931 (1972), holding that no Fifteenth Amendment rights were violated, that the city had valid reasons for seeking to annex in 1962, and

that the record would support no finding that the 1969 annexation was not motivated by the same considerations.

On December 9, 1971, Holt began another suit (*Holt II*) in the Eastern District of Virginia, this time seeking to have the annexation declared invalid under § 5 of the Voting Rights Act for failure to have secured either the approval of the Attorney General or of the United States District Court for the District of Columbia. As the result of this litigation, which was stayed pending the outcome of the present suit, further city council elections have been enjoined and the council elected in 1970 has remained in office.

Upon denial of certiorari in *Holt I, supra,* the Attorney General was again asked to modify his disapproval of the annexation because of the Fourth Circuit's decision that no impermissible purpose had accompanied the annexation and that Fifteenth Amendment rights had not been violated. Receiving no response from the Attorney General, the city filed the present suit in the United States District Court for the District of Columbia on August 25, 1972, seeking approval of the annexation and relying on the Fourth Circuit's decision in *Holt I.* Respondent Holt and the Crusade for Voters intervened.

Shortly thereafter, *City of Petersburg* v. *United States,* 354 F. Supp. 1021 (1972), was decided by the United States District Court for the District of Columbia. There, the District Court held invalid an annexation by a Virginia city, where at-large council elections were the rule both before and after the annexation, but indicated that approval could be had "on the condition that modifications calculated to neutralize to the extent possible any adverse effect upon the political participation of black voters are adopted, i. e., that the plaintiff shift from an at-large to a ward system of electing its city councilmen." *Id.,* at 1031. We affirmed that judgment. 410 U. S. 962 (1973).

Thereafter, Richmond developed and submitted to the Attorney General various plans for establishing councilmanic districts in the city. With some modification, to which the city council agreed, the Attorney General indicated approval of one of these plans. This was a nine-ward proposal under which four of the wards would have substantial black majorities, four wards substantial white majorities, and the ninth a racial division of approximately 59% white and 41% black. The city and the Attorney General submitted this plan to the District Court for the District of Columbia in the form of a consent judgment. The intervenors opposed it, and the District Court referred the case to a Special Master for hearings and recommendations.[5] The Special Master submitted recommended findings of fact and conclusions of law. Based on the statements of various officials of the city and other events which he found to have taken place, the Master concluded that the city had not met its burden of proving that the annexation did not have the purpose of diluting the right of black persons to vote, and that the ward plan did not cure the discriminatory racial purpose accompanying the annexation. In addition, he concluded that in any event the diluting effect of the annexation had not been dissipated to the greatest extent reasonably possible, that the city had not demonstrated any acceptable counterbalancing economic and administrative benefits, and that deannexation was the only acceptable remedy for the violations of § 5 which had been found.

The District Court, 376 F. Supp. 1344 (1974), essentially accepted the findings and conclusions of the Special

[5] The parties stipulated to the record in *Holt I*, and the Special Master referred in his decision to that record and to the three days of testimony which he heard. See 376 F. Supp. 1344, 1349 (DC 1974).

Master except for his recommendation with respect to deannexation. Based on the Special Master's findings, the District Court concluded that the city's "1970 changes in its election practices following upon the annexation were discriminatory in purpose and effect and thus violative of Section 5's substantive standards as well as the section's procedural command that prior approval be obtained from the Attorney General or this court." *Id.*, at 1352. The District Court went on to hold that the invidious racial purpose underlying the annexation had not been eliminated since no "objectively verifiable, legitimate purpose for annexation" had been shown and since the ward plan does not effectively eliminate or sufficiently compensate for the dilution of the black voting power resulting from the annexation. *Id.*, at 1353–1354. Furthermore, in fashioning the ward system the city had not, the court held, minimized the dilution of black voting power to the greatest possible extent, relying for this conclusion on another ward plan presented by intervenors which would have improved the chance that Negroes would control five out of the nine wards. The annexation could not be approved, therefore, because it also had the forbidden effect of denying the right to vote of the Negro community in Richmond.

The District Court, however, declined to order deannexation, and left the matter of the remedy to be fashioned in *Holt II*, still pending in the Eastern District of Virginia. We noted probable jurisdiction, 419 U. S. 1067 (1974).

II

We deal first with whether the annexation involved here had the effect of denying or abridging the right to vote within the contemplation of § 5 of the Voting Rights Act.

Perkins v. *Matthews, supra,* held that changes in city boundaries by annexation have sufficient potential for denying or abridging the right to vote on account of race or color that prior to becoming effective they must have the administrative or judicial approval required by § 5. But it would be difficult to conceive of any annexation that would not change a city's racial composition at least to some extent; and we did not hold in *Perkins* that every annexation effecting a reduction in the percentage of Negroes in the city's population is prohibited by § 5. We did not hold, as the District Court asserted, that "[i]f the proportion of blacks in the new citizenry from the annexed area is appreciably less than the proportion of blacks living within the city's old boundaries, and particularly if there is a history of racial bloc voting in the city, the voting power of black citizens as a class is diluted and thus abridged," 376 F. Supp., at 1348 (footnote omitted), and that the annexation thus violates § 5 and cannot be approved.

In *City of Petersburg* v. *United States, supra,* the city sought a declaratory judgment that a proposed annexation satisfied the standards of § 5. Councilmen were elected at large; Negroes made up more than half the population, but less than half the voters; and the area to be annexed contained a heavy white majority. A three-judge District Court for the District of Columbia, although finding no evidence of a racially discriminatory purpose, held that in the context of at-large elections, the annexation would have the effect of denying the right to vote because it would create or perpetuate a white majority in the city and, positing racial voting which was found to be prevalent, it would enhance the power of the white majority totally to exclude Negroes from the city council. The court held, however, that a reduction of a racial group's relative political

strength in the community does not always deny or abridge the right to vote within the meaning of § 5:

"If the view of the *Diamond* intervenors concerning what constitutes a denial or abridgment in annexation cases were to prevail, no court could ever approve any annexation in areas covered by the Voting Rights Act if there were a history of racial bloc-voting in local elections for any office and if the racial balance were to shift in even the smallest degree as a result of the annexation. It would not matter that the annexation was essential for the continued economic health of a municipality or that it was favored by citizens of all races; because if the demographic makeup of the surrounding areas were such that any annexation would produce a shift of majority strength from one race to another, a court would be required to disapprove it without even considering any other evidence, and the municipality would be effectively locked into its original boundaries. This Court cannot agree that this was the intent of Congress when it enacted the Voting Rights Act." 354 F. Supp., at 1030 (footnote omitted).

The court went on to hold that the effect on the right to vote forbidden by § 5, which had been found to exist in the case, could be cured by a ward plan for electing councilmen in the enlarged city:

"The Court concludes then, that this annexation, insofar as it is a mere boundary change and not an expansion of an at-large system, is not the kind of discriminatory change which Congress sought to prevent; but it also concludes, in accordance with the Attorney General's findings, that this annexation can be approved only on the condition that modifications calculated to neutralize to the extent possible

> any adverse effect upon the political participation of black voters are adopted, i. e., that the plaintiff shift from an at-large to a ward system of electing its city councilmen." *Id.*, at 1031.

The judgment entered by the District Court in the *Petersburg* case, although refusing the declaratory judgment in the context of at-large elections, retained jurisdiction and directed that "plaintiff prepare a plan for conducting its city council elections in accordance with the requirements of the Voting Rights Act as interpreted by this Court . . . ." Jurisdictional Statement in *City of Petersburg* v. *United States,* No. 72-865, O. T. 1972, p. 25a. In its appeal, the city presented the question, among others, whether the District Court was correct in conditioning approval of the annexation upon the adoption of the plan to elect councilmen by wards. We affirmed the judgment without opinion. 410 U. S. 962 (1973).

Petersburg was correctly decided. On the facts there presented, the annexation of an area with a white majority, combined with at-large councilmanic elections and racial voting, created or enhanced the power of the white majority to exclude Negroes totally from participation in the governing of the city through membership on the city council. We agreed, however, that that consequence would be satisfactorily obviated if at-large elections were replaced by a ward system of choosing councilmen. It is our view that a fairly designed ward plan in such circumstances would not only prevent the total exclusion of Negroes from membership on the council but would afford them representation reasonably equivalent to their political strength in the enlarged community.

We cannot accept the position that such a single-member ward system would nevertheless have the effect of denying or abridging the right to vote because Negroes

would constitute a lesser proportion of the population after the annexation than before and, given racial bloc voting, would have fewer seats on the city council. If a city having a ward system for the election of a nine-man council annexes a largely white area, the wards are fairly redrawn, and as a result Negroes have only two rather than the four seats they had before, these facts alone do not demonstrate that the annexation has the effect of denying or abridging the right to vote. As long as the ward system fairly reflects the strength of the Negro community as it exists after the annexation, we cannot hold, without more specific legislative directions, that such an annexation is nevertheless barred by § 5. It is true that the black community, if there is racial bloc voting, will command fewer seats on the city council; and the annexation will have effected a decline in the Negroes' relative influence in the city. But a different city council and an enlarged city are involved after the annexation. Furthermore, Negro power in the new city is not undervalued, and Negroes will not be underrepresented on the council.

As long as this is true, we cannot hold that the effect of the annexation is to deny or abridge the right to vote. To hold otherwise would be either to forbid all such annexations or to require, as the price for approval of the annexation, that the black community be assigned the same proportion of council seats as before, hence perhaps permanently overrepresenting them and underrepresenting other elements in the community, including the nonblack citizens in the annexed area. We are unwilling to hold that Congress intended either consequence in enacting § 5.

We are also convinced that the annexation now before us, in the context of the ward system of election finally proposed by the city and then agreed to by the United

States, does not have the effect prohibited by § 5. The findings on which this case was decided and is presented to us were that the postannexation population of the city was 42% Negro as compared with 52% prior to annexation. The nine-ward system finally submitted by the city included four wards each of which had a greater than a 64% black majority. Four wards were heavily white. The ninth had a black population of 40.9%. In our view, such a plan does not undervalue the black strength in the community after annexation; and we hold that the annexation in this context does not have the effect of denying or abridging the right to vote within the meaning of § 5. To the extent that the District Court rested on a different view, its judgment cannot stand.

III

The foregoing principles should govern the application of § 5 insofar as it forbids changes in voting procedures having the effect of denying or abridging the right to vote on the grounds of race or color. But the section also proscribes changes that are made with the purpose of denying the right to vote on such grounds. The District Court concluded that when the annexation eventually approved in 1969 took place, it was adopted by the city with a discriminatory racial purpose, the precise purpose prohibited by § 5, and that to purge itself of that purpose the city was required to prove two factors, neither of which had been successfully or satisfactorily shown: (1) that the city had some objectively verifiable, legitimate purpose for the annexation at the time of adopting the ward system of electing councilmen in 1973; and (2) that "the ward plan not only reduced, but also effectively eliminated, the dilution of black voting power caused by the annexation . . . ." 376 F. Supp., at 1353 (footnote omitted). The Master's findings were

accepted to the effect that there were no current, legitimate economic or administrative reasons warranting the annexation. As for the second requirement, the ward plan failed to afford Negroes the political potential comparable to that which they would have enjoyed without the annexation, because they would soon have had a majority of the voting population in the old city and would have controlled the council, and because, in any event, it was doubtful that their political power under the proposed ward system in the enlarged community was equivalent to their influence in the old city under an at-large election system.

The requirement that the city allocate to the Negro community in the larger city the voting power or the seats on the city council in excess of its proportion in the new community and thus permanently to under-represent other elements in the community is fundamentally at odds with the position we have expressed earlier in this opinion, and we cannot approve treating the failure to satisfy it as evidence of any purpose proscribed by § 5.

Accepting the findings of the Master in the District Court that the annexation, as it went forward in 1969, was infected by the impermissible purpose of denying the right to vote based on race through perpetuating white majority power to exclude Negroes from office through at-large elections,[6] we are nevertheless persuaded

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[6] The city contends that the decision of the Court of Appeals in *Holt I* should be given estoppel effect in this case on the question of the purpose behind the annexation. In its view, the earlier decision as to purpose is binding on all the parties participating in the *Holt I* litigation, and although the United States and the Attorney General did not participate in that litigation, the city asserts that they are in agreement with the city's position in this case. The District Court rejected the city's argument by pointing to the fact that the burden of proof was not on the city in the *Holt I* pro-

that if verifiable reasons are now demonstrable in support of the annexation, and the ward plan proposed is fairly designed, the city need do no more to satisfy the requirements of § 5. We are also convinced that if the annexation cannot be sustained on sound, nondiscriminatory grounds, it would be only in the most extraordinary circumstances that the annexation should be permitted on condition that the Negro community be permanently overrepresented in the governing councils of the enlarged city. We are very doubtful that those circumstances exist in this case; for, as far as this record is concerned, Chesterfield County was and still is quite ready

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ceedings although that burden is on Richmond in this case, and to the different legal bases of the two cases, with different authorities applicable in each. 376 F. Supp., at 1352 n. 43. Whatever the merits of the District Court's position on this collateral-estoppel issue, we find controlling the nonparticipation of the United States and the Attorney General in the *Holt I* case. The federal parties explicitly reject the estoppel argument of the city, Brief for the Federal Parties 16–17, n. 4, and, whatever support the United States presently gives to the city's annexation, it now recommends that the case be remanded to the District Court for the taking of further evidence and the making of further findings on the question of the city's purpose:

"We believe that the evidence in the record would support a finding that the City has objectively verifiable, legitimate reasons for retaining the annexed area. However, the parties at trial did not directly litigate that question. The parties, including the federal parties, concentrated on the extent to which the City's ward plan minimized the dilutive effects of the annexation, *i. e.*, on the permissibility of the effect of the voting change under *City of Petersburg*, and not on the nondiscriminatory purposes that might justify retention of the annexed area. Thus the City did not develop and present all its evidence relating to such purposes, and the intervening defendants have not had a full opportunity to rebut such evidence." *Id.*, at 34–35.

Given this position of the United States, we conclude that *Holt I* should not be given estoppel effect in this case.

to receive back the annexed area, to compensate the city for its capital improvements, and to resume governance of the area. It would also seem obvious that if there are no verifiable economic or administrative benefits from the annexation that would accrue to the city, its financial or other prospects would not be worsened by deannexation.

We need not determine this matter now, however; for if, as we have made clear, the controlling factor in this case is whether there are now objectively verifiable, legitimate reasons for the annexation, we agree with the United States that further proceedings are necessary to bring up to date and reassess the evidence bearing on the issue. We are not satisfied that the Special Master and the District Court gave adequate consideration to the evidence in this case in deciding whether there are now justifiable reasons for the annexation which took place on January 1, 1970. The special, three-judge court of the State of Virginia made the annexation award, giving great weight to the compromise agreement, but nevertheless finding that "Richmond is entitled to some annexation in this case. . . . Obviously cities must in some manner be permitted to grow in territory and population or they will face disastrous economic and social problems." 1 App. 42. The court went on to find that the annexation met all of the "requirements of necessity and, most important of all, expediency," *id.*, at 47, expediency in the sense that it is " 'advantageous' and in furtherance of the policy of the State that 'urban areas should be under urban government and rural areas under county government.' " *Id.*, at 44.

In *Holt I,* where the annexation was attacked under the Fifteenth Amendment as being a purposeful plan to deprive black citizens of their constitutional right to vote without discrimination on grounds of race, the Court

of Appeals for the Fourth Circuit, en banc, concluded that the plaintiffs had not proved a purposeful design to annex in order to deprive Negro citizens of their political rights. The majority expressly held that there were legitimate grounds for annexing part of Chesterfield County in 1962 and that the proof was inadequate to show that these grounds had been replaced by impermissible racial purposes in 1969. The District Court had come to a contrary conclusion with respect to the 1969 annexation but, according to the Court of Appeals, had itself "found that annexation rested upon such firm non-racial grounds that it was necessary, expedient and inevitable." [7] The two dissenting judges both were of the view that, absent an impermissible racial purpose, the annexation would have been legally acceptable even though the Negro proportion in the community was thereby diminished. One of the dissenters said: "Since there is no reason to question that some annexation, at

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[7] The Court of Appeals said in this respect, 459 F. 2d 1093, 1097 (1972):

"In 1961 there were compelling reasons for annexation of portions of Chesterfield County. Negroes were then a minority in Richmond and no one was then thinking in terms of a possible cleavage between black and white voters. Race was not a factor in the decision to seek annexation. Indeed, the finding was that, without the settlement agreement, the annexation court would have awarded more territory, and a larger preponderance of white voters, to Richmond.

. . . . .

"The District Court recognized, however, that there was no racial motivation in the institution of the annexation proceeding or in its prosecution. If some members of Richmond's governing body had developed a sense of urgency because of the growing number of black voters and their supposed opposition to any annexation and the election of 'Richmond Forward' candidates, no such thoughts were believed to have infected the minds of the judges of the annexation court. In fact, the District Court found that annexation rested upon such firm non-racial grounds that it was necessary, expedient and inevitable."

least as great in geographical scope, would have been decreed had the proceedings run their course and since, from my reading of the record, there could not have been an annexation of territory without an annexation of people and consequent dilution of the black vote, I approve of the district judge's fashioning relief solely by ordering a new election of council members under conditions where the black vote could not be diluted." 459 F. 2d, at 1111 (Winter, J., dissenting).

In the present case the District Court stated that it had no doubt that "Richmond's leadership was motivated in 1962 by nondiscriminatory goals in filing its 1962 annexation suit," 376 F. Supp., at 1354 n. 52, but went on to accept the Master's findings that the annexed area was a financial burden to the city and that there were no administrative or other advantages justifying the annexation. As for the contrary evidence in the record, the District Court asserted that "[t]hese evidentiary references to *Holt* were, of course, considered by the Master in making his findings," and summarily concluded, without discussion, that the contrary evidence did not "persuade us that the Master's findings are wrong, nor do they dissipate the evidence of illegal purpose which permeates this record." *Id.*, at 1354 (footnote omitted).[8]

In making his findings, however, it appears to us that the Special Master may have relied solely on the testimony of the county administrator of Chesterfield County who had opposed any annexation and was an obviously interested witness. At least there is no indication from the Special Master's findings or conclusions that he gave any attention to the contrary evidence in the record.

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[8] A study by the Urban Institute showing a 1971 fiscal year surplus from the annexed area was not part of the record, the District Court said, and "could not in any case remove the doubts created by testimony at the hearing." 376 F. Supp., at 1354 n. 51.

The city now claims that the issues before the Special Master did not encompass the possible economic and administrative advantages of the annexation agreed upon in 1969. Given our responsibilities under § 5, we should be confident of the evidentiary record and the adequacy of the lower court's consideration of it. In this case, for the various reasons stated above, we have sufficient doubt that the record is complete and up to date with respect to whether there are now justifiable reasons for the city to retain the annexed area that we believe further proceedings with respect to this question are desirable.

IV

We have held that an annexation reducing the relative political strength of the minority race in the enlarged city as compared with what it was before the annexation is not a statutory violation as long as the post-annexation electoral system fairly recognizes the minority's political potential. If this is so, it may be asked how it could be forbidden by § 5 to have the purpose and intent of achieving only what is a perfectly legal result under that section and why we need remand for further proceedings with respect to purpose alone. The answer is plain, and we need not labor it. An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 forbids voting changes taken with the purpose of denying the vote on the grounds of race or color. Congress surely has the power to prevent such gross racial slurs, the only point of which is "to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights." *Gomillion* v. *Lightfoot,* 364 U. S. 339, 347 (1960). Annexations animated by such a purpose have no credentials what-

soever; for "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end. . . ." *Western Union Telegraph Co.* v. *Foster,* 247 U. S. 105, 114 (1918); *Gomillion* v. *Lightfoot, supra,* at 347. An annexation proved to be of this kind and not proved to have a justifiable basis is forbidden by § 5, whatever its actual effect may have been or may be.

The judgment of the District Court is vacated and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

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

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

The District Court, applying proper legal standards, found that the city of Richmond had failed to prove that its annexation of portions of Chesterfield County, Va., on January 1, 1970, had neither the purpose nor the effect of abridging or diluting the voting rights of Richmond's black citizens. I believe that that finding, far from being clearly erroneous, was amply supported by the record below, and that the District Court properly denied the declaratory judgment sought by Richmond. I therefore dissent.

I

The Voting Rights Act of 1965 [1] grew out of a long and sorry history of resistance to the Fifteenth Amendment's ringing proscription of racial discrimination in voting. That history, which we reviewed in the course

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[1] 79 Stat. 437, as amended, 84 Stat. 314, 42 U. S. C. § 1973 *et seq.*

of upholding the Act's constitutionality in *South Carolina* v. *Katzenbach,* 383 U. S. 301, 308–315 (1966), showed a persistent and often ingenious use of tests and devices to disenfranchise black citizens.[2] Congress, in response, banned or restricted the use of many of the more familiar discriminatory devices; [3] but in addition, recognizing "that some of the States covered by § 4 (b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination . . . [and] that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself," [4] Congress enacted the broad prophylactic rule of § 5 of the Act, prohibiting covered States from implementing any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first securing the approval of either the Attorney General or the United States District Court for the District of Columbia. In an effort to avoid the delays and uncertainties fostered by prior statutes, under which affected parties or the Attorney General had been forced to assume the initiative in challenging discriminatory voting practices, Congress placed the burden of proof in a § 5 proceeding squarely upon the acting State or municipality to show that its proposed change is free of a racially discriminatory purpose or effect.[5] This burden is intended

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[2] See also *Beer* v. *United States,* 374 F. Supp. 363, 377–378 (DC 1974); H. R. Rep. No. 439, 89th Cong., 1st Sess., 8–13 (1965); S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess., 3–12 (1965).

[3] These devices included literacy tests, requirements of "good moral character," and voucher requirements, §§ 4 (a)–(d), 42 U. S. C. §§ 1973b (a)–(d), as well as poll taxes, § 10, 42 U. S. C. § 1973h.

[4] *South Carolina* v. *Katzenbach,* 383 U. S. 301, 335 (1966).

[5] *Georgia* v. *United States,* 411 U. S. 526, 538 (1973).

to be a substantial one for a State or locality with a history of past racial discrimination.[6]

In short, Congress, through the Voting Rights Act of 1965, imposed a stringent and comprehensive set of controls upon States falling within the Act's coverage. We have heretofore held that the language of § 5 was designed "to give the Act the broadest possible scope," and to require "that all changes, no matter how small, be subjected to § 5 scrutiny," *Allen* v. *State Board of Elections,* 393 U. S. 544, 567–568 (1969); we have thus applied § 5 to legislative reapportionments, annexations, and any other state actions which may potentially abridge or dilute voting rights. *Id.,* at 569–571; *Georgia* v. *United States,* 411 U. S. 526 (1973); *Perkins* v. *Matthews,* 400 U. S. 379 (1971).

The frontline judicial responsibility for interpreting and applying the substantive standards of § 5 rests exclusively with the United States District Court for the District of Columbia,[7] and the considerable experience which that court has acquired in dealing with § 5 cases enhances the respect to which its judgments are entitled on appellate review by virtue of that unique position. The District Court here recognized that it bears a "heavy responsibility" under § 5, and that that "responsibility is no less than to ensure realization of the Fifteenth Amendment's promise of equal participation in

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[6] *City of Petersburg* v. *United States,* 354 F. Supp. 1021, 1027 (DC 1972), aff'd, 410 U. S. 962 (1973).

[7] We have consistently held that the substantive issue of discriminatory purpose or effect under § 5 can be litigated only in the District Court for the District of Columbia; the sole question open for consideration in any other district court is whether a state voting practice or requirement is of the sort required by § 5 to be submitted for prior approval. *Perkins* v. *Matthews,* 400 U. S. 379, 383–386 (1971); *Allen* v. *State Board of Elections,* 393 U. S. 544, 555–559 (1969); *Connor* v. *Waller,* 421 U. S. 656 (1975).

our electoral process." 376 F. Supp. 1344, 1346–1347 (1974). In exercising our power of appellate review over that court's substantive § 5 determinations, we must be equally devoted to that same majestic promise.

II

In my view, the flagrantly discriminatory purpose with which Richmond hastily settled its Chesterfield County annexation suit in 1969 compelled the District Court to deny Richmond the declaratory judgment. The record is replete with statements by Richmond officials which prove beyond question that the predominant (if not the sole) motive and desire of the negotiators of the 1969 settlement was to acquire 44,000 additional white citizens for Richmond, in order to avert a transfer of political control to what was fast becoming a black-population majority.[8] The District Court's findings on this point were quite explicit:

> "Richmond's focus in the negotiations was upon the number of new white voters it could obtain by annexation; it expressed no interest in economic or geographic considerations such as tax revenues, vacant land, utilities, or schools. The mayor required assurances from Chesterfield County officials that at least 44,000 additional white citizens would be obtained by the City before he would agree upon settlement of the annexation suit. And the mayor and one of the city councilmen conditioned final acceptance of the settlement agreement on the annexation going into effect in sufficient time to make citizens in the annexed area eligible to vote in the City Council elections of 1970." [9]

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[8] 376 F. Supp. 1344, 1349–1350 (DC 1974). The statements quoted, *id.*, at 1349 n. 29, particularly those of then-Mayor Bagley, can hardly be described as subtle or indirect.

[9] *Id.*, at 1350 (footnotes omitted).

Against this background, the settlement represented a clear victory for Richmond's entrenched white political establishment: the city realized a net gain of 44,000 white citizens, its black population was reduced from 52% to 42% of the total population, and the predominantly white Richmond Forward organization retained its 6–3 majority on the city council.

Having succeeded in this patently discriminatory enterprise, Richmond now argues that it can purge the taint of its impermissible purpose by dredging up supposed objective justifications for the annexation and by replacing its practice of at-large councilmanic elections with a ward-voting system. The implications of the proposed ward-voting system are discussed in Part III, *infra;* meanwhile, I have grave difficulty with the idea that the taint of an illegal purpose can, under § 5, be dispelled by the sort of *post hoc* rationalization which the city now offers.

The court below noted that Richmond, in initiating annexation proceedings in 1962, was motivated "by legitimate goals of urban expansion." 376 F. Supp., at 1351. By 1969, however, those legitimate goals had been pushed into the background by the unseemly haste of the white political establishment to protect and solidify its position of power. The District Court's findings quoted above fully establish that the 1969 settlement of Richmond's annexation suit was negotiated in an atmosphere totally devoid of any concern for economic or administrative issues; the city's own Boundary Expansion Coordinator was not even consulted about the financial or geographical implications of the so-called Horner-Bagley line until several weeks after the line had been drawn.[10] The contours of this particular annexation were shaped solely by racial and political considerations,

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[10] 2 App. 352–354.

and the inference is not merely reasonable but indeed compelled that the annexation line would have been significantly different had the racial motivation not been present.[11]

To hold that an annexation agreement reached under such circumstances can be validated by objective economic justifications offered many years after the fact, in my view, wholly negates the prophylactic purpose of § 5.[12] The Court nevertheless, at the suggestion of the United States, remands for the taking of further evidence on the presence of any "objectively verifiable, legitimate reasons for the annexation." Even assuming, as the District Court did, that such reasons could now validate an originally illegal annexation, I cannot agree that a remand is necessary.

The District Court, adopting the findings of the Master whom it had appointed under Fed. Rule Civ. Proc. 53, squarely held that Richmond " 'has failed to establish any counterbalancing economic or administrative benefits of the annexation.' " 376 F. Supp., at 1353. The

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[11] Several judges involved in a prior phase of this dispute have expressed a belief, founded upon the record, that Richmond would have secured far more favorable annexation terms had it not been prodded into a hasty settlement by the pendency of the 1970 elections. See *Holt* v. *City of Richmond*, 459 F. 2d 1093, 1108 (CA4) (Winter, J., dissenting), cert. denied, 408 U. S. 931 (1972); *Holt* v. *City of Richmond*, 334 F. Supp. 228, 236 (ED Va. 1971), rev'd on other grounds, 459 F. 2d 1093, *supra*.

[12] Had this agreement been properly submitted for § 5 clearance in 1969, I cannot believe that the annexation would ever have been permitted to take place. But our holding in *Perkins* v. *Matthews*, *supra*, that annexations fall within the scope of § 5, came more than a year after the Richmond annexation took effect; by this quirk of timing, the annexation escaped preimplementation scrutiny entirely. The 1969 line thus remains in place, a grim reminder in its contours and in its very existence of the discriminatory purpose which gave it birth.

record before the Master, including the entire record in *Holt* v. *City of Richmond,* 334 F. Supp. 228 (ED Va. 1971), rev'd, 459 F. 2d 1093 (CA4), cert. denied, 408 U. S. 931 (1972), to which the parties stipulated,[13] contained ample evidence on the economic and administrative consequences of the annexation. The Master and the District Court weighed this often conflicting evidence and found that Richmond had failed to carry its burden of proof by showing any legitimate purpose for the annexation as consummated in 1969.[14]

Federal Rule Civ. Proc. 52 (a) compels us to accept that finding unless it can be called clearly erroneous. I find it impossible, on this record, to attach that label to the findings below, and indeed, the Court never goes so far as to do so. Nevertheless, in apparent disagreement with the manner in which conflicting evidence was weighed and resolved by the lower court, the Court remands for further evidentiary proceedings, perhaps in hopes that a re-evaluation of the evidence will produce a more acceptable result. This course of action is to me wholly inconsistent with the proper role of an appellate court operating under the strictures of Rule 52 (a).

III

The second prong of any § 5 inquiry is whether the voting change under consideration will have the effect of denying or abridging the right to vote on account of

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[13] 376 F. Supp., at 1349.

[14] Much of the evidence in the record below appears to have dealt with Richmond's need for expansion and annexation in the abstract. Annexation in the abstract, however, is not at issue here; the critical question is whether the particular line drawn in 1969 had any contemporary justification in terms of objective factors such as Richmond's need for vacant land, an expanded tax base, and the like.

race or color. In *Perkins* v. *Matthews, supra,* holding that § 5 applies to annexations, we said:

> "Clearly, revision of boundary lines has an effect on voting in two ways: (1) by including certain voters within the city and leaving others outside, it determines who may vote in the municipal election and who may not; (2) it dilutes the weight of the votes of the voters to whom the franchise was limited before the annexation, and 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.' *Reynolds* v. *Sims,* 377 U. S. 533, 555 (1964). Moreover, § 5 was designed to cover changes having a potential for racial discrimination in voting, and such potential inheres in a change in the composition of the electorate affected by an annexation." 400 U. S., at 388–389.

The guidelines of this discussion in *Perkins* were correctly applied by the District Court, which continued as follows:

> "*Perkins* left implicit the obvious: If the proportion of blacks in the new citizenry from the annexed area is appreciably less than the proportion of blacks living within the city's old boundaries, and particularly if there is a history of racial bloc voting in the city, the voting power of black citizens as a class is diluted and thus abridged." 376 F. Supp., at 1348 (footnote omitted).

Measured against these standards, the dilutive effect of Richmond's annexation is clear, both as a matter of semantics and as a matter of political realities. Blacks constituted 52% of the preannexation population and 44.8% of the preannexation voting-age population in

Richmond, but now constitute only 42% of the postannexation population and only 37.3% of the postannexation voting-age population. I cannot agree that such a significant dilution of black voting strength can be remedied, for § 5 purposes, simply by allocating to blacks a reasonably proportionate share of voting power within the postannexation community.

The history of the Voting Rights Act, as set forth in Part I, *supra*, discloses the intent of Congress to impose a stringent system of controls upon changes in state voting practices in order to thwart even the most subtle attempts to dilute black voting rights. We have elsewhere described the Act as "an unusual, and in some aspects a severe, procedure for insuring that States would not discriminate on the basis of race in the enforcement of their voting laws."[15] Congress was certainly aware of the hardships and inconvenience which § 5 and other portions of the Act could impose upon covered States and localities; but in passing the Act in its final form, Congress unmistakably declared that those hardships are outweighed by the need to ensure effective protection for black voting rights.

Today's decision seriously weakens the protection so emphatically accorded by the Act. Municipal politicians who are fearful of losing their political control to emerging black voting majorities are today placed on notice that their control can be made secure as long as they can find concentrations of white citizens into which to expand their municipal boundaries. Richmond's black population, having finally begun to approach an opportunity to elect responsive officials and to have a significant voice in the conduct of its municipal affairs, now finds its voting strength reduced by a plan which "guarantees"

[15] *Allen* v. *State Board of Elections*, 393 U. S., at 556 (footnote omitted).

four seats on the City Council but which makes the elusive fifth seat more remote than it was before. The Court would offer, as consolation, the fact that blacks will enjoy a fair share of the voting power available under a ward system operating within the boundaries of the postannexation community; but that same rationale would support a plan which added far greater concentrations of whites to the city and reduced black voting strength to the equivalent of three seats, two seats, or even fractions of a seat. The reliance upon postannexation fairness of representation is inconsistent with what I take to be the fundamental objective of § 5, namely, the protection of *present* levels of voting effectiveness for the black population.

It may be true, as the Court suggests, that this interpretation would effectively preclude some cities from undertaking desperately needed programs of expansion and annexation. Certainly there is nothing in § 5 which suggests that black voters could or should be given a disproportionately high share of the voting power in a postannexation community; where the racial composition of an annexed area is substantially different from that of the annexing area, it may well be impossible to protect preannexation black voting strength without invidiously diluting the voting strength of other racial groups in the community. I see no reason to assume that the "demographics" of the situation are such that this would be an insuperable problem for all or even most cities covered by the Act; but in any event, if there is to be a "municipal hardship" exception for annexations vis-à-vis § 5, that exception should originate with Congress and not with the courts.

At the very least, therefore, I would adopt the *Petersburg* standard relied upon by the District Court, namely, that the dilutive effect of an annexation of this sort can

be cured only by a ward plan " 'calculated to neutralize to the extent possible any adverse effect upon the political participation of black voters.' " 376 F. Supp., at 1352.[16] The Crusade for Voters of Richmond, intervenor in the court below, submitted several plans providing for a greater black representation in the so-called "swing district" than that afforded by Richmond's own plan; the District Court, in light of these alternative submissions and in light of the fact that Richmond's ward plan had been drawn up without any reference to racial living patterns, concluded that Richmond's plan did not, "to the extent possible," minimize dilution of black voting power. *Id.,* at 1356–1357. On that basis, I would affirm the finding that Richmond failed to establish the absence of a discriminatory effect prohibited by § 5.

IV

More than five years have elapsed since the last municipal elections were held in Richmond.[17] Hopes which were lifted by the District Court decision over a year ago are today again dashed, as the case is remanded for what may prove to be several additional years of litigation; Richmond will continue to be governed, as it has been for the last five years, by a slate of councilmen elected in clear violation of § 5.[18] The black population of Richmond may be justifiably suspicious of the "pro-

[16] The original version of this standard appears in *City of Petersburg* v. *United States,* 354 F. Supp., at 1031.

[17] The last councilmanic election was held on June 10, 1970. 1 App. 71; 376 F. Supp., at 1351.

[18] The 1970 elections were conducted on an at-large basis in the postannexation community, a procedure inconsistent with even the narrowed *Petersburg* "effect" test adopted by the Court today. Moreover, since the elections occurred prior to our decision in *Perkins, supra,* there was no attempt to submit the annexation for prior approval. Section 5 is violated in both respects.

tection" its voting rights are receiving when these rights can be suspended in limbo, and the people deprived of the right to select their local officials in an election meeting constitutional and statutory standards, for so many years. I would affirm the judgment below, and let the United States District Court for the Eastern District of Virginia set about the business of fashioning an appropriate remedy as expeditiously as possible.

ROE ET AL. v. NORTON, COMMISSIONER OF WELFARE

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

No. 73-6033. Argued February 25, 1975—Decided June 24, 1975

A three-judge District Court's judgment upholding the constitutionality of a Connecticut statute that requires the mother of an illegitimate child receiving Aid to Families with Dependent Children (AFDC) assistance to disclose the putative father's name and imposing a criminal sanction for noncompliance, and concluding that the statute does not conflict with the Social Security Act, is vacated and the case is remanded for further consideration in light of an intervening Social Security Act amendment requiring parents, as a condition of eligibility for AFDC assistance, to cooperate with state efforts to locate and obtain support from absent parents but providing no punitive sanctions, and, also, if a relevant state criminal proceeding is pending, in light of *Younger* v. *Harris,* 401 U. S. 37, and *Huffman* v. *Pursue, Ltd.,* 420 U. S. 592.

365 F. Supp. 65, vacated and remanded.

Frank Cochran argued the cause and filed briefs for parent appellants. *David N. Rosen* argued the cause for children appellants. With him on the brief was *Edward J. Dolan.*

Michael Anthony Arcari, Assistant Attorney General of Connecticut, argued the cause for appellee. With him on the brief were *Robert K. Killian,* Attorney General, and *Paige J. Everin, Lorna M. Dwyer,* and *Francis J. MacGregor,* Assistant Attorneys General.*

**Marian Wright Edelman, Norman Dorsen,* and *Leo Pfeffer* filed a brief for the American Academy of Child Psychiatry et al. as *amici curiae.*

PER CURIAM.

Appellants, mothers of illegitimate children receiving Aid to Families With Dependent Children (AFDC) assistance, and the children, commenced this action challenging § 52–440b, Conn. Gen. Stat. Rev. (1973),* which requires the mother of an illegitimate child to divulge to designated officials the name of the putative father of the child. Noncompliance with the statute is a contempt punishable by imprisonment up to one year and a fine of up to $200. A three-judge District Court upheld the constitutionality of § 52–440b against appellants' claims of denial of due process and equal protection and invasion of appellants' right to privacy, and also concluded that the statute did not conflict with the purpose and objectives of the Social Security Act. We noted probable jurisdiction, 415 U. S. 912 (1974). However, since that time Pub. L. 93–647, 88 Stat. 2337, was en-

*Section 52–440b, Conn. Gen. Stat. Rev., provides:

"(a) If the mother of any child born out of wedlock, or the mother of any child born to any married woman during marriage which child shall be found not to be issue of the marriage terminated by a divorce decree or by decree of any court of competent jurisdiction, fails or refuses to disclose the name of the putative father of such child under oath to the welfare commissioner, if such child is a recipient of public assistance, or to a selectman of a town in which such child resides, if such child is a recipient of general assistance, or otherwise to a guardian or a guardian ad litem of such child, such mother may be cited to appear before any judge of the circuit court and compelled to disclose the name of the putative father under oath and to institute an action to establish the paternity of said child.

"(b) Any woman who, having been cited to appear before a judge of the circuit court pursuant to subsection (a), fails to appear or fails to disclose or fails to prosecute a paternity action may be found to be in contempt of said court and may be fined not more than two hundred dollars or imprisoned not more than one year or both."

acted. Public L. 93–647 amends § 402 (a) of the Social Security Act to require parents, as a condition of eligibility for AFDC assistance, to cooperate with state efforts to locate and obtain support from absent parents but provides no punitive sanctions comparable to those provided by Conn. Gen. Stat. Rev. § 52–440b (1973). Section 402 (a), as amended, 88 Stat. 2359, 42 U. S. C. § 602 (a) (1970 ed., Supp. IV), provides in pertinent part:

> "A State plan for aid and services to needy families with children must
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> . . . . .
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> "(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required—
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> . . . . .
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> "(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child and that, if the relative with whom the child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section [606 (b)(2) of this title] (without regard to subparagraphs (A) through (E) of such section) . . . ."

We vacate the judgment of the District Court and remand the case for further consideration in light of Pub. L. 93–647, and, if a relevant state criminal proceeding

is pending, also for further consideration in light of *Younger* v. *Harris,* 401 U. S. 37 (1971), and *Huffman* v. *Pursue, Ltd.,* 420 U. S. 592 (1975).

It is so ordered.

MR. JUSTICE DOUGLAS concurs except with respect to *Younger* v. *Harris,* 401 U. S. 37 (1971), and *Huffman* v. *Pursue, Ltd.,* 420 U. S. 592 (1975).

PREISER, COMMISSIONER OF CORRECTIONAL SERVICES OF NEW YORK, ET AL. v. NEWKIRK

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

No. 74-107. Argued January 20, 1975—Decided June 25, 1975

After being transferred, without explanation or hearing, from a medium security to a maximum security prison in New York because of his involvement in a conflict among inmates concerning a petition for a prisoners' "union" at the former prison, respondent brought suit under 28 U. S. C. §§ 1343 (3) and (4) and 42 U. S. C. § 1983 against petitioner prison officials, seeking declaratory and injunctive relief. The District Court, granting relief in part, ruled that the transfer violated the Due Process Clause of the Fourteenth Amendment, because it was made without any explanation to respondent or opportunity to be heard. The Court of Appeals affirmed with some modification, holding, *inter alia,* that the suit was not mooted by the fact that respondent was returned to the medium security prison prior to the District Court's ruling. Respondent was later transferred to a minimum security prison and will soon be eligible for parole. *Held:* In light of respondent's return to the medium security prison and later transfer to a minimum security prison, the suit does not present a case or controversy as required by Art. III of the Constitution but is now moot and must be dismissed, since as to the original complaint there is now no reasonable expectation that the wrong will be repeated and the question presented does not fall within the category of harm capable of repetition, yet evading review. Pp. 401-403.

499 F. 2d 1214, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a concurring statement, *post,* p. 404. DOUGLAS, J., filed a dissenting statement, *post,* p. 404.

Hillel Hoffman, Assistant Attorney General of New York, argued the cause for petitioners. With him on the

brief were *Louis J. Lefkowitz,* Attorney General, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Joel Lewittes,* Assistant Attorney General.

Daniel Pochoda argued the cause for respondent. With him on the brief were *William E. Hellerstein* and *Marjorie Mazen Smith.**

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

Respondent Newkirk has been an inmate of the New York prison system since his conviction for murder in the second degree in 1962. He had initially been confined at the Ossining Correctional Facility and, subsequently, at the Attica Correctional Facility, the Green Haven Correctional Facility, and the Auburn Correctional Facility. These facilities were maximum security institutions [1] at the time respondent was confined in them and are located in different parts of New York. In April 1971, nine years after his initial confinement, he was transferred to the Wallkill Correctional Facility, a medium security institution. The District Court and

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**Solicitor General Bork, Acting Assistant Attorney General Keeney, Deputy Solicitor General Frey,* and *Joseph S. Davies* filed a brief for the United States as *amicus curiae* urging reversal

Barbara M. Milstein, Alvin J. Bronstein, Arpiar G. Saunders, Jr., Jack Greenberg, Stanley A. Bass, and *Cary Coen* filed a brief for the National Prison Project et al. as *amici curiae* urging affirmance.

[1] New York State has six correctional facilities that are designated as maximum security institutions: Attica, Auburn, Clinton, Green Haven, Ossining, and Great Meadow. Eight facilities, or portions thereof, are designated as medium security institutions: Adirondack, Bedford Hills, Coxsackie, Elmira, Eastern, Fishkill, Tappon, and Wallkill. Six others are designated minimum security institutions: Albion, Bayview, Edgecombe, Parkside, Rochester, and Taconic. There are also four minimum security correctional camps. See 7 NYCRR, pt. 100, §§ 100.1–100.94.

the Court of Appeals found, and it is not seriously disputed here, that the Wallkill facility is "unique," and has advantages over other correctional institutions in the New York system in that there are fewer restrictions and physical restraints as well as a more comprehensive rehabilitation program.

Early in 1972, a petition aimed at the formation of a prisoners' "union" was circulated at Wallkill. This event produced some vociferous controversy among the prisoners. Tension among the inmates, according to the District Court, stemmed in part from the hostility of an existing prisoner representative committee toward the "union" movement. The prison administration, however, did not forbid or actively discourage the circulation of the petition. The administrators did, however, monitor the level of unrest within the prison brought on by the clash of opinions on the petition. On June 2, 1972, there was a general meeting of the inmates at which the petition was discussed loudly by the contending factions; the meeting dispersed peacefully, however, without incidents of violence. Respondent did not attend this meeting, but he had previously signed a proposed "union" constitution and, immediately prior to the meeting, had received a petition from a fellow inmate, signed it, and passed it along.

A report prepared by the assistant deputy superintendent identified Newkirk as one of the inmates who had been canvassing for the "union" but did not charge him with any violation of regulations or misconduct. This report—including its naming of Newkirk—was apparently based on information other officers had given the assistant deputy superintendent. Newkirk was not afforded an opportunity to give his account. The following day, on June 6, 1972, the superintendent called the central office of the Department of Corrections and

arranged for transfer of several inmates, including Newkirk, to other facilities within the state corrections system. The transfer of Newkirk was effected on June 8. He was summoned to the infirmary and informed that he was being transferred.

Newkirk was transferred to the Clinton Correctional Facility, a maximum security institution. The conditions for the general prison population at Clinton were substantially different from those at Wallkill. At Clinton, the cells are locked, access to the library and recreational facilities is more limited, and the rehabilitation programs are less extensive. Newkirk requested a truck-driving assignment when he arrived at Clinton and understood he was on a waiting list. He was then assigned to the residence of the superintendent of Clinton at the same wage he earned at Wallkill. Since Newkirk's family lived in New York City, 80 miles from Wallkill but 300 miles from Clinton, his transfer to Clinton made visits by his family more difficult.

Newkirk and three of the other four prisoners transferred from Wallkill brought suit in the United States District Court for the Southern District of New York, pursuant to 28 U. S. C. §§ 1343 (3) and (4), and 42 U. S. C. § 1983, against the superintendent of Wallkill and the State Commissioner of Correctional Services. They requested a declaratory judgment that the transfers were in violation of the Constitution and laws of the United States and an injunction ordering their return to Wallkill, expunging all record of their transfer, and prohibiting future transfers without a hearing. The District Court denied a preliminary injunction but set the case for trial on an accelerated basis. Prior to the commencement of the trial, two of the plaintiffs were released and the complaint was dismissed inso-

far as it related to them. During the trial another plaintiff was released, and the action was dismissed as to him as well; subsequently Newkirk was returned to Wallkill. The superintendent of that institution also had a memorandum placed in respondent's file which explained the nature of the transfer, noted that the transfer was not for disciplinary reasons, and was not to have any bearing on eligibility for parole or the decisions of the time-allowance committee.

The District Court held that the transfer violated the Due Process Clause of the Fourteenth Amendment since it had been made without any explanation to Newkirk or opportunity to be heard. The court entered a declaratory judgment which required that Newkirk be given such an explanation and an opportunity to be heard in connection with any future transfer, and further declared that no adverse parole action could be taken against Newkirk or punishment administered because of the transfer. It held that Newkirk should be informed of the scope of permissible behavior at Wallkill and the circumstances which would warrant his transfer to another prison in the future. At the same time, however, the court refused the prayer for an injunction against future summary transfers because it was "not persuaded that the threat of transfer is sufficiently great at this time . . ." *Newkirk* v. *Butler,* 364 F. Supp. 497, 504 (1973); the court concluded that "in the present posture of the case there is not a sufficiently delineated controversy to merit its adjudication," *id.,* at 500. Noting that "an explanatory note has been included with the record of transfer, and that no action adverse to plaintiff, whether with reference to parole or discipline, will be based on this information . . . ," *id.,* at 504, the court also denied a request that all record of the transfer be expunged from his file.

The Court of Appeals affirmed the judgment with some modification. 499 F. 2d 1214 (CA2 1974). It held that, when a prisoner suffers a "substantial loss" as a result of the transfer, "he is entitled to the basic elements of rudimentary due process, i. e., notice and an opportunity to be heard," *id.*, at 1217, whether or not his transfer is part of a formal disciplinary proceeding and whether or not it has any adverse parole consequences. Noting that there were no formal disciplinary proceedings in this case, the Court of Appeals relied on the fact that the transfer changed Newkirk's living conditions, his job assignment, and training opportunities. However, although agreeing that advance publication of "rules," violation of which might result in transfer, "would serve the salutary function of avoiding misunderstanding and resentment . . . ," *id.*, at 1219, the Court of Appeals concluded that requiring prison officials to draw up such rules would place officials in "an unnecessary straight jacket [*sic*]." *Ibid.* It, therefore, modified the judgment of the District Court to remove this requirement from its order. Although specifically noting that Newkirk had been returned to Wallkill from Clinton, the Court of Appeals held that the suit was not moot since "[e]ven after his return he remained subject to a new transfer at any time . . . ." *Ibid.* Furthermore, despite the District Court's reliance on the good-faith assurances of prison officials that the transfer would not have an adverse effect on Newkirk's parole possibility, the Court of Appeals concluded he was "entitled to a judicial decree to that effect." *Ibid.*

We granted petitioners' petition for writ of certiorari which presented the following question: "Whether a prison inmate who is transferred within a state from a medium security institution to a maximum security insti-

tution, without the imposition of disciplinary punishment, is entitled under the Due Process Clause of the Fourteenth Amendment to notice of the reasons for the transfer and an opportunity to be heard"?[2] In granting the petition, however, the Court directed that the parties brief and argue the question of mootness. 419 U. S. 894 (1974).

All of the developments since the original challenged transfer must be read in light of not only Newkirk's transfer to Wallkill but also his later transfer, after the decision of the Court of Appeals, to the Edgecombe Correctional Facility, a minimum security institution in New York City. Newkirk will be eligible for parole in July 1975.[3]

The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy. As the Court noted in *North Carolina* v. *Rice,* 404 U. S. 244, 246 (1971), a federal court has neither the power to render advisory opinions nor "to decide questions that cannot affect the rights of litigants in the case before them." Its judgments must resolve " 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' " *Ibid.,* quoting *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 241 (1937). As the Court noted last Term, in an opinion by MR. JUSTICE BRENNAN, *Steffel* v. *Thompson,* 415 U. S. 452, 459 n. 10 (1974): "The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. See, *e. g., Roe* v. *Wade,* 410 U. S. [113,] 125 [(1973)];

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[2] Pet. for Cert. 2. See this Court's Rule 23 (1)(c).

[3] Tr. of Oral Arg. 7, 22; Brief for Respondent 10.

SEC v. *Medical Comm. for Human Rights,* 404 U. S. 403 (1972); *United States* v. *Munsingwear, Inc.,* 340 U. S. 36 (1950)."

In *Maryland Casualty Co.* v. *Pacific Co.,* 312 U. S. 270 (1941), this Court, noting the difficulty in fashioning a precise test of universal application for determining whether a request for declaratory relief had become moot, held that, basically, "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, *of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.*" *Id.,* at 273 (emphasis supplied). This is not a class action and Newkirk has not sought damages. As noted, *supra,* before the ruling of the District Court, Newkirk had been transferred back to Wallkill and had been there for 10 months. No adverse action was taken against him during that period. A notation had been made in his file expressly stating that the transfer "should have no bearing in any future determinations made by the Board of Parole or the time allowance committee." Newkirk has now been transferred, as noted above, to a minimum security facility in New York City. It is therefore clear that correction authorities harbor no animosity toward Newkirk. We have before us more than a "[m]ere voluntary cessation of allegedly illegal conduct," *United States* v. *Concentrated Phosphate Export Assn., Inc.,* 393 U. S. 199, 203 (1968), where we would leave "[t]he defendant . . . free to return to his old ways." *United States* v. *W. T. Grant Co.,* 345 U. S. 629, 632 (1953). As to Newkirk's original complaint, there is now " 'no reasonable expectation that the wrong will be repeated,' " *id.,* at 633, quoting *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 448 (CA2 1945).

Any subjective fear Newkirk might entertain of being again transferred, under circumstances similar to those alleged in the complaint, or of suffering adverse consequences as a result of the 1972 transfer, is indeed remote and speculative and hardly casts that "continuing and brooding presence" over him that concerned the Court in *Super Tire Engineering Co.* v. *McCorkle,* 416 U. S. 115, 122 (1974). As the Court noted in *United States* v. *SCRAP,* 412 U. S. 669, 688–689 (1973), "pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." Similarly, while there is always the *possibility* that New York authorities might disregard the specific record notation that the transfer should have no effect on good time or parole decisions in regard to Newkirk, "such speculative contingencies afford no basis for our passing on the substantive issues [Newkirk] would have us decide . . . ," *Hall* v. *Beals,* 396 U. S. 45, 49 (1969). The record of events since the challenged transfer hardly bears out a genuine claim of an injury or possible injury "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.,* 312 U. S., at 273. Newkirk, as noted above, will be eligible for parole within a matter of days. See *supra,* at 401.

We conclude that the question presented does not fall within that category of harm "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911); *Roe* v. *Wade,* 410 U. S. 113, 125 (1973). Accordingly, we vacate the judgment of the Court of Appeals and remand the case to that court

with directions that the complaint be dismissed by the District Court. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950).

It is so ordered.

MR. JUSTICE DOUGLAS dissents from the holding of mootness and would affirm the judgment below.

MR. JUSTICE MARSHALL, concurring.

I join this opinion only because for some reason respondent did not file this case as a class action. As a result, the State of New York by releasing the other three named plaintiffs, transferring respondent back to Wallkill after the District Court action, and finally to a lesser correctional facility after the Court of Appeals acted, thereby made the case moot.

Syllabus

ALBEMARLE PAPER CO. ET AL. v. MOODY ET AL.

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

No. 74-389. Argued April 14, 1975—Decided June 25, 1975*

Respondents, a certified class of present and former Negro employees, brought this action against petitioners, their employer, Albemarle Paper Co., and the employees' union, seeking injunctive relief against "any policy, practice, custom or usage" at the plant violative of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, and after several years of discovery moved to add a class backpay demand. At the trial, the major issues were the plant's seniority system, its program of employment testing, and backpay. The District Court found that, following a reorganization under a new collective-bargaining agreement, the Negro employees had been " 'locked' in the lower paying job classifications," and ordered petitioners to implement a system of plantwide seniority. The court refused, however, to order backpay for losses sustained by the plaintiff class under the discriminatory system, on the grounds that (1) Albemarle's breach of Title VII was found not to have been in "bad faith," and (2) respondents, who had initially disclaimed interest in backpay, had delayed making their backpay claim until five years after the complaint was filed, thereby prejudicing petitioners. The court also refused to enjoin or limit Albemarle's testing program, which respondents had contended had a disproportionate adverse impact on blacks and was not shown to be related to job performance, the court concluding that "personnel tests administered at the plant have undergone validation studies and have been proven to be job related." Respondents appealed on the backpay and pre-employment tests issues. The Court of Appeals reversed the District Court's judgment. *Held:*

1. Given a finding of unlawful discrimination, backpay should be denied only for reasons that, if applied generally, would not frustrate the central statutory purposes manifested by Congress in enacting Title VII of eradicating discrimination throughout the

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*Together with No. 74-428, *Halifax Local No. 425, United Papermakers & Paperworkers, AFL-CIO* v. *Moody et al.*, also on certiorari to the same court.

economy and making persons whole for injuries suffered through past discrimination. Pp. 413–422.

2. The absence of bad faith is not a sufficient reason for denying backpay, Title VII not being concerned with the employer's "good intent or absence of discriminatory intent," for "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation," *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 432. Pp. 422–423.

3. Whether respondents' tardiness and inconsistency in making their backpay demand were excusable and whether they actually prejudiced petitioners are matters that will be open to review by the Court of Appeals if the District Court, on remand, decides again to decline a backpay award. Pp. 423–425.

4. As is clear from *Griggs, supra,* and the Equal Employment Opportunity Commission's Guidelines for employers seeking to determine through professional validation studies whether employment tests are job related, such tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." Measured against that standard, Albemarle's validation study is materially defective in that (1) it would not, because of the odd patchwork of results from its application, have "validated" the two general ability tests used by Albemarle for all the skilled lines of progression for which the two tests are, apparently, now required; (2) it compared test scores with subjective supervisorial rankings, affording no means of knowing what job-performance criteria the supervisors were considering; (3) it focused mostly on job groups near the top of various lines of progression, but the fact that the best of those employees working near the top of a line of progression score well on a test does not necessarily mean that the test permissibly measures the qualifications of new workers entering lower level jobs; and (4) it dealt only with job-experienced, white workers, but the tests themselves are given to new job applicants, who are younger, largely inexperienced, and in many instances nonwhite. Pp. 425–435.

5. In view of the facts that during the appellate stages of this litigation Albemarle has apparently been amending its departmental organization and the use made of its tests; that issues of standards of proof for job relatedness and of evidentiary procedures involving validation tests have not until now been clarified;

and that provisional use of tests pending new validation efforts may be authorized, the District Court on remand should initially fashion the necessary relief. P. 436.

474 F. 2d 134, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, MARSHALL, and REHNQUIST, JJ., joined. MARSHALL, J., *post*, p. 440, and REHNQUIST, J., *post*, p. 441, filed concurring opinions. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 447. BURGER, C. J., filed an opinion concurring in part and dissenting in part, *post*, p. 449. POWELL, J., took no part in the consideration or decision of the cases.

Francis V. Lowden, Jr., argued the cause for petitioners in No. 74-389. With him on the briefs were *Gordon G. Busdicker, Charles O'Connell, Charles F. Blanchard,* and *Julian R. Allsbrook, Jr.* *Warren Woods* argued the cause for petitioner in No. 74-428. With him on the brief was *Leonard Appel.*

J. LeVonne Chambers argued the cause for respondents in both cases. With him on the brief were *Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, Eric Schnapper, Morris J. Baller, Barry L. Goldstein, Robert Belton, Conrad O. Pearson, T. T. Clayton, Albert J. Rosenthal,* and *Louis H. Pollak.*

James P. Turner argued the cause for the United States et al. as *amici curiae* urging affirmance in both cases. On the brief were *Solicitor General Bork, Assistant Attorney General Pottinger, Mark L. Evans, Brian K. Landsberg, David L. Rose, John C. Hoyle, Julia C. Cooper, Joseph T. Eddins,* and *Beatrice Rosenberg.*†

†Briefs of *amici curiae* in both cases were filed by *Gerard C. Smetana, Jerry Kronenberg, Milton A. Smith,* and *Richard B. Berman* for the Chamber of Commerce of the United States; by *J. Harold Flannery, Paul R. Dimond, William E. Caldwell, Robert B. Wallace, William H. Brown III, Lloyd N. Cutler,* and *Erwin N. Griswold* for the Lawyers' Committee for Civil Rights Under Law;

MR. JUSTICE STEWART delivered the opinion of the Court.

These consolidated cases raise two important questions under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. III): First: When employees or applicants for employment have lost the opportunity to earn wages because an employer has engaged in an unlawful discriminatory employment practice, what standards should a federal district court follow in deciding whether to award or deny backpay? Second: What must an employer show to establish that pre-employment tests racially discriminatory in effect, though not in intent, are sufficiently "job related" to survive challenge under Title VII?

I

The respondents—plaintiffs in the District Court—are a certified class of present and former Negro employees at a paper mill in Roanoke Rapids, N. C.; the petitioners—defendants in the District Court—are the plant's owner, the Albemarle Paper Co., and the plant employees' labor union, Halifax Local No. 425.[1] In August 1966, after filing a complaint with the Equal Employment Opportunity Commission (EEOC), and receiving notice of their right to sue,[2] the

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and by the American Society for Personnel Administration. *John Vanderstar* filed a brief for Scott Paper Co. as *amicus curiae* in No. 74-389.

[1] The paper mill has changed hands during this litigation, but these changes are irrelevant to the issues considered in this opinion, and the employer interest will be referred to throughout as Albemarle or the Company. The labor union is involved in only the backpay aspect of this litigation.

[2] The relevant procedures may be found at 42 U. S. C. § 2000e-5 (f)(1) (1970 ed., Supp. III). See *McDonnell Douglas Corp.* v.

respondents brought a class action in the United States District Court for the Eastern District of North Carolina, asking permanent injunctive relief against "any policy, practice, custom or usage" at the plant that violated Title VII. The respondents assured the court that the suit involved no claim for any monetary awards on a class basis, but in June 1970, after several years of discovery, the respondents moved to add a class demand for backpay. The court ruled that this issue would be considered at trial.

At the trial, in July and August 1971, the major issues were the plant's seniority system, its program of employment testing, and the question of backpay. In its opinion of November 9, 1971, the court found that the petitioners had "strictly segregated" the plant's departmental "lines of progression" prior to January 1, 1964, reserving the higher paying and more skilled lines for whites. The "racial identifiability" of whole lines of progression persisted until 1968, when the lines were reorganized under a new collective-bargaining agreement. The court found, however, that this reorganization left Negro employees " 'locked' in the lower paying job classifications." The formerly "Negro" lines of progression had been merely tacked on to the bottom of the formerly "white" lines, and promotions, demotions, and layoffs continued to be governed—where skills were "relatively equal"—by a system of "job seniority." Because of the plant's previous history of overt segregation, only whites had seniority in the higher job categories. Accordingly, the court ordered the petitioners to implement a system of "plantwide" seniority.

Green, 411 U. S. 792, 798 (1973); *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44–45 (1974). See also n. 8, *infra*.

The court refused, however, to award backpay to the plaintiff class for losses suffered under the "job seniority" program.[3] The court explained:

> "In the instant case there was no evidence of bad faith non-compliance with the Act. It appears that the company as early as 1964 began active recruitment of blacks for its Maintenance Apprentice Program. Certain lines of progression were merged on its own initiative, and as judicial decisions expanded the then existing interpretations of the Act, the defendants took steps to correct the abuses without delay. . . .
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> "In addition, an award of back pay is an equitable remedy. . . . The plaintiffs' claim for back pay was filed nearly five years after the institution of this action. It was not prayed for in the pleadings. Although neither party can be charged with deliberate dilatory tactics in bringing this cause to trial, it is apparent that the defendants would be substantially prejudiced by the granting of such affirmative relief. The defendants might have chosen to exercise unusual zeal in having this court determine their rights at an earlier date had they known that back pay would be at issue."

The court also refused to enjoin or limit Albemarle's testing program. Albemarle had required applicants for employment in the skilled lines of progression to have a high school diploma and to pass two tests, the Revised Beta Examination, allegedly a measure of nonverbal in-

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[3] Under Title VII backpay liability exists only for practices occurring after the effective date of the Act, July 2, 1965, and accrues only from a date two years prior to the filing of a charge with the EEOC. See 42 U. S. C. § 2000e-5 (g) (1970 ed., Supp. III). Thus no award was possible with regard to the plant's pre-1964 policy of "strict segregation."

telligence, and the Wonderlic Personnel Test (available in alternative Forms A and B), allegedly a measure of verbal facility. After this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), and on the eve of trial, Albemarle engaged an industrial psychologist to study the "job relatedness" of its testing program. His study compared the test scores of current employees with supervisorial judgments of their competence in ten job groupings selected from the middle or top of the plant's skilled lines of progression. The study showed a statistically significant correlation with supervisorial ratings in three job groupings for the Beta Test, in seven job groupings for either Form A or Form B of the Wonderlic Test, and in two job groupings for the required battery of both the Beta and the Wonderlic Tests.[4] The respondents' experts challenged the reliability of these studies, but the court concluded:

> "The personnel tests administered at the plant have undergone validation studies and have been proven to be job related. The defendants have carried the burden of proof in proving that these tests are 'necessary for the safe and efficient operation of the business' and are, therefore, permitted by the Act. However, the high school education requirement used in conjunction with the testing requirements is unlawful in that the personnel tests alone are adequate to measure the mental ability and reading skills required for the job classifications."

The petitioners did not seek review of the court's judgment, but the respondents appealed the denial of a backpay award and the refusal to enjoin or limit Albemarle's use of pre-employment tests. A divided Court of Appeals for the Fourth Circuit reversed the judgment of

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[4] See *infra*, at 429–430.

the District Court, ruling that backpay should have been awarded and that use of the tests should have been enjoined, 474 F. 2d 134 (1973). As for backpay, the Court of Appeals held that an award could properly be requested after the complaint was filed and that an award could not be denied merely because the employer had not acted in "bad faith," *id.*, at 142:

> "Because of the compensatory nature of a back pay award and the strong congressional policy embodied in Title VII, a district court must exercise its discretion as to back pay in the same manner it must exercise discretion as to attorney fees under Title II of the Civil Rights Act. . . . Thus, a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render such an award unjust. Newman v. Piggie Park Enterprises, 390 U. S. 400 . . . (1968)." (Footnote omitted.)

As for the pre-employment tests, the Court of Appeals held, *id.*, at 138, that it was error

> "to approve a validation study done without job analysis, to allow Albemarle to require tests for 6 lines of progression where there has been no validation study at all, and to allow Albemarle to require a person to pass two tests for entrance into 7 lines of progression when only one of those tests was validated for that line of progression."

In so holding the Court of Appeals "gave great deference" to the "Guidelines on Employee Selection Procedures," 29 CFR pt. 1607, which the EEOC has issued "as a workable set of standards for employers, unions and employment agencies in determining whether their selection

procedures conform with the obligations contained in title VII . . . ." 29 CFR § 1607.1 (c).

We granted certiorari [5] because of an evident Circuit conflict as to the standards governing awards of backpay [6] and as to the showing required to establish the "job relatedness" of pre-employment tests.[7]

II

Whether a particular member of the plaintiff class should have been awarded any backpay and, if so, how much, are questions not involved in this review. The equities of individual cases were never reached. Though at least some of the members of the plaintiff class obviously suffered a loss of wage opportunities on account of Albemarle's unlawfully discriminatory system of job seniority, the District Court decided that *no* backpay should be awarded to *anyone* in the class. The court declined to make such an award on two stated grounds: the lack of "evidence of bad faith non-compliance with the Act," and the fact that "the defendants would be substantially prejudiced" by an award of backpay that was demanded contrary to an earlier representation and late in the progress of the litigation. Relying directly

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[5] 419 U. S. 1068 (1974). The Fourth Circuit initially granted a petition to rehear this case en banc. But that petition was ultimately denied, after this Court ruled, on a certified question, that "senior circuit judges who are members of the originally assigned division hearing a case are not authorized by Congress to participate in the determination whether to rehear that case in banc." 417 U. S. 622, 624 (1974).

[6] For example, compare *Kober* v. *Westinghouse Electric Corp.*, 480 F. 2d 240 (CA3 1973), with *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211 (CA5 1974), and *Head* v. *Timken Roller Bearing Co.*, 486 F. 2d 870 (CA6 1973).

[7] For example, compare *Pettway* v. *American Cast Iron Pipe Co.*, *supra*, with *Castro* v. *Beecher*, 459 F. 2d 725 (CA1 1972).

on *Newman* v. *Piggie Park Enterprises,* 390 U. S. 400 (1968), the Court of Appeals reversed, holding that backpay could be denied only in "special circumstances." The petitioners argue that the Court of Appeals was in error—that a district court has virtually unfettered discretion to award or deny backpay, and that there was no abuse of that discretion here.[8]

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[8] The petitioners also contend that no backpay can be awarded to those unnamed parties in the plaintiff class who have not themselves filed charges with the EEOC. We reject this contention. The Courts of Appeals that have confronted the issue are unanimous in recognizing that backpay may be awarded on a class basis under Title VII without exhaustion of administrative procedures by the unnamed class members. See, *e. g., Rosen* v. *Public Service Electric & Gas Co.,* 409 F. 2d 775, 780 (CA3 1969), and 477 F. 2d 90, 95–96 (CA3 1973); *Robinson* v. *Lorillard Corp.,* 444 F. 2d 791, 802 (CA4 1971); *United States* v. *Georgia Power Co.,* 474 F. 2d 906, 919–921 (CA5 1973); *Head* v. *Timken Roller Bearing Co., supra,* at 876; *Bowe* v. *Colgate-Palmolive Co.,* 416 F. 2d 711, 719–721 (CA7 1969); *United States* v. *N. L. Industries, Inc.,* 479 F. 2d 354, 378–379 (CA8 1973). The Congress plainly ratified this construction of the Act in the course of enacting the Equal Employment Opportunity Act of 1972, Pub. L. 92–261, 86 Stat. 103. The House of Representatives passed a bill, H. R. 1746, 92d Cong., 1st Sess., that would have barred, in § 3 (e), an award of backpay to any individual who "neither filed a charge [with the EEOC] nor was named in a charge or amendment thereto." But the Senate Committee on Labor and Public Welfare recommended, instead, the re-enactment of the backpay provision without such a limitation, and cited with approval several cases holding that backpay was awardable to class members who had not personally filed, nor been named in, charges to the EEOC. S. Rep. No. 92–415, p. 27 (1971). See also 118 Cong. Rec. 4942 (1972). The Senate passed a bill without the House's limitation, *id.,* at 4944, and the Conference Committee adopted the Senate position. A Section-by-Section Analysis of the Conference Committee's resolution notes that "[a] provision limiting class actions was contained in the House bill and specifically rejected by the Conference Committee," *id.,* at 7168, 7565. The Conference Committee bill was accepted by both Chambers. *Id.,* at 7170, 7573.

Piggie Park Enterprises, supra, is not directly in point. The Court held there that attorneys' fees should "ordinarily" be awarded—*i. e.,* in all but "special circumstances"—to plaintiffs successful in obtaining injunctions against discrimination in public accommodations, under Title II of the Civil Rights Act of 1964. While the Act appears to leave Title II fee awards to the district court's discretion, 42 U. S. C. § 2000a-3 (b), the court determined that the great public interest in having injunctive actions brought could be vindicated only if successful plaintiffs, acting as "private attorneys general," were awarded attorneys' fees in all but very unusual circumstances. There is, of course, an equally strong public interest in having injunctive actions brought under Title VII, to eradicate discriminatory employment practices. But this interest can be vindicated by applying the *Piggie Park* standard to the *attorneys' fees* provision of Title VII, 42 U. S. C. § 2000e-5 (k), see *Northcross* v. *Memphis Board of Education,* 412 U. S. 427, 428 (1973). For guidance as to the granting and denial of *backpay,* one must, therefore, look elsewhere.

The petitioners contend that the statutory scheme provides no guidance, beyond indicating that backpay awards are within the District Court's discretion. We disagree. It is true that backpay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts "may" invoke.[9] The

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[9] Title 42 U. S. C. § 2000e-5 (g) (1970 ed., Supp. III) provides:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful

scheme implicitly recognizes that there may be cases calling for one remedy but not another, and—owing to the structure of the federal judiciary—these choices are, of course, left in the first instance to the district courts. However, such discretionary choices are not left to a court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *United States* v. *Burr,* 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.). The power to award backpay was bestowed by Congress, as part of a complex legislative design directed at a historic evil of national proportions. A court must exercise this power "in light of the large objectives of the Act," *Hecht Co.* v. *Bowles,* 321 U. S. 321, 331 (1944). That the court's discretion is equitable in nature, see *Curtis* v. *Loether,* 415 U. S. 189, 197 (1974), hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review. In *Mitchell* v. *DeMario Jewelry,* 361 U. S. 288, 292 (1960), this Court held, in the face of a silent statute, that district courts enjoyed the "historic power of equity" to award lost wages to workmen unlawfully discriminated

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employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e–3 (a) of this title."

against under § 17 of the Fair Labor Standards Act of 1938, 52 Stat. 1069, as amended, 29 U. S. C. § 217 (1958 ed.) The Court simultaneously noted that "the statutory purposes [leave] little room for the exercise of discretion not to order reimbursement." 361 U. S., at 296.

It is true that "[e]quity eschews mechanical rules . . . [and] depends on flexibility." *Holmberg* v. *Armbrecht,* 327 U. S. 392, 396 (1946). But when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not "equity [which] varies like the Chancellor's foot." [10] Important national goals would be frustrated by a regime of discretion that "produce[d] different results for breaches of duty in situations that cannot be differentiated in policy." *Moragne* v. *States Marine Lines,* 398 U. S. 375, 405 (1970).

The District Court's decision must therefore be measured against the purposes which inform Title VII. As the Court observed in *Griggs* v. *Duke Power Co.,* 401 U. S., at 429–430, the primary objective was a prophylactic one:

> "It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."

Backpay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst

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[10] Eldon, L. C., in *Gee* v. *Pritchard,* 2 Swans. *403, *414, 36 Eng. Rep. 670, 674 (1818).

which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 379 (CA8 1973).

It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to "secur[e] complete justice," *Brown* v. *Swann*, 10 Pet. 497, 503 (1836); see also *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 397–398 (1946). "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood*, 327 U. S. 678, 684 (1946). Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination. The terms "complete justice" and "necessary relief" have acquired a clear meaning in such circumstances. Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U. S. 145, 154 (1965). And where a legal injury is of an economic character,

> "[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in

the situation he would have occupied if the wrong had not been committed." *Wicker* v. *Hoppock,* 6 Wall. 94, 99 (1867).

The "make whole" purpose of Title VII is made evident by the legislative history. The backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act.[11] Under that Act, "[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Phelps Dodge Corp.* v. *NLRB,* 313 U. S. 177, 197 (1941). See also *Nathanson* v. *NLRB,* 344 U. S. 25, 27 (1952); *NLRB* v. *Rutter-Rex Mfg. Co.,* 396 U. S. 258, 263 (1969). We may assume that Congress was aware that the Board,

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[11] Section 10 (c) of the NLRA, 49 Stat. 454, as amended, 29 U. S. C. § 160 (c), provides that when the Labor Board has found that a person has committed an "unfair labor practice," the Board "shall issue" an order "requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." The backpay provision of Title VII provides that when the court has found "an unlawful employment practice," it "may enjoin" the practice "and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . ." 42 U. S. C. § 2000e-5 (g) (1970 ed., Supp. III). The framers of Title VII stated that they were using the NLRA provision as a model. 110 Cong. Rec. 6549 (1964) (remarks of Sen. Humphrey); *id.,* at 7214 (interpretative memorandum by Sens. Clark and Case). In early versions of the Title VII provision on remedies, it was stated that a court "may" issue injunctions, but "shall" order appropriate affirmative action. This anomaly was removed by Substitute Amendment No. 656, 110 Cong. Rec. 12814, 12819 (1964). The framers regarded this as merely a "minor language change," *id.,* at 12723-12724 (remarks of Sen. Humphrey). We can find here no intent to back away from the NLRA model or to denigrate in any way the status of backpay relief.

since its inception, has awarded backpay as a matter of course—not randomly or in the exercise of a standardless discretion, and not merely where employer violations are peculiarly deliberate, egregious, or inexcusable.[12] Furthermore, in passing the Equal Employment Opportunity Act of 1972, Congress considered several bills to limit the judicial power to award backpay. These limiting efforts were rejected, and the backpay provision was re-enacted substantially in its original form.[13] A Section-by-Section Analysis introduced by Senator Williams to accompany the Conference Committee Report on the 1972 Act

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[12] "The finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed by the employer," *NLRB* v. *Mastro Plastics Corp.*, 354 F. 2d 170, 178 (CA2 1965). While the backpay decision rests in the NLRB's discretion, and not with the courts, *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U. S. 258, 263 (1969), the Board has from its inception pursued "a practically uniform policy with respect to these orders requiring affirmative action." NLRB, First Annual Report 124 (1936). "[I]n all but a few cases involving discriminatory discharges, discriminatory refusals to employ or reinstate, or discriminatory demotions in violation of section 8 (3), the Board has ordered the employer to offer reinstatement to the employee discriminated against and to make whole such employee for any loss of pay that he has suffered by reason of the discrimination." NLRB, Second Annual Report 148 (1937).

[13] As to the unsuccessful effort to restrict class actions for backpay, see n. 8, *supra.* In addition, the Senate rejected an amendment which would have required a jury trial in Title VII cases involving backpay, 118 Cong. Rec. 4917, 4919–4920 (1972) (remarks of Sens. Ervin and Javits), and rejected a provision that would have limited backpay liability to a date two years prior to filing a complaint in court. Compare H. R. 1746, which passed the House, with the successful Conference Committee bill, analyzed at 118 Cong. Rec. 7168 (1972), which adopted a substantially more liberal limitation, *i. e.,* a date two years prior to filing a charge with the EEOC. See 42 U. S. C. § 2000e–5 (g) (1970 ed., Supp. III).

strongly reaffirmed the "make whole" purpose of Title VII:

> "The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706 (g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." 118 Cong. Rec. 7168 (1972).

As this makes clear, Congress' purpose in vesting a variety of "discretionary" powers in the courts was not to limit appellate review of trial courts, or to invite inconsistency and caprice, but rather to make possible the "fashion[ing] [of] the most complete relief possible."

It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.[14] The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener apprecia-

[14] It is necessary, therefore, that if a district court does decline to award backpay, it carefully articulate its reasons.

tion of those facts and circumstances peculiar to particular cases.

The District Court's stated grounds for denying backpay in this case must be tested against these standards. The first ground was that Albemarle's breach of Title VII had not been in "bad faith." [15] This is not a sufficient reason for denying backpay. Where an employer *has* shown bad faith—by maintaining a practice which he knew to be illegal or of highly questionable legality—he can make no claims whatsoever on the Chancellor's conscience. But, under Title VII, the mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer's favor. If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the "make whole" purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in "bad faith." [16] Title VII is not concerned with the employer's "good intent or absence of discriminatory intent" for "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Griggs* v. *Duke*

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[15] The District Court thought that the breach of Title VII had not been in "bad faith" because judicial decisions had only recently focused directly on the discriminatory impact of seniority systems. The court also noted that Albemarle had taken some steps to recruit black workers into one of its departments and to eliminate strict segregation through the 1968 departmental merger.

[16] The backpay remedy of the NLRA on which the Title VII remedy was modeled, see n. 11, *supra*, is fully available even where the "unfair labor practice" was committed in good faith. See, *e. g.*, *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U. S., at 265; *American Machinery Corp.* v. *NLRB*, 424 F. 2d 1321, 1328–1330 (CA5 1970); *Laidlaw Corp.* v. *NLRB*, 414 F. 2d 99, 107 (CA7 1969).

Power Co., 401 U. S., at 432. See also *Watson* v. *City of Memphis*, 373 U. S. 526, 535 (1963); *Wright* v. *Council of City of Emporia*, 407 U. S. 451, 461–462 (1972).[17] To condition the awarding of backpay on a showing of "bad faith" would be to open an enormous chasm between injunctive and backpay relief under Title VII. There is nothing on the face of the statute or in its legislative history that justifies the creation of drastic and categorical distinctions between those two remedies.[18]

The District Court also grounded its denial of backpay on the fact that the respondents initially disclaimed any interest in backpay, first asserting their claim five years after the complaint was filed. The court concluded that the petitioners had been "prejudiced" by this conduct. The Court of Appeals reversed on the ground "that the broad aims of Title VII require that the issue of back pay be fully developed and determined even though it was not raised until the post-trial stage of litigation," 474 F. 2d, at 141.

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[17] Title VII itself recognizes a complete, but very narrow, immunity for employer conduct shown to have been undertaken "in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [Equal Employment Opportunity] Commission." 42 U. S. C. § 2000e–12 (b). It is not for the courts to upset this legislative choice to recognize only a narrowly defined "good faith" defense.

[18] We note that some courts have denied backpay, and limited their judgments to declaratory relief, in cases where the employer discriminated on sexual grounds in reliance on state "female protective" statutes that were inconsistent with Title VII. See, *e. g.*, *Kober* v. *Westinghouse Electric Corp.*, 480 F. 2d 240 (CA3 1973); *LeBlanc* v. *Southern Bell Telephone & Telegraph Co.*, 460 F. 2d 1228 (CA5 1972); *Manning* v. *General Motors Corp.*, 466 F. 2d 812 (CA6 1972); *Rosenfeld* v. *Southern Pacific Co.*, 444 F. 2d 1219 (CA9 1971). There is no occasion in this case to decide whether these decisions were correct. As to the effect of Title VII on state statutes inconsistent with it, see 42 U. S. C. § 2000e–7.

It is true that Title VII contains no legal bar to raising backpay claims after the complaint for injunctive relief has been filed, or indeed after a trial on that complaint has been had.[19] Furthermore, Fed. Rule Civ. Proc. 54 (c) directs that

> "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

But a party may not be "entitled" to relief if its conduct of the cause has improperly and substantially prejudiced the other party. The respondents here were not merely tardy, but also inconsistent, in demanding backpay. To deny backpay because a *particular* cause has been prosecuted in an eccentric fashion, prejudicial to the other party, does not offend the broad purposes of Title VII. This is not to say, however, that the District Court's ruling was necessarily correct. Whether the petitioners were in fact prejudiced, and whether the respondents' trial conduct was excusable, are questions that will be open to review by the Court of Appeals, if the District Court, on remand, decides again to decline to make any award of backpay.[20] But the standard of review will be the familiar one of whether the District Court was "clearly erroneous" in its factual findings and whether it "abused" its traditional discretion to locate "a just result" in light of the circumstances peculiar to the case,

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[19] See *Rosen* v. *Public Service Electric & Gas Co.*, 409 F. 2d, at 780 n. 20; *Robinson* v. *Lorillard Corp.*, 444 F. 2d, at 802-803; *United States* v. *Hayes International Corp.*, 456 F. 2d 112, 116, 121 (CA5 1972).

[20] The District Court's stated grounds for denying backpay were, apparently, cumulative rather than independent. The District Court may, of course, reconsider its backpay determination in light of our ruling on the "good faith" question.

Langnes v. *Green,* 282 U. S. 531, 541 (1931). On these issues of procedural regularity and prejudice, the "broad aims of Title VII" provide no ready solution.

III

In *Griggs* v. *Duke Power Co.,* 401 U. S. 424 (1971), this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." *Id.,* at 432.[21] This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, *i. e.,* has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. See *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 802 (1973). If an employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship." *Id.,* at 801. Such a showing would be evidence that the employer was using its tests merely as a "pretext" for discrimination. *Id.,* at 804–805. In the present case, however, we are concerned only with the question whether Albemarle has shown its tests to be job related.

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[21] In *Griggs,* the Court was construing 42 U. S. C. § 2000e–2 (h), which provides in pertinent part that it shall not "be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

The concept of job relatedness takes on meaning from the facts of the *Griggs* case. A power company in North Carolina had reserved its skilled jobs for whites prior to 1965. Thereafter, the company allowed Negro workers to transfer to skilled jobs, but all transferees—white and Negro—were required to attain national median scores on two tests:

> "[T]he Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Comprehension Test. Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs. . . .
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> * * * * *
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> ". . . Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force." 401 U. S., at 428–431.

The Court took note of "the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability," *id.*, at 433, and concluded:

> "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." *Id.*, at 436.

Like the employer in *Griggs,* Albemarle uses two general ability tests, the Beta Examination, to test nonverbal intelligence, and the Wonderlic Test (Forms A and B), the purported measure of general verbal facility which was also involved in the *Griggs* case. Applicants for hire into various skilled lines of progression at the plant are required to score 100 on the Beta Exam and 18 on one of the Wonderlic Test's two alternative forms.[22]

The question of job relatedness must be viewed in the context of the plant's operation and the history of the testing program. The plant, which now employs about 650 persons, converts raw wood into paper products. It is organized into a number of functional departments, each with one or more distinct lines of progression, the theory being that workers can move up the line as they acquire the necessary skills. The number and structure of the lines have varied greatly over time. For many years, certain lines were themselves more skilled and paid higher wages than others, and until 1964 these skilled lines were expressly reserved for white workers. In 1968, many of the unskilled "Negro" lines were "end-tailed" onto skilled "white" lines, but it apparently remains true that at least the top jobs in certain lines require greater skills than the top jobs in other lines. In this sense, at least, it is still possible to speak of relatively skilled and relatively unskilled lines.

In the 1950's while the plant was being modernized with new and more sophisticated equipment, the Company introduced a high school diploma requirement for entry into the skilled lines. Though the Company soon concluded that this requirement did not improve the quality of the labor force, the requirement was continued

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[22] Albemarle has informed us that it has now reduced the cut-off score to 17 on the Wonderlic Test.

until the District Court enjoined its use. In the late 1950's the Company began using the Beta Examination and the Bennett Mechanical Comprehension Test (also involved in the *Griggs* case) to screen applicants for entry into the skilled lines. The Bennett Test was dropped several years later, but use of the Beta Test continued.[23]

The Company added the Wonderlic Tests in 1963, for the skilled lines, on the theory that a certain verbal intelligence was called for by the increasing sophistication of the plant's operations. The Company made no attempt to validate the test for job relatedness,[24] and simply adopted the national "norm" score of 18 as a cut-off point for new job applicants. After 1964, when it discontinued overt segregation in the lines of progression,

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[23] While the Company contends that the Bennett and Beta Tests were "locally validated" when they were introduced, no record of this validation was made. Plant officials could recall only the barest outlines of the alleged validation. Job relatedness cannot be proved through vague and unsubstantiated hearsay.

[24] As explained by the responsible plant official, the Wonderlic Test was chosen in rather casual fashion:

"I had had experience with using the Wonderlic before, which is a short form Verbal Intelligence Test, and knew that it had, uh, probably more validation studies behind it than any other short form Verbal Intelligence Test. So, after consultation we decided to institute the Wonderlic, in addition to the Beta, in view of the fact that the mill had changed quite a bit and it had become exceedingly more complex in operation . . . . [W]e did not, uh, validate it, uh, locally, primarily, because of the, the expense of conducting such a validation, and there were some other considerations, such as, uh, we didn't know whether we would get the co-operation of the employees that we'd need to validate it against in taking the test, and we certainly have to have that, so, we used National Norms and on my suggestion after study of the Wonderlic and Norms had been established nationally for skilled jobs, we developed a, uh, cut-off score of eighteen (18)."

the Company allowed Negro workers to transfer to the skilled lines if they could pass the Beta and Wonderlic Tests, but few succeeded in doing so. Incumbents in the skilled lines, some of whom had been hired before adoption of the tests, were not required to pass them to retain their jobs or their promotion rights. The record shows that a number of white incumbents in high-ranking job groups could not pass the tests.[25]

Because departmental reorganization continued up to the point of trial, and has indeed continued since that point, the details of the testing program are less than clear from the record. The District Court found that, since 1963, the Beta and Wonderlic Tests have been used in 13 lines of progression, within eight departments. Albemarle contends that at present the tests are used in only eight lines of progression, within four departments.

Four months before this case went to trial, Albemarle engaged an expert in industrial psychology to "validate" the job relatedness of its testing program. He spent a half day at the plant and devised a "concurrent validation" study, which was conducted by plant officials, without his supervision. The expert then subjected the results to statistical analysis. The study dealt with 10 job groupings, selected from near the top of nine of the

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[25] In the course of a 1971 validation effort, see *supra,* at 411 and *infra,* this page and 430, test scores were accumulated for 105 incumbent employees (101 of whom were white) working in relatively high-ranking jobs. Some of these employees apparently took the tests for the first time as part of this study. The Company's expert testified that the test cutoff scores originally used to screen these incumbents for employment or promotion "couldn't have been . . . very high scores because some of these guys tested very low, as low as 8 in the Wonderlic test, and as low as 95 in the Beta. They couldn't have been using very high cut-off scores or they wouldn't have these low testing employees."

lines of progression.[26] Jobs were grouped together solely by their proximity in the line of progression; no attempt was made to analyze jobs in terms of the particular skills they might require. All, or nearly all, employees in the selected groups participated in the study—105 employees in all, but only four Negroes. Within each job grouping, the study compared the test scores of each employee with an independent "ranking" of the employee, relative to each of his coworkers, made by two of the employee's supervisors. The supervisors, who did not know the test scores, were asked to

> "determine which ones they felt irrespective of the job that they were actually doing, but in their respective jobs, did a better job than the person they were rating against . . . ." [27]

For each job grouping, the expert computed the "Phi coefficient" of statistical correlation between the test scores and an average of the two supervisorial rankings. Consonant with professional conventions, the expert regarded as "statistically significant" any correlation that could have occurred by chance only five times, or fewer, in 100 trials.[28] On the basis of these results, the District Court found that "[t]he personnel tests administered at the plant have undergone validation studies and have been proven to be job related." Like the Court of Appeals, we are constrained to disagree.

The EEOC has issued "Guidelines" for employers seeking to determine, through professional validation studies,

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[26] See the charts appended to this opinion. It should be noted that testing is no longer required for some of the job groups listed.

[27] This "standard" for the ranking was described by the plant official who oversaw the conduct of the study.

[28] The results of the study are displayed on Chart A in the Appendix to this opinion.

whether their employment tests are job related. 29 CFR pt. 1607. These Guidelines draw upon and make reference to professional standards of test validation established by the American Psychological Association.[29] The EEOC Guidelines are not administrative "regulations" promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute "[t]he administrative interpretation of the Act by the enforcing agency," and consequently they are "entitled to great deference." *Griggs* v. *Duke Power Co.,* 401 U. S., at 433–434. See also *Espinoza* v. *Farah Mfg. Co.,* 414 U. S. 86, 94 (1973).

The message of these Guidelines is the same as that of the *Griggs* case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." 29 CFR § 1607.4 (c).

Measured against the Guidelines, Albemarle's validation study is materially defective in several respects:

(1) Even if it had been otherwise adequate, the study would not have "validated" the Beta and Wonderlic test battery for all of the skilled lines of progression for which the two tests are, apparently, now required. The study showed significant correlations for the Beta Exam in only three of the eight lines. Though the Wonderlic Test's Form A and Form B are in theory identical and

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[29] American Psychological Association, Standards for Educational and Psychological Tests and Manuals (1966) (hereafter APA Standards). A volume of the same title, containing modifications, was issued in 1974. The EEOC Guidelines refer to the APA Standards at 29 CFR § 1607.5 (a). Very similar guidelines have been issued by the Secretary of Labor for the use of federal contractors. 41 CFR § 60–3.1 *et seq.*

interchangeable measures of verbal facility, significant correlations for one form but not for the other were obtained in four job groupings. In two job groupings neither form showed a significant correlation. Within some of the lines of progression, one form was found acceptable for some job groupings but not for others. Even if the study were otherwise reliable, this odd patchwork of results would not entitle Albemarle to impose its testing program under the Guidelines. A test may be used in jobs other than those for which it has been professionally validated only if there are "no significant differences" between the studied and unstudied jobs. 29 CFR § 1607.4 (c)(2). The study in this case involved no analysis of the attributes of, or the particular skills needed in, the studied job groups. There is accordingly no basis for concluding that "no significant differences" exist among the lines of progression, or among distinct job groupings within the studied lines of progression. Indeed, the study's checkered results appear to compel the opposite conclusion.

(2) The study compared test scores with subjective supervisorial rankings. While they allow the use of supervisorial rankings in test validation, the Guidelines quite plainly contemplate that the rankings will be elicited with far more care than was demonstrated here.[30]

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[30] The Guidelines provide, at 29 CFR §§ 1607.5 (b)(3) and (4):

"(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.

"(4) In view of the possibility of bias inherent in subjective

Albemarle's supervisors were asked to rank employees by a "standard" that was extremely vague and fatally open to divergent interpretations. As previously noted, each "job grouping" contained a number of different jobs, and the supervisors were asked, in each grouping, to

> "determine which ones [employees] they felt irrespective of the job that they were actually doing, but in their respective jobs, did a better job than the person they were rating against . . . ."[31]

There is no way of knowing precisely what criteria of job performance the supervisors were considering, whether each of the supervisors was considering the same criteria or whether, indeed, any of the supervisors actually applied a focused and stable body of criteria of any kind.[32] There is, in short, simply no way to determine whether the criteria *actually* considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact.

(3) The Company's study focused, in most cases, on job groups near the top of the various lines of progression. In *Griggs* v. *Duke Power Co., supra,* the Court

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evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. In addition, minorities might obtain unfairly low performance criterion scores for reasons other than supervisor's prejudice, as when, as new employees, they have had less opportunity to learn job skills. The general point is that all criteria need to be examined to insure freedom from factors which would unfairly depress the scores of minority groups."

[31] See n. 27, *supra.*

[32] It cannot escape notice that Albemarle's study was conducted by plant officials, without neutral, on-the-scene oversight, at a time when this litigation was about to come to trial. Studies so closely controlled by an interested party in litigation must be examined with great care.

left open "the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need." 401 U. S., at 432. The Guidelines take a sensible approach to this issue, and we now endorse it:

> "If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it shall be considered that candidates are being evaluated for a job at or near the entry level." 29 CFR § 1607.4 (c)(1).

The fact that the best of those employees working near the top of a line of progression score well on a test does not necessarily mean that that test, or some particular cutoff score on the test, is a permissible measure of the minimal qualifications of new workers entering lower level jobs. In drawing any such conclusion, detailed consideration must be given to the normal speed of promotion, to the efficacy of on-the-job training in the scheme of promotion, and to the possible use of testing as a promotion device, rather than as a screen for entry into low-level jobs. The District Court made no findings on these issues. The issues take on special importance in a case, such as this one, where incumbent employees are permitted to work at even high-level jobs without passing the company's test battery. See 29 CFR § 1607.11.

(4) Albemarle's validation study dealt only with job-experienced, white workers; but the tests themselves are given to new job applicants, who are younger, largely inexperienced, and in many instances nonwhite. The APA Standards state that it is "essential" that

> "[t]he validity of a test should be determined on subjects who are at the age or in the same educational or vocational situation as the persons for whom the test is recommended in practice." ¶ C 5.4.

The EEOC Guidelines likewise provide that "[d]ata must be generated and results separately reported for minority and nonminority groups wherever technically feasible." 29 CFR § 1607.5 (b)(5). In the present case, such "differential validation" as to racial groups was very likely not "feasible," because years of discrimination at the plant have insured that nearly all of the upper level employees are white. But there has been no clear showing that differential validation was not feasible for lower level jobs. More importantly, the Guidelines provide:

> "If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible." 29 CFR § 1607.5 (b)(1).
>
> ". . . [E]vidence of satisfactory validity based on other groups will be regarded as only provisional compliance with these guidelines pending separate validation of the test for the minority group in question." 29 CFR § 1607.5 (b)(5).

For all these reasons, we agree with the Court of Appeals that the District Court erred in concluding that

Albemarle had proved the job relatedness of its testing program and that the respondents were consequently not entitled to equitable relief. The outright reversal by the Court of Appeals implied that an injunction should immediately issue against all use of testing at the plant. Because of the particular circumstances here, however, it appears that the more prudent course is to leave to the District Court the precise fashioning of the necessary relief in the first instance. During the appellate stages of this litigation, the plant has apparently been amending its departmental organization and the use made of its tests. The appropriate standard of proof for job relatedness has not been clarified until today. Similarly, the respondents have not until today been specifically apprised of their opportunity to present evidence that even validated tests might be a "pretext" for discrimination in light of alternative selection procedures available to the Company. We also note that the Guidelines authorize provisional use of tests, pending new validation efforts, in certain very limited circumstances. 29 CFR § 1607.9. Whether such circumstances now obtain is a matter best decided, in the first instance, by the District Court. That court will be free to take such new evidence, and to exercise such control of the Company's use and validation of employee selection procedures, as are warranted by the circumstances and by the controlling law.

Accordingly, the judgment is vacated, and these cases are remanded to the District Court for proceedings consistent with this opinion.

It is so ordered.

Mr. Justice Powell took no part in the consideration or decision of these cases.

[Appendix to opinion of the Court follows.]

APPENDIX TO OPINION OF THE COURT

CHART A

Results of Validation Study

			Test	
Job Group	*N*	*Beta*	*W–A*	*W–B*
1. Caustic Operator, Lime Kiln Operator	8	.25	1.00**	.47
2. C. E. Recovery Operator, C. E. Recovery 1st Helpers & Evaporator Operators	12	.64**	.32	.17
3. Wood Yard: Long Log Operators, Log Stackers, Small Equipment Operators & Oilers	14	.00	1.00**	.72*
4. Technical Services: B Mill Shift Testmen, Additive men, General Lab. Testmen, General Lab. asst., A Mill Testmen, Samplemen		.50*	.75**	.64*
5. B Paper Mill: Machine Tenders and Back Tenders	16	.00	.50**	.34
6. B Paper Mill: Stock Room Operator, Stock Room 1st Helper	8	—.50	.00	.00
7. B Paper Mill: 3rd Hands, 4th Hands & 5th Hands	21	.43	.81**	.60**
8. Wood Yard: Chipper Unloader, Chipper Operator, No. 2 Chain Operator	6	.76*	—.25	1.00**
9. Pulp Mill: Stock Room Operator, Stock Room 1st Helpers	8	.50	.80*	.76*
10. Power Plant: Power Plant Operator, Power Plant 1st Helper, Power Plant 2nd Helper	12	.34	.75**	.66*

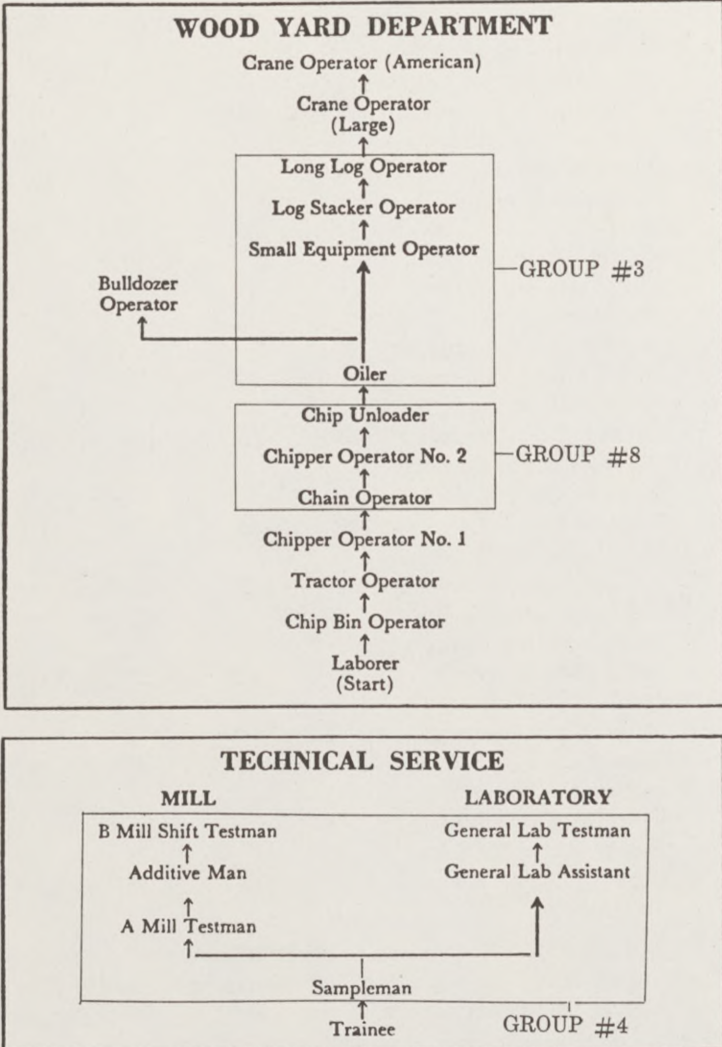
NOTE

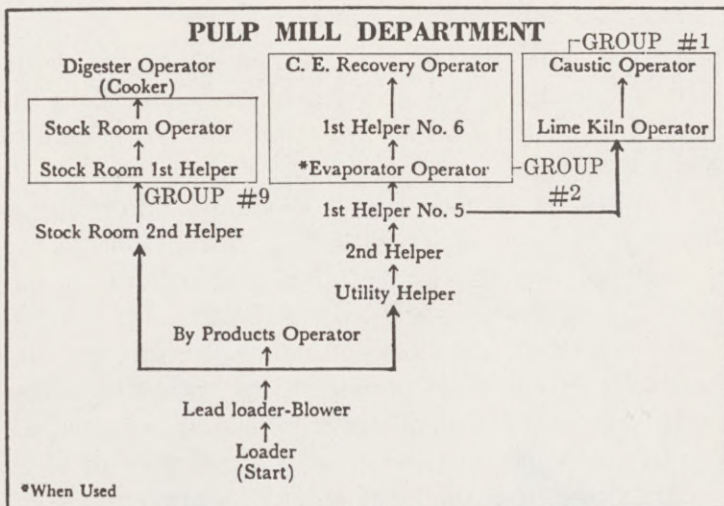
The job groups are identified in Chart B. N indicates the number of employees tested. A single (double) asterisk indicates the "Phi" coefficient of correlation, shown on the chart, is statistically significant at a 95% (99%) level of confidence. The other coefficients are not statistically significant.

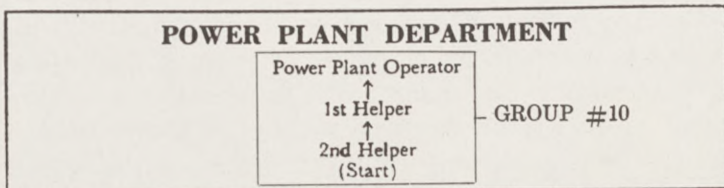
CHART B

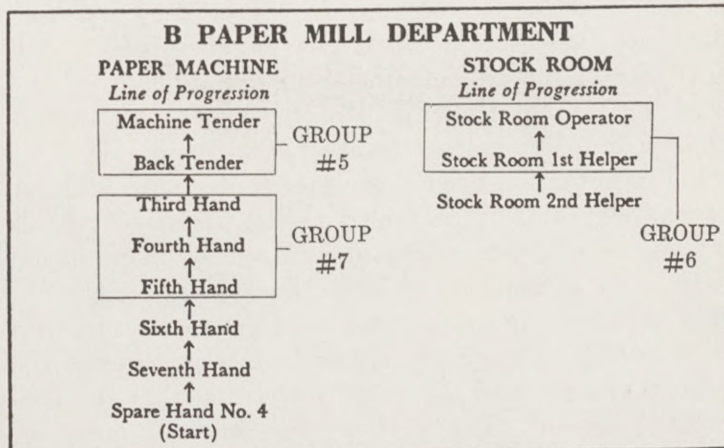
Albemarle's Skilled Lines of Progression

NOTE: The numbered job groups are those examined in the validation study summarized in Chart A. Testing is no longer required for entry into the Woodyard Department.




PULP MILL DEPARTMENT
GROUP #1
Digester Operator
(Cooker)
Stock Room Operator
Stock Room 1st Helper
GROUP #9
Stock Room 2nd Helper
C. E. Recovery Operator
1st Helper No. 6
*Evaporator Operator
GROUP #2
1st Helper No. 5
2nd Helper
Utility Helper
Caustic Operator
Lime Kiln Operator
By Products Operator
Lead loader-Blower
Loader
(Start)
*When Used


POWER PLANT DEPARTMENT
Power Plant Operator
1st Helper
2nd Helper
(Start)
GROUP #10


B PAPER MILL DEPARTMENT
PAPER MACHINE
Line of Progression
Machine Tender
Back Tender
GROUP #5
Third Hand
Fourth Hand
Fifth Hand
GROUP #7
Sixth Hand
Seventh Hand
Spare Hand No. 4
(Start)
STOCK ROOM
Line of Progression
Stock Room Operator
Stock Room 1st Helper
Stock Room 2nd Helper
GROUP #6

MR. JUSTICE MARSHALL, concurring.

I agree with the opinion of the Court. I write today only to make the following observations about the proceedings in the District Court on remand relative to the backpay issue.

As the Court affirms, there is no legal bar to raising a claim for backpay under Title VII at any time in the proceedings, even "indeed after a trial on [the] complaint [for injunctive relief] has been had." *Ante,* at 424. Furthermore, only the most unusual circumstances would constitute an equitable barrier to the award of make-whole relief where liability is otherwise established. The bar of laches, predicated on the prejudice to a defendant's case from the tardy entry of a prayer for compensation, should be particularly difficult to establish.

Backpay in Title VII cases is generally computed, with respect to each affected employee or group of employees, by determining the amount of compensation lost as a direct result of the employer's discriminatory decision not to hire or promote. In litigation such as this, where the plaintiff class is limited to present and former employees of petitioner company who were denied promotions into the more lucrative positions because of their race, there is no need to make additional findings and offsetting computations for wages earned in alternative employment during the relevant period.

The information needed in order to compute backpay for nonpromotion is contained in the personnel records and pay schedules normally maintained by an employer, some under compulsion of law. These data include the time at which an employee in the favored group was promoted over an otherwise more senior member of the disfavored class, and the wage differential that the promotion entailed. Rarely, if ever, could an employer plausibly invoke the doctrine of laches on the usual

ground that the passage of time has put beyond reach evidence or testimony necessary to his case.

The prejudice on which the District Court relied here was, indeed, of a different and more speculative variety. The court made no findings of fact relevant to the subject, but found it "apparent" that prejudice would accrue because "[t]he defendants might have chosen to exercise unusual zeal in having this court determine their rights at an earlier date had they known that back pay would be at issue." 2 App. 498. This indulgent speculation is clearly not an adequate basis on which to deny the successful Title VII complainant compensatory backpay and surely even less of a reason for penalizing the members of the class that he represents.* In posing as an issue on remand "[w]hether the petitioners were *in fact* prejudiced," *ante,* at 424 (emphasis added), the Court recognizes as much.

Although on the record now before us I have no doubt that respondents' tardiness in asserting their claim to backpay was excusable in light of the uncertain state of the law during the first years of this litigation, I agree that the District Court should be the first to pass upon the issues as the Court has posed them. Doubtful though I remain about their ability to do so, petitioners are entitled at least to an opportunity to prove that respondents' delay prejudiced their defense so substantially as to make an award of compensatory relief oppressive.

MR. JUSTICE REHNQUIST, concurring.

I join the opinion of the Court. The manner in which 42 U. S. C. § 2000e–5 (g) (1970 ed., Supp. III) is con-

*Even the District Court's formulation, if founded upon proof that the defendants would have "chosen to exercise unusual zeal," would only justify a limitation on the award of backpay to reflect the earlier date at which the court would have awarded it; in no event would it support the denial of all backpay relief.

strued has important consequences not only as to the circumstances under which backpay may be awarded, but also as to the method by which any such award is to be determined.

To the extent that an award of backpay were to be analogized to an award of damages, such an award upon proper proof would follow virtually as a matter of course from a finding that an employer had unlawfully discriminated contrary to the provisions of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. III). Plaintiffs would be entitled to the benefit of the rule enunciated in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 265 (1946):

> " 'The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights. *Story Parchment Co.* v. *Patterson Co.*, [282 U. S. 555,] 565."

But precisely to the extent that an award of backpay is thought to flow as a matter of course from a finding of wrongdoing, and thereby becomes virtually indistinguishable from an award for damages, the question (not raised by any of the parties, and therefore quite properly not discussed in the Court's opinion), of whether either side may demand a jury trial under the Seventh Amendment becomes critical. We said in *Curtis* v. *Loether*, 415 U. S. 189, 197 (1974), in explaining the difference between the provision for damages under § 812 of the Civil Rights Act of 1968, 82 Stat. 88, 42 U. S. C.

§ 3612, and the authorization for the award of backpay which we treat here:

> "In Title VII cases, also, the courts have relied on the fact that the decision whether to award backpay is committed to the discretion of the trial judge. There is no comparable discretion here: if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount. . . . Whatever may be the merit of the 'equitable' characterization in Title VII cases, there is surely no basis for characterizing the award of compensatory and punitive damages here as equitable relief." (Footnote omitted.)

In *Curtis, supra,* the Court further quoted the description of the Seventh Amendment in Mr. Justice Story's opinion for this Court in *Parsons* v. *Bedford,* 3 Pet. 433, 447 (1830), to the effect that:

> "In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights."

To the extent, then, that the District Court retains substantial discretion as to whether or not to award backpay notwithstanding a finding of unlawful discrimination, the nature of the jurisdiction which the court exercises is equitable, and under our cases neither party may demand a jury trial. To the extent that discretion is replaced by awards which follow as a matter of course from a finding of wrongdoing, the action of the court in making such awards could not be fairly characterized as equitable in character, and would quite arguably be subject to the provisions of the Seventh Amendment.

Thus I believe that the broad latitude which the

Court's opinion reposes in the district courts in the decision as to whether backpay shall be awarded is not only consistent with the statute, but is supported by policy considerations which would favor the more expeditious disposition which may be made of numerous claims on behalf of frequently large classes by a court sitting without a jury. As the Court states, *ante,* at 419, the backpay remedy provided by Title VII is modeled on the remedial provisions of the NLRA. This Court spoke to the breadth of the latter provision in *Phelps Dodge Corp.* v. *NLRB,* 313 U. S. 177, 198 (1941), when it said:

> "[W]e must avoid the rigidities of an either-or rule. The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations."

I agree, nonetheless, with the Court that the District Court should not have denied backpay in this litigation simply on the ground that Albemarle's breach of Title VII had not been in "bad faith." Good faith is a necessary condition for obtaining equitable consideration, but in view of the narrower "good faith" defense created by statute, 42 U. S. C. § 2000e–12 (b), it is not for this Court to expand such a defense beyond those situations to which Congress had made it applicable. I do not read the Court's opinion to say, however, that the facts upon which the District Court based its conclusion, *ante,* at 422 n. 15, would not have supported a finding that the conduct of Albemarle was reasonable under the circumstances as well as being simply in good faith. Nor do I read the Court's opinion to say that such a combination of factors might not, in appropriate circumstances, be an

adequate basis for denial of backpay. See *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F. 2d 1002, 1006 (CA9 1972); *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 922 (CA5 1973).

A cursory canvass of the decisions of the District Courts and Courts of Appeals which confront these problems much more often than we do suggests that the most frequently recurring problem in this area is the difficulty of ascertaining a sufficient causal connection between the employer's conduct properly found to have been in violation of the statute and an ascertainable amount of backpay lost by a particular claimant as a result of that conduct. *United States* v. *St. Louis-S. F. R. Co.*, 464 F. 2d 301, 311 (CA8 1972), cert. denied, 409 U. S. 1116 (1973). The Court of Appeals for the Eighth Circuit aptly described the difficulty of fashioning an award of backpay in the circumstances before it, and upheld the District Court's refusal to award backpay, in *Norman* v. *Missouri P. R. Co.*, 497 F. 2d 594, 597 (1974), cert. denied, 420 U. S. 908 (1975):

> "No standard could determine the right to back pay itself nor the date from which to compute any right to back pay. Courts that have found back pay awards to be appropriate remedies in Title VII actions have generally recognized that such awards should be limited to actual damages . . . ."

As the Court recognizes, *ante*, at 424–425, another factor presented here which is relevant to the District Court's exercise of discretion is the possible detrimental reliance of petitioners on prior representations of respondents that they were not seeking classwide backpay. In 1966 respondents in replying to a motion for summary judgment expressly represented to the District Court that they had no interest in classwide backpay:

> "It is important to understand the exact nature of

the class relief being sought by plaintiffs. No money damages are sought for any member of the class not before the court . . . .

. . . . .

". . . [T]he matter of specific individual relief for other class members is not before this Court." 1 App. 13–14.

Five years later, respondents reversed their position and asserted a claim for classwide backpay. Petitioners have argued here and below that they reasonably relied to their detriment on respondents' statement in numerous ways including an interim sale of the mill at a price which did not take into account the ruinous liability with which the new owners are now faced, failure to investigate and prepare defenses to individual backpay claims which are now nine years old, and failure to speed resolution of this lawsuit. 474 F. 2d 134, 146 n. 16 (CA4 1973). This conduct by the respondents presents factual and legal questions to be resolved in the first instance by the District Court, reviewable only on whether its factual findings are "clearly erroneous" and whether its ultimate conclusion is an "abuse of discretion" under all the circumstances of this case. *Ante*, at 424–425. In the same manner that the good faith of an employer may not be viewed in isolation as precluding backpay under any and all circumstances, the excusable nature of respondents' conduct, if found excusable, will not necessarily preclude denial of a backpay award if petitioners are found to have substantially and justifiably relied on respondents' prior representations.

If the award of backpay is indeed governed by equitable considerations, and not simply a thinly disguised form of damages, factors such as these and others, which may argue in favor of or against the equities of either plaintiff or defendants, must be open for consideration

by the District Court. It, like the NLRB, must avail itself "of the freedom given it by Congress to attain just results in diverse, complicated situations." *Phelps Dodge Corp.* v. *NLRB,* 313 U. S., at 198.

MR. JUSTICE BLACKMUN, concurring in the judgment.

I concur in the judgment of the Court, but I do not agree with all that is said in the Court's opinion.

The statutory authority for making awards of backpay in Title VII cases is cast in language that emphasizes flexibility and discretion in fashioning an appropriate remedy:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action *as may be appropriate, which may include,* but is not limited to, reinstatement or hiring of employees, *with or without* back pay . . . or any other equitable relief as the court deems appropriate." 78 Stat. 261, as amended, 86 Stat. 107, 42 U. S. C. § 2000e-5 (g) (1970 ed., Supp. III) (emphasis added).

Despite this statutory emphasis on discretion, the Court of Appeals in this case reasoned by analogy to *Newman* v. *Piggie Park Enterprises,* 390 U. S. 400 (1968), that once a violation of Title VII had been established, "[backpay] should ordinarily be awarded . . . unless special circumstances would render such an award unjust." 474 F. 2d 134, 142 (CA4 1973). Today the Court rejects the "special circumstances" test adopted by the Court of Appeals and holds that the power to award backpay is a discretionary power, the exercise of which must be measured against "the purposes which

inform Title VII." *Ante,* at 415–417. With this much of the Court's opinion I agree. The Court goes on to suggest, however, that an employer's good faith is never a sufficient reason for refusing to award backpay. *Ante,* at 422–423. With this suggestion I do not agree. Instead, I believe that the employer's good faith may be a very relevant factor for a court to consider in exercising its discretionary power to fashion an appropriate affirmative action order. Thus, to take a not uncommon example, an employer charged with sex discrimination may defend on the ground that the challenged conduct was *required* by a State's "female protective" labor statute. See, *e. g., Kober* v. *Westinghouse Electric Corp.,* 480 F. 2d 240 (CA3 1973); *Manning* v. *General Motors Corp.,* 466 F. 2d 812 (CA6 1972), cert. denied, 410 U. S. 946 (1973); *Schaeffer* v. *San Diego Yellow Cabs, Inc.,* 462 F. 2d 1002 (CA9 1972); *LeBlanc* v. *Southern Bell Telephone & Telegraph Co.,* 460 F. 2d 1228 (CA5), cert. denied, 409 U. S. 990 (1972). In such a case, the employer may be thrust onto the horns of a dilemma: either he must violate Title VII or he must violate a presumptively valid state law. Even though good-faith reliance on the state statute may not exonerate an employer from a finding that he has intentionally violated Title VII, see, *e. g., Kober* v. *Westinghouse Electric Corp., supra;* cf., *ante,* at 423 nn. 17–18, surely the employer's good-faith effort to comply with Title VII to the extent possible under state law is a relevant consideration in considering whether to award backpay. Although backpay in such a case would serve the statutory purpose of making the discriminatee whole, it would do so at the expense of an employer who had no alternative under state law and who derived no economic benefit from the challenged conduct.

I also agree with the decision of the Court

to vacate the judgment of the Court of Appeals insofar as it appeared to require an injunction against all testing by Albemarle. I cannot join, however, in the Court's apparent view that absolute compliance with the EEOC Guidelines is a *sine qua non* of pre-employment test validation. The Guidelines, of course, deserve that deference normally due agency statements based on agency experience and expertise. Nevertheless, the Guidelines in question have never been subjected to the test of adversary comment. Nor are the theories on which the Guidelines are based beyond dispute. The simple truth is that pre-employment tests, like most attempts to predict the future, will never be completely accurate. We should bear in mind that pre-employment testing, so long as it is fairly related to the job skills or work characteristics desired, possesses the potential of being an effective weapon in protecting equal employment opportunity because it has a unique capacity to measure all applicants objectively on a standardized basis. I fear that a too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII.

MR. CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I agree with the Court's opinion insofar as it holds that the availability of backpay is a matter which Title VII commits to the sound equitable discretion of the trial court. I cannot agree with the Court's application of that principle in this case, or with its method of reviewing the District Court's findings regarding Albemarle's testing policy.

With respect to the backpay issue, it must be emphasized that Albemarle was not held liable for practicing overt racial discrimination. It is undisputed that it voluntarily discontinued such practices prior to the effective date of Title VII and that the statute does not—and could not—apply to acts occurring before its passage. The basis of Albemarle's liability was that its seniority system perpetuated the effects of past discrimination and, as the District Court pointed out, the law regarding an employer's obligation to cure such effects was unclear for a considerable period of time. Moreover, the District Court's finding that Albemarle did not act in bad faith was not simply a determination that it thought its seniority system was legal but, rather, a finding that both prior to and after the filing of this lawsuit it took steps to integrate minorities into its labor force and to promptly fulfill its obligations under the law as it developed.[1]

In light of this background, the Court's suggestion that the District Court "conditioned" awards of backpay upon a showing of bad faith, *ante,* at 423, is incorrect. Moreover, the District Court's findings on this point cannot be disregarded as irrelevant. As the Court's opinion notes, one of Congress' major purposes in giving district courts discretion to award backpay in Title VII

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[1] The District Court concluded that Albemarle was entirely justified in maintaining some type of seniority system which insured that its employees would have "a certain degree of training and experience." Its findings regarding the absence of bad faith were as follows:

"It appears that the company as early as 1964 began active recruitment of blacks for its Maintenance Apprentice Program. Certain lines of progression were merged on its own initiative, and as judicial decisions expanded the then existing interpretations of the Act, the defendants took steps to correct the abuses without delay." 2 App. 498.

actions was to encourage employers and unions " 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' " *Ante,* at 418. By the same token, if employers are to be assessed backpay even where they have attempted in good faith to conform to the law, they will have little incentive to eliminate marginal practices until bound by a court judgment. Plainly, then, the District Court's findings relate to "reasons which, if applied generally, would not frustrate the central statutory purposes . . . ." *Ante,* at 421. Because respondents waited five years before changing their original position disclaiming backpay and belatedly seeking it, thus suggesting that a desire to be "made whole" was not a major reason for their pursuit of this litigation, I cannot say that the District Court abused its discretion by denying that remedy.[2]

The Court's treatment of the testing issue is equally troubling. Its entire analysis is based upon a wooden application of EEOC Guidelines which, it says, are entitled to "great deference" as an administrative interpretation of Title VII under *Griggs* v. *Duke Power Co.,* 401 U. S. 424 (1971). The Court's reliance upon *Griggs* is misplaced. There we were dealing with Guidelines which state that a test must be demonstrated to be job related before it can qualify for the exemption contained in § 703 (h) of Title VII, 78 Stat. 257, 42 U. S. C. § 2000e-2 (h), as a device not "designed, intended or used to discriminate . . . ." Because this interpretation

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[2] As the Court points out, *ante,* at 424 n. 20, the District Court's reasons for denying backpay were cumulative. It did not favor one policy of Title VII to the exclusion of all others, as I fear this Court is now doing.

of specific statutory language was supported by both the Act and its legislative history, we observed that there was "good reason to treat the guidelines as expressing the will of Congress." 401 U. S., at 434. See also *Espinoza* v. *Farah Mfg. Co.*, 414 U. S. 86, 93–95 (1973).

In contrast, the Guidelines upon which the Court now relies relate to methods for *proving* job relatedness; they interpret no section of Title VII and are nowhere referred to in its legislative history. Moreover, they are not federal regulations which have been submitted to public comment and scrutiny as required by the Administrative Procedure Act.[3] Thus, slavish adherence to the EEOC Guidelines regarding test validation should not be required; those provisions are, as their title suggests, guides entitled to the same weight as other well-founded testimony by experts in the field of employment testing.

The District Court so considered the Guidelines in this case and resolved any conflicts in favor of Albemarle's experts. For example, with respect to the question whether validating tests for persons at or near the top of a line of progression "is a permissible measure of the minimal qualifications of new workers," *ante*, at 434, the District Court found:

> "The group tested was typical of employees in the skilled lines of progression. They were selected from the top and middle of various lines. Professional studies have shown that when tests are vali-

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[3] Such comment would not be a mere formality in light of the fact that many of the EEOC Guidelines are not universally accepted. For example, the Guideline relating to "differential validation," upon which the Court relies in this case, *ante*, at 435, has been questioned by the American Psychological Association. See *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 914 n. 8 (CA5 1973).

> dated in such a narrow range of competence, there is a greater chance that the test will validate even a broader range, that is, if job candidates as well as present employees are tested." 2 App. 490–491.

Unless this Court is prepared to hold that this and similar factual findings are clearly erroneous, the District Court's conclusion that Albemarle had sustained its burden of showing that its tests were job related is entitled to affirmance, if we follow traditional standards of review. At the very least, the case should be remanded to the Court of Appeals with instructions that it reconsider the testing issue, giving the District Court's findings of fact the deference to which they are entitled.

MUNIZ ET AL. v. HOFFMAN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD

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

No. 73-1924. Argued March 24, 1975—Decided June 25, 1975

After their request for a jury trial was denied, petitioners, a labor union officer and the union, were adjudged guilty of criminal contempt for violating temporary injunctions issued by the District Court pursuant to § 10 (*l*) of the National Labor Relations Act (NLRA) against picketing of an employer pending the National Labor Relations Board's final disposition of the employer's unfair labor practice charge against such picketing. The District Court suspended sentencing of the officer and placed him on probation, but imposed a $10,000 fine on the union. On appeal the Court of Appeals rejected petitioners' claims that they had a statutory right to a jury trial under 18 U. S. C. § 3692, which provides for jury trial in contempt cases arising under any federal law governing the issuance of injunctions "in any case" growing out of a labor dispute, and that they also had a right to a jury trial under the Constitution (the latter question being limited in this Court to whether the union had such a constitutional right). *Held:*

1. Petitioners are not entitled to a jury trial under 18 U. S. C. § 3692. Pp. 458–474.

(a) It is clear from § 10 (*l*) of the NLRA, as added by the Labor Management Relations Act (LMRA), and related sections, particularly § 10 (h) (which provides that the courts' jurisdiction to grant temporary injunctive relief or to enforce or set aside an NLRB unfair practice order shall not be limited by the Norris-LaGuardia Act), and from the legislative history of such sections, that Congress not only intended to exempt injunctions authorized by the NLRA and the LMRA from the Norris-LaGuardia Act's limitations, including original § 11 of the latter Act (now repealed) requiring jury trials in contempt actions arising out of that Act, but also intended that civil and criminal contempt proceedings enforcing those injunctions were not to afford contemnors the right to a jury trial. By providing for labor Act injunctions outside the Norris-LaGuardia Act's framework, Congress necessarily contemplated that there would be no right to a jury trial in such contempt proceedings. Pp. 458–467.

(b) Absent an express provision or any indication in the Reviser's Note to 18 U. S. C. § 3692 that a substantive change in the law was contemplated, no intention on Congress' part to change its original intention that there be no jury trials in contempt proceedings arising out of NLRA injunctions, is shown by the fact that § 11 of the Norris-LaGuardia Act was repealed and replaced by § 3692 as part of the 1948 revision of the Criminal Code. Just as § 3692 may not be read apart from other relevant provisions of the labor law, that section likewise may not be read isolated from its legislative history and the revision process from which it emerged, all of which place definite limitations on this Court's latitude in construing it. Pp. 467–474.

2. Nor does petitioner union have a right to a jury trial under Art. III, § 2, of the Constitution, and the Sixth Amendment. Despite 18 U. S. C. § 1 (3), which defines petty offenses as those crimes "the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both," a contempt need not be considered a serious crime under all circumstances where the punishment is a fine of more than $500, unaccompanied by imprisonment. Here, where it appears that petitioner union collects dues from some 13,000 persons, the $10,000 fine imposed was not of such magnitude that the union was deprived of whatever right to a jury trial it might have under the Sixth Amendment. Pp. 475–477.

492 F. 2d 929, affirmed.

White, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, Blackmun, and Rehnquist, JJ., joined. Douglas, J., filed a dissenting opinion, *post*, p. 478. Stewart, J., filed a dissenting opinion, in which Marshall and Powell, JJ., joined, *post*, p. 481.

Victor J. Van Bourg argued the cause for petitioners. With him on the briefs was *Sheldon Otis*.

Solicitor General Bork argued the cause for respondent. With him on the brief were *Allan Abbot Tuttle, Peter G. Nash, John S. Irving, Patrick Hardin,* and *Norton J. Come.**

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*Briefs of *amici curiae* urging reversal were filed by *Frank J. Donner, Winn Newman, Ruth Weyand, Harold I. Cammer, Norman*

MR. JUSTICE WHITE delivered the opinion of the Court.

The issues in this case are whether a labor union or an individual, when charged with criminal contempt for violating an injunction issued pursuant to § 10 (*l*) of the Labor Management Relations Act, as added, 61 Stat. 149, and as amended, 29 U. S. C. § 160 (*l*), has a right to a jury trial under 18 U. S. C. § 3692, and whether the union has a right to a jury trial under the Constitution when charged with such a violation and a fine of as much as $10,000 is to be imposed.

I

Early in 1970, Local 21 of the San Francisco Typographical Union commenced picketing a publishing plant of a daily newspaper in San Rafael, Cal. Shortly thereafter, the newspaper filed an unfair labor practice charge against this union activity, and the Regional Director of the National Labor Relations Board, in response to that filing, petitioned the District Court pursuant to § 10 (*l*) for a temporary injunction against those activities pending final disposition of the charge by the Board. The District Court, after a hearing, granted the requested relief and, more than two months later, granted a second petition for a temporary injunction filed by the Regional Director in response to other union activities related to

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Leonard, and *I. Philip Sipser* for the United Electrical, Radio, and Machine Workers of America et al.; by *Joseph A. Yablonski* and *Daniel B. Edelman* for the United Mine Workers of America; by *Nancy Stearns* for the Union Nacional de Trabajadores; and by *Jonathan Shapiro* for the Labor Committee of the National Lawyers Guild.

Nathan R. Berke filed a brief for California Newspapers, Inc., dba San Rafael Independent Journal, as *amicus curiae* urging affirmance.

the original dispute. On June 24, 1970, Local 21 and certain of its officials were found to be in civil contempt of the latter injunction. After the entry of this contempt order, the tempo of illegal activities in violation of both injunctions increased, with other locals, including Local 70, participating. Various unions and their officers, including petitioners, were subsequently ordered to show cause why they should not be held in civil and criminal contempt of the injunctions. After proceedings in the criminal contempt case had been severed from the civil contempt proceedings, petitioners demanded a jury trial in the criminal case; this request was denied and petitioners were adjudged guilty of criminal contempt after appropriate proceedings. The District Court suspended the sentencing of petitioner Muniz and placed him on probation for one year; the court imposed a fine on petitioner Local 70 which, for purposes of this case, was $10,000.[1] On appeal of that judgment to the Court of Appeals, petitioners argued, *inter alia,* that they had a statutory right to a jury trial of any disputed issues of fact, relying on 18 U. S. C. § 3692; [2] petitioners also argued that they had a right to a jury trial under Art. III, § 2, of the Constitution, and the Sixth Amendment. The Court of Appeals rejected these and other claims

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[1] A fine of $25,000 was imposed initially, but $15,000 of that fine was subsequently remitted by the District Court based on Local 70's obedience of the injunctions subsequent to the adjudication of contempt.

[2] Title 18 U. S. C. § 3692 reads in pertinent part as follows:

"In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed."

made by petitioners, 492 F. 2d 929 (CA9 1974), who then petitioned this Court for a writ of certiorari. The writ was granted, 419 U. S. 992 (1974), limited to the questions whether petitioners had a statutory right to a jury trial and whether petitioner Local 70 had a constitutional right to jury trial in this case.

II

The petitioners' claim to jury trial under § 3692 is simply stated: that section provides for jury trial in contempt cases arising under any federal law governing the issuance of injunctions in *any case* growing out of a labor dispute; here, the injunction issued under § 10 (*l*) arose out of a labor dispute in the most classic sense and hence contempt proceedings were subject to § 3692's requirement for jury trial. Were we to consider only the language of § 3692, we might be hard pressed to disagree. But it is not unusual that exceptions to the applicability of a statute's otherwise all-inclusive language are not contained in the enactment itself but are found in another statute dealing with particular situations to which the first statute might otherwise apply.[3] *Tidewater Oil*

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[3] Although stating broadly at the outset that "[b]y its own terms [§ 3692] encompasses *all* cases of contempt arising under any of the several *laws* of the United States governing the issuance of injunctions in cases of a 'labor dispute,'" dissenting opinion of Mr. Justice Stewart, *post,* at 482, that dissent seems to imply that § 3692, after all, does not reach all cases of contempt in labor dispute injunctions. That dissent appears to say that § 3692 provides the right to jury trials only in cases involving criminal, as opposed to civil, contempt. This is so, it is suggested, because that section guarantees the right to "the accused," the inference being that one charged with civil contempt is not one properly denominated as an "accused." *Post,* at 487–488, n. 7. But the phrase "the accused" was taken verbatim from § 11 of the Norris-LaGuardia Act, 47 Stat. 72, 29 U. S. C. § 111 (1946 ed.), and the legislative history of § 11 leaves little room to doubt that when Congress enacted § 11, it

Co. v. *United States,* 409 U. S. 151 (1972); *MacEvoy Co.* v. *United States ex rel. Tomkins Co.,* 322 U. S. 102 (1944). The Norris-LaGuardia Act, 47 Stat. 70, as amended, 29

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intended that section to be applicable to both criminal and civil contempt proceedings. That history establishes that § 11 was a compromise between the Senate version of the bill, which provided for a jury trial in all contempt cases, and the House version of the bill, which provided for jury trials in all criminal contempt cases arising under the Norris-LaGuardia Act. The compromise, as explained to the House, gave the right to a jury trial in all contempts, civil or criminal, in cases arising under the Act. 75 Cong. Rec. 6336–6337 (1932). In the Senate, Senator Norris himself explained the compromise as follows:

"As the House passed the bill it did not apply to all contempt cases under the act. As the Senate passed it, it applied to all cases, either under the act or otherwise. As the House passed it, it applied only to criminal contempt. As the Senate passed it, it applied to all contempts. The compromise was to confine it to all cases under the act and to eliminate the word 'criminal,' but the cases must arise under this act." *Id.,* at 6450.

And, Senator Norris continued:

"Under the compromise made, the language of the Senate was agreed to, so that now anyone charged with any kind of a contempt arising under any of the provisions of this act will be entitled to a jury trial in the contempt proceedings." *Id.,* at 6453.

Certainly when Congress used the phrase "the accused" in § 11, it did not mean to limit that phrase to describing only those accused of criminal contempt.

The dissent of Mr. Justice Stewart also suggests that this limited reading of § 3692 is "consistent" with the placing of that provision, based on § 11 of Norris-LaGuardia, into Title 18 in 1948. If there is any consistency in this suggestion, it is in that dissent's consistent position that Congress in 1948, without expressing any intention whatsoever to do so, made substantial changes in the right to jury trial—including outright repeal of whatever statutory right there was to jury trial in civil contempt cases arising out of labor disputes, thereby reversing itself on an issue that had been thoroughly considered and decided some 16 years before in Norris-LaGuardia.

In arguing that § 3692 may not reach civil contempt cases, Mr. Justice Stewart also relies on implications which he finds in § 10 (*l*)

U. S. C. § 101 *et seq.*, for example, categorically withdraws jurisdiction from the United States courts to issue any injunctions against certain conduct arising out of labor

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of the LMRA that § 3692, despite its language, has no application in those cases. As is clear from this opinion, *infra,* at 463–467, we too rely on § 10 (*l*), as well as other provisions, in suggesting that certain contempt cases are not reached by § 3692.

There is also a suggestion in the dissent of MR. JUSTICE STEWART that one charged with contempt of an injunction issued during a national emergency, 29 U. S. C. §§ 176–180, would not have the right to a jury trial notwithstanding § 3692. Apparently this is so because 29 U. S. C. § 178 (b), § 208 of the Taft-Hartley Act, "provided simply and broadly that all the provisions of that [Norris-LaGuardia] Act are inapplicable." *Post,* at 486. But the language Congress used in § 178 (b), "the provisions of sections 101 to 115 of this title, shall not be applicable," is remarkably similar to the language used in the Conference Report of the Taft-Hartley Act to convey the congressional understanding of § 10 (h) of the Wagner Act which it was re-enacting in Taft-Hartley: "making inapplicable the provisions of the Norris-LaGuardia Act in proceedings before the courts . . . ." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 57 (1947). See n. 6, *infra.*

MR. JUSTICE STEWART'S position with respect to the applicability of § 3692 in proceedings brought in the Court of Appeals to enforce Board orders directed against employers is even less clear, but it would seem to be the inescapable conclusion under the dissent's analysis that, at least in criminal contempts of such orders, the courts of appeals would be required to empanel juries, a result that would certainly represent a novel procedure, see *United States* v. *Barnett,* 376 U. S. 681, 690–691, and n. 7 (1964).

On the other hand, if MR. JUSTICE STEWART would limit § 3692 to apply only to disobedience of those injunctions newly authorized by the Taft-Hartley Act in 1947, that section, despite its language, would not apply to injunctions issued by the courts of appeals in enforcement actions against employers (it would be otherwise where unions or employees are involved) for the reason that the provisions of the Wagner Act included in the LMRA have the effect of exempting those situations from the reach of § 3692. Very similar reasons furnish sound ground for the inapplicability of § 3692 to contempt cases arising out of *any* of the injunctions authorized by the Taft-Hartley Act.

disputes and permits other injunctions in labor disputes only if certain procedural formalities are satisfied. It contains no exceptions with respect to injunctions in those labor disputes dealt with by the Wagner Act, passed in 1935, or by the Taft-Hartley Act passed in 1947. Yet those Acts expressly or impliedly, *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U. S. 235 (1970), authorized various kinds of injunctions in labor dispute cases and expressly or impliedly exempted those injunctions from the jurisdictional and procedural limitations of Norris-LaGuardia to the extent necessary to effectuate the provisions of those Acts.

The crucial issue is whether in enacting the Wagner and Taft-Hartley Acts, Congress not only intended to exempt the injunctions they authorized from Norris-LaGuardia's limitations, but also intended that civil and criminal contempt proceedings enforcing those injunctions were not to afford contemnors the right to a jury trial. Surely, if § 10 (*l*) of Taft-Hartley had expressly provided that contempt proceedings arising from the injunctions which the section authorized would not be subject to jury trial requirements, it would be as difficult to argue that § 3692 nevertheless requires a jury trial as it would be to insist that Norris-LaGuardia bars the issuance of any injunctions in the first place. Section 10 (*l*), of course, does not so provide; we think it reasonably clear from that and related sections and from their legislative history that this result is precisely what Congress intended.

The Wagner Act made employers subject to court orders enforcing Board cease-and-desist orders. Those orders, or many of them, were of the kind Norris-LaGuardia, on its face, prohibited; but § 10 (h) of the Wagner Act provided that in "granting appropriate temporary relief or a restraining order, or . . . enforcing . . . or setting aside . . . an order of the Board, . . .

the jurisdiction of courts sitting in equity shall not be limited by" 29 U. S. C. §§ 101–115. In 1947, in passing the Taft-Hartley Act as part of the Labor Management Relations Act, Congress provided for unfair labor practice proceedings against unions; and § 10 (j) gave jurisdiction to the courts to issue injunctions in unfair labor practice proceedings, whether against unions or management, pending final disposition by the Board. Section 10 (*l*) made special provision for interim injunctions "notwithstanding any other provision of law" in particular kinds of unfair labor practice proceedings against unions. Section 10 (h) was retained in its original form.

No party in this case suggests that the injunctions authorized by Congress in 1935 and 1947 were subject to the jurisdictional and procedural limitations of Norris-LaGuardia. Neither can it be seriously argued that, at the time of enactment of the Wagner and Taft-Hartley Acts, civil or criminal contempt charges arising from violations of injunctions authorized by those statutes were to be tried to a jury. The historic rule at the time was that, absent contrary provision by rule or statute, jury trial was not required in the case of either civil or criminal contempt. See *Green* v. *United States,* 356 U. S. 165, 183, 189 (1958). Section 11 of Norris-LaGuardia, 29 U. S. C. § 111 (1946 ed.),[4] required jury trials in contempt actions arising out of labor disputes. But § 11 was among those sections which § 10 (h) expressly provided would not limit the power of federal courts to

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[4] Section 11 of the Norris-LaGuardia Act, 29 U. S. C. § 111 (1946 ed.), read, in pertinent part, as follows:

"In all cases arising under sections 101–115 of this title in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed."

enforce Board orders. Moreover, § 11 was limited by its own terms and by judicial decision to cases "arising under" the Norris-LaGuardia Act. *United States* v. *Mine Workers,* 330 U. S. 258, 298 (1947). Injunctions issued pursuant to either the Wagner Act or Taft-Hartley Act were not issued "under," but in spite of Norris-LaGuardia;[5] and contempt actions charging violations of those injunctions were not "cases arising under" Norris-LaGuardia. Section 11 of Norris-LaGuardia was thus on its face inapplicable to injunctions authorized by the Wagner and Taft-Hartley Acts; petitioners do not contend otherwise. They say: "From the effective date of Taft-Hartley in late summer, 1947, until June 28, 1948, the effective date of the new § 3692, an alleged contemnor of a Taft-Hartley injunction would probably have been denied the jury trial guaranteed by § 11 of Norris-LaGuardia, because the injunction would not have been one arising under Norris-LaGuardia itself." Brief for Petitioners 41.

It would be difficult to contend otherwise. It seems beyond doubt that since 1935 it had been understood that the injunctions and enforcement orders referred to in § 10 (h) were not subject to the jury requirements of § 11 of Norris-LaGuardia. When Congress subjected labor unions to unfair labor practice proceedings in 1947, and in §§ 10 (j) and 10 (*l*) provided for interim injunctive relief from the courts pending Board decision in unfair labor practice cases, it was equally plain that § 11 by its own terms would not apply to contempt cases arising out of these injunctions. By providing for labor

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[5] The position of MR. JUSTICE DOUGLAS, dissenting, *post,* at 478–479, that injunctions issued pursuant to the Wagner and Taft-Hartley Acts are or would have been "arising under" the Norris-LaGuardia Act, and therefore subject to § 11 prior to 1948, is contrary to the understanding of the Congresses that passed the Wagner Act, n. 6, *infra,* and the Taft-Hartley Act, *infra,* at 464–467, and of every court to have considered this question, see cases cited n. 12, *infra.*

Act injunctions outside the framework of Norris-LaGuardia, Congress necessarily contemplated that there would be no right to jury trial in contempt cases.

That this was the congressional understanding is revealed by the legislative history of the Labor Management Relations Act.[6] The House Managers' statement in explanation of the House Conference Report on Taft-Hartley stated:

> "Sections 10 (g), (h), and (i) of the present act, concerning the effect upon the Board's orders of enforcement and review proceedings, *making inapplicable the provisions* of the Norris-LaGuardia Act in proceedings before the courts, were unchanged either by the House bill or by the Senate amendment, and are carried into the conference agreement." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 57 (1947) (emphasis added).[7]

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[6] The only legislative history of the Wagner Act addressing this question was the statement of a witness, apparently made in reference to the original version of § 10 (h), § 304 (a) of S. 2926, which was uncontradicted by any prior or subsequent history:

"The whole theory of enforcement of these orders is through contempt proceedings . . . . [T]he order of the labor board is made an order of the Federal court, subject to being punished by contempt. Now, in the Norris-LaGuardia Act, there has been considerable change of the ordinary procedure on contempt. I won't go into detail, but simply state that in a great majority of instances punishment, where the employees are the defendants, must be by trial by jury. This is, of course, not permissible in any case under the Wagner bill." Hearings on S. 2926 before the Senate Committee on Education and Labor, 73d Cong., 2d Sess., 505 (1934).

[7] The dissents suggest that the word "jurisdiction" as used in both § 10 (h) and § 10 (*l*) is to be read in the technical sense and that the reference to all the provisions of Norris-LaGuardia in § 10 (h) was merely "an additional means of identifying" the Norris-LaGuardia Act. *Post,* at 486. Yet the language quoted in the text from the House Managers' statement supports only the position that Congress, in re-enacting § 10 (h) in 1947, understood that section as "making inapplicable the provisions of the Norris-LaGuardia

Such also was the understanding of Senator Ball, unchallenged on this point by his colleagues on the floor of the Senate during the debate on Taft-Hartley. Senator Ball stated:

> "[T]he . . . Norris-LaGuardia Act is completely suspended . . . in the current National Labor Relations Act whenever the Board goes into court to obtain an enforcement order for one of its decisions. Organized labor did not object to the suspension of the Norris-LaGuardia Act in that case, I suppose presumably because under the present act the only ones to whom it could apply are employers. Organized labor was perfectly willing to have the Norris-LaGuardia Act completely wiped off the books when it came to enforcing Board orders in labor disputes against employers." 93 Cong. Rec. 4835 (1947).

This statement was made in the context of Senator Ball's explanation of his proposed amendment to § 10 (*l*) as reported out of committee. That section provided generally that the Board would be required, under certain circumstances, to seek injunctive relief in the federal

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Act," not "making inapplicable the *jurisdictional* provisions of the Norris-LaGuardia Act" as the dissents would have it. Support for the position that § 10 (h) was understood by Congress in 1947 to make inapplicable all the provisions of Norris-LaGuardia comes not only from the House Managers' statement but also from a memorandum introduced into the Congressional Record a decade later by Representative Celler, who concluded that "the clear and unequivocal wording of section 10 (h) . . . clearly indicates a waiver of all the provisions of the Norris-LaGuardia Act, including the provisions for a jury trial, in cases where the Government was a party to the original action." 103 Cong. Rec. 8685 (1957). Representative Celler was the chairman of a House subcommittee which had previously held hearings on the 1948 revision of the Criminal Code including § 3692. The dissents offer nothing from the legislative history that should lead us to reject the clear meaning of the House Managers' statement with respect to the congressional understanding of § 10 (h).

courts against secondary boycotts and jurisdictional strikes "notwithstanding any other provision of law . . . ." Senator Ball's proposed amendment would have had two effects; first, it would have permitted private parties, in addition to the Board, to seek injunctive relief against the identical practices directly in the District Court; and, second, the amendment would have left in effect for such proceedings the provisions of §§ 11 and 12 of the Norris-LaGuardia Act, giving defendants in such proceedings the right to a jury trial. As Senator Ball stated:

> "[W]hen the regional attorney of the NLRB seeks an injunction [pursuant to § 10 (*l*) as reported] the Norris-LaGuardia Act is completely suspended . . . . We do not go quite that far in our amendment. We simply provide that the Norris-LaGuardia Act shall not apply, with certain exceptions. We leave in effect the provisions of sections 11 and 12. Those are the sections which give an individual charged with contempt of court the right to a jury trial." 93 Cong. Rec. 4834 (1947).

The Ball amendment was defeated, and private injunctive actions were not authorized. But the provisions for Board injunctions were retained and the necessity for them explained in the Senate Report:

> "Time is usually of the essence in these matters, and consequently the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives—the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining. Hence we have provided that *the Board, acting in the public interest and not*

in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices." S. Rep. No. 105, 80th Cong., 1st Sess., 8 (1947) (emphasis added).

III

It is argued, however, that whatever the intention of Congress might have been with respect to jury trial in contempt actions arising out of Taft-Hartley injunctions, all this was changed when § 11 was repealed and replaced by 18 U. S. C. § 3692 as part of the 1948 revision of the Criminal Code, in the course of which some sections formerly in Title 18 were revised and some related provisions in other titles were recodified in Title 18. The new § 3692, it is insisted, required jury trials for contempt charges arising out of any injunctive order issued under the Labor Management Relations Act if a labor dispute of any kind was involved. Thenceforward, it is claimed, contempt proceedings for violations by unions or employers of enforcement orders issued by courts of appeals or of injunctions issued under § 10 (j) or § 10 (*l*) must provide the alleged contemnor a jury trial.

This argument is unpersuasive. Not a word was said in connection with recodifying § 11 as § 3692 of the Criminal Code that would suggest any such important change in the settled intention of Congress, when it enacted the Wagner and Taft-Hartley Acts, that there would be no jury trials in contempt proceedings arising out of labor Act injunctions. Injunctions authorized by the Labor Management Relations Act were limited to those sought by the Board, "acting in the public interest and not in vindication of purely private rights." S. Rep.

No. 105, 80th Cong., 1st Sess., 8 (1947). We cannot accept the proposition that Congress, without expressly so providing, intended in § 3692 to change the rules for enforcing injunctions which the Labor Management Relations Act authorized the Labor Board, an agency of the United States, to seek in a United States court. Cf. *United States* v. *Mine Workers,* 330 U. S., at 269-276.[8]

Just as § 3692 may not be read apart from other relevant provisions of the labor law, that section likewise may not be read isolated from its legislative history and the revision process from which it emerged, all of which place definite limitations on the latitude we have in construing it. The revision of the Criminal Code was, as petitioners suggest, a massive undertaking, but,

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[8] Petitioners' contention that § 3692 was Congress' response to the Court's decision in *United States* v. *Mine Workers, supra,* is particularly insupportable in light of the fact that the Reviser's Note, as set forth *infra,* at 469, was taken verbatim from the prior Reviser's Note to § 3692 that was reported to the House on February 15, 1945, more than two years prior to this Court's decision in *Mine Workers* and more than three years prior to the 1948 revision of the Criminal Code. The bill reported to the House in 1945, H. R. 2200, was adopted by the House on July 16, 1946, again prior to the decision in *United Mine Workers* and prior to February 5, 1947, when the House Committee on Education and Labor began hearings on labor legislation which eventually led to the introduction of the Taft-Hartley bill in the House on April 10, 1947. The identical version of the Criminal Code passed the House for the final time on May 12, 1947, almost two months prior to the House's acceptance of the conference version of Taft-Hartley.

There could be no argument that the change in wording in § 3692 was intended to reach criminal contempt proceedings for violation of those Board injunctions newly authorized in 1947, for the House of Representatives passed § 3692 for the first time more than six months before hearings even commenced in the House to consider the Taft-Hartley legislation, and passed it for the second and final time, *unchanged,* almost two months before the House accepted the conference version of Taft-Hartley.

as the Senate Report on that legislation made clear, "[t]he original intent of Congress is preserved." S. Rep. No. 1620, 80th Cong., 2d Sess., 1 (1948). Nor is it arguable that there was any intent in the House to work a change in the understood applicability of § 11 in enacting § 3692. The House Report stated that "[r]evision, as distinguished from codification, meant the substitution of plain language for awkward terms, reconciliation of conflicting laws, omission of superseded sections, and consolidation of similar provisions." H. R. Rep. No. 304, 80th Cong., 1st Sess., 2 (1947). Revisions in the law were carefully explained [9] in a series of Reviser's Notes printed in the House Report. *Id.*, at A1 *et seq.* But the Reviser's Note to § 3692 indicates no change of substance in the law:

> "Based on section 111 of title 29, U. S. C., 1940 ed., Labor (Mar. 23, 1932, ch. 90, § 11, 47 Stat. 72).
>
> "The phrase 'or the District of Columbia arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute' was inserted and the reference to specific sections of the Norris-LaGuardia Act (sections 101–115 of title 29, U. S. C., 1940 ed.) were eliminated." H. R. Rep. No. 304, *supra,* at A176; 18 U. S. C., pp. 4442–4443.

It has long been a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Holy Trinity Church* v. *United States,* 143 U. S. 457, 459 (1892). Whatever may be said with regard to the application of this rule in other

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[9] The House Report states that "[t]he reviser's notes . . . explain in detail every change made in text." H. R. Rep. No. 304, 80th Cong., 1st Sess., 9 (1947).

contexts, this Court has stated unequivocally that the principle embedded in the rule "has particular application in the construction of labor legislation . . . ." *National Woodwork Mfrs. Assn.* v. *NLRB,* 386 U. S. 612, 619 (1967). Moreover, we are construing a statute of Congress which, like its predecessor, created an exception to the historic rule that there was no right to a jury trial in contempt proceedings. To read a substantial change in accepted practice into a revision of the Criminal Code without any support in the legislative history of that revision is insupportable. As this Court said in *United States* v. *Ryder,* 110 U. S. 729, 740 (1884): "It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such an intention be clearly expressed."

The general rule announced in *Ryder* was applied by this Court in *Fourco Glass Co.* v. *Transmirra Corp.,* 353 U. S. 222 (1957). In that case, the question was whether venue in patent infringement actions was to be governed by 28 U. S. C. § 1400 (b), a discrete provision dealing with venue in patent infringement actions, or 28 U. S. C. § 1391 (c), a general provision dealing with venue in actions brought against corporations. Both of these provisions underwent some change in wording in the 1948 revision of the Judicial Code.[10] The respondents in that

[10] The Court's analysis in *Fourco Glass Co.* v. *Transmirra Corp.,* 353 U. S. 222 (1957), is particularly relevant to our inquiry in this case because of the parallel courses followed by the revisions of the Criminal and Judicial Codes. The revision to the Criminal Code was prepared by a staff of experts drawn from various sources and, after this staff completed its work on that revision, the same staff turned its attention to the revision of the Judicial Code. The only hearings held in the House on either of the revisions were held jointly by a subcommittee of the House Committee on the Judiciary. Hearings on Revision of Titles 18 and 28 of the United States Code, before Subcommittee No. 1 of the House Committee on the

case, arguing in favor of the applicability of the general venue provision, § 1391 (c), took the position that the plain language of § 1391 (c) was "clear and unambiguous and that its terms include all actions . . . ." 353 U. S., at 228. This Court, stating that the respondents' argument "merely points up the question and does nothing to answer it," *ibid.*, determined that the general provision, § 1391 (c), had to be read in a fashion consistent with the more particular provision, § 1400 (b). The respondents contended, however, that the predecessor of § 1400 (b), which this Court had held to govern venue irrespective of a general revenue provision, *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561 (1942), had undergone a substantive change during the revision of the Judicial Code in 1948 which effectively reversed the result dictated by *Stonite*.

The Court rejected this argument in terms acutely

Judiciary, 80th Cong., 1st Sess. (1947). The House Reports issued subsequent to those hearings parallel one another in many respects, including almost identical statements respecting the purpose and scope of the two revisions. Compare H. R. Rep. No. 304, 80th Cong., 1st Sess., 2 (1947), quoted in the text, *supra*, at 469, with H. R. Rep. No. 308, 80th Cong., 1st Sess., 2 (1947):

"Revision, as distinguished from codification, required the substitution of plain language for awkward terms, reconciliation of conflicting laws, repeal of superseded sections, and consolidation of related provisions."

The Senate Reports on the two revisions likewise expressed the intention of preserving the original meaning of the statutes undergoing revision. Compare S. Rep. No. 1620, 80th Cong., 2d Sess., 1 (1948), quoted in the text, *supra*, at 469, with S. Rep. No. 1559, 80th Cong., 2d Sess., 2 (1948) ("great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval"). Testimony in the House joint hearings confirms that the methods and intent of the revisers themselves were the same with respect to both revisions. Hearings, *supra*, at 6.

relevant to this case. "[N]o changes of law or policy," the Court said, "are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." 353 U. S., at 227. Furthermore, a change in the language of a statute itself was not enough to establish an intent to effect a substantive change, for "every change made in the text is explained in detail in the Revisers' Notes," *id.*, at 226, and the Notes failed to express any substantive change. The Court relied on the Senate and House Reports on the 1948 revision to support this position, *id.*, at 226 nn. 6 and 7; the language quoted by the Court from the House Report is virtually identical to that which appears in the House Report of the 1948 revision of the Criminal Code, see n. 9, *supra*. In view of the express disavowals in the House and Senate Reports on the revisions of both the Criminal Code, see *supra*, at 468–469, and the Judicial Code, see n. 10, *supra*, it would seem difficult at best to argue that a change in the substantive law could nevertheless be effected by a change in the language of a statute without any indication in the Reviser's Note of that change. It is not tenable to argue that the Reviser's Note to § 3692, although it explained in detail what words were deleted from and added to what had been § 11 of the Norris-LaGuardia Act, simply did not bother to explain at all, much less in detail, that an admittedly substantial right was being conferred on potential contemnors that had been rejected in the defeat of the Ball amendment the previous year and that, historically, contemnors had never enjoyed.[11]

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[11] This point was clearly made by the Law Revision Counsel to the House subcommittee which held joint hearings on the revisions to the Judicial and Criminal Codes:

"There is one thing that I would like to point out . . . and that is the rule of statutory construction.

"In the work of revision, principally codification, as we have

In *Tidewater Oil Co.* v. *United States,* 409 U. S. 151 (1972), the Court applied the rule that revisions contained in the 1948 Judicial Code should be construed by reference to the Reviser's Notes. The question was whether a change in the language of 28 U. S. C. § 1292 (a)(1), made in the 1948 revision of the Judicial Code, had modified a longstanding policy under § 2 of the Expediting Act of 1903, 32 Stat. 823, as amended, 15 U. S. C. § 29, providing generally that this Court should have exclusive appellate jurisdiction over civil antitrust

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done here, keeping revision to a minimum, I believe the rule of statutory construction is that a mere change of wording will not effect a change in meaning unless a clear intent to change the meaning is evidenced.

"To find out the intent, I think the courts would go to the report of the committee on the bills and these reports are most comprehensive. We have incorporated in them . . . notes to each section of the bills, both the criminal code and the judicial code.

"It is clearly indicated in each of those revisers' notes whether any change was intended so that merely because we have changed the language—we have changed the language to get a uniform style, to avoid awkward expression, to state a thing more concisely and succinctly—but a mere change in language will not be interpreted as an intent to change the law unless there is some *other* clear evidence of an intent to change the law." Hearings on Revision of Titles 18 and 28 of the United States Code before Subcommittee No. 1 of the House Committee on the Judiciary, 80th Cong., 1st Sess., 40 (1947) (emphasis added).

This statement is particularly persuasive in view of the fact that its maker, Mr. Zinn, had served as Counsel to the Committee on Revision of the Laws for the previous eight years; the House Report on the revision of the Criminal Code pointed out that Mr. Zinn had, for that Committee, "exercised close and constant supervision" over the work of the revisers who prepared the revision. H. R. Rep. No. 304, 80th Cong., 1st Sess., 3 (1947). The nature of the revision process itself requires the courts, including this Court, to give particular force to the many express disavowals in the House and Senate Reports of any intent to effect substantive changes in the law.

actions brought by the Government. Section 1292 (a) (1), as revised, was susceptible of two constructions, one of which would have resulted in a change in that policy. After emphasizing that "the function of the Revisers of the 1948 Code was generally limited to that of consolidation and codification," we invoked the "well-established principle governing the interpretation of provisions altered in the 1948 revision . . . that 'no change is to be presumed unless clearly expressed.'" 409 U. S., at 162, quoting *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U. S., at 228. After going to the committee reports, the Court went to the Reviser's Notes and, in the Note to § 1292 (a)(1), found no affirmative indication of a substantive change. On this basis, the Court refused to give § 1292 (a)(1) as revised the "plausible" construction urged by respondents there.

In this case, involving the 1948 revision of the Criminal Code, the House and Senate Reports caution repeatedly against reading substantive changes into the revision, and the Reviser's Note to § 3692 gives absolutely no indication that a substantive change in the law was contemplated. In these circumstances, our cases and the canon of statutory construction which Congress expected would be applied to the revisions of both the Criminal and Judicial Codes, require us to conclude, along with all the lower federal courts having considered this question since 1948, save one, that § 3692 does not provide for trial by jury in contempt proceedings brought to enforce an injunction issued at the behest of the Board in a labor dispute arising under the Labor Management Relations Act.[12]

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[12] *Madden* v. *Grain Elevator, Flour & Feed Mill Workers*, 334 F. 2d 1014 (CA7 1964), cert. denied, 379 U. S. 967 (1965) (§ 10 (*l*) proceeding); *Schauffler* v. *Local 1291, International Longshoremen's Assn.*, 189 F. Supp. 737 (ED Pa. 1960), rev'd on other grounds, 292

IV

We also agree with the Court of Appeals that the union petitioner had no right to a jury trial under Art. III, § 2, and the Sixth Amendment. *Green* v. *United States,* 356 U. S. 165 (1958), reaffirmed the historic rule that state and federal courts have the constitutional power to punish any criminal contempt without a jury trial. *United States* v. *Barnett,* 376 U. S. 681 (1964), and *Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966), presaged a change in this rule. The constitutional doctrine which emerged from later decisions such as *Bloom* v. *Illinois,* 391 U. S. 194 (1968); *Frank* v. *United States,* 395 U. S. 147 (1969); *Baldwin* v. *New York,* 399 U. S. 66 (1970); *Taylor* v. *Hayes,* 418 U. S. 488 (1974); and *Codispoti* v. *Pennsylvania,* 418 U. S. 506 (1974), may be capsuled as follows: (1) Like other minor crimes, "petty" contempts may be tried

F. 2d 182 (CA3 1961) (§ 10 (*l*) proceeding). See *United States* v. *Robinson,* 449 F. 2d 925 (CA9 1971) (suit for injunctive relief brought by the United States against employees of a federal agency); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R. Co.,* 127 U. S. App. D. C. 23, 380 F. 2d 570, cert. denied, 389 U. S. 327 (1967) (proceeding under Railway Labor Act, 45 U. S. C. § 151 *et seq.*); *NLRB* v. *Red Arrow Freight Lines,* 193 F. 2d 979 (CA5 1952) (proceeding brought for violation of § 7 of the Wagner Act, as amended by the Taft-Hartley Act, now 29 U. S. C. § 157); *In re Winn-Dixie Stores, Inc.,* 386 F. 2d 309 (CA5 1967) (proceedings for violation of § 7 of the Wagner Act, as amended by the Taft-Hartley Act, now 29 U. S. C. § 157); *Mitchell* v. *Barbee Lumber Co.,* 35 F. R. D. 544 (SD Miss. 1964) (proceedings brought for violation of order issued for violation of Fair Labor Standards Act, 29 U. S. C. § 201 *et seq.*); *In re Piccinini,* 35 F. R. D. 548 (WD Pa. 1964) (proceedings brought for violation of consent decree involving Fair Labor Standards Act, 29 U. S. C. § 201 *et seq.*). The only decision to the contrary, *In re Union Nacional de Trabajadores,* 502 F. 2d 113 (CA1 1974), was decided without express reference to any of the pertinent legislative history of the Wagner and Taft-Hartley Acts; the panel of the Court of Appeals was itself divided over the correct result, see *id.,* at 121–122 (Campbell, J., dissenting).

without a jury, but contemnors in serious contempt cases in the federal system have a Sixth Amendment right to a jury trial; (2) criminal contempt, in and of itself and without regard to the punishment imposed, is not a serious offense absent legislative declaration to the contrary; (3) lacking legislative authorization of more serious punishment, a sentence of as much as six months in prison, plus normal periods of probation, may be imposed without a jury trial; (4) but imprisonment for longer than six months is constitutionally impermissible unless the contemnor has been given the opportunity for a jury trial.

This Court has as yet not addressed the question whether and in what circumstances, if at all, the imposition of a fine for criminal contempt, unaccompanied by imprisonment, may require a jury trial if demanded by the defendant. This case presents the question whether a fine of $10,000 against an unincorporated labor union found guilty of criminal contempt may be imposed after denying the union's claim that it was entitled to a jury trial under the Sixth Amendment. Local 70 insists that where a fine of this magnitude is imposed, a contempt cannot be considered a petty offense within the meaning of 18 U. S. C. § 1 (3), and that its demand for a jury trial was therefore erroneously denied.

We cannot agree. In determining the boundary between petty and serious contempts for purposes of applying the Sixth Amendment's jury trial guarantee, and in holding that a punishment of more than six months in prison could not be ordered without making a jury trial available to the defendant, the Court has referred to the relevant rules and practices followed by the federal and state regimes, including the definition of petty offenses under 18 U. S. C. § 1 (3). Under that section, petty offenses are defined as those crimes "the penalty for which

does not exceed imprisonment for a period of six months or a fine of not more than $500, or both." But in referring to that definition, the Court accorded it no talismanic significance; and we cannot accept the proposition that a contempt must be considered a serious crime under all circumstances where the punishment is a fine of more than $500, unaccompanied by imprisonment. It is one thing to hold that deprivation of an individual's liberty beyond a six-month term should not be imposed without the protections of a jury trial, but it is quite another to suggest that, regardless of the circumstances, a jury is required where any fine greater than $500 is contemplated. From the standpoint of determining the seriousness of the risk and the extent of the possible deprivation faced by a contemnor, imprisonment and fines are intrinsically different. It is not difficult to grasp the proposition that six months in jail is a serious matter for any individual, but it is not tenable to argue that the possibility of a $501 fine would be considered a serious risk to a large corporation or labor union. Indeed, although we do not reach or decide the issue tendered by the respondent—that there is no constitutional right to a jury trial in any criminal contempt case where only a fine is imposed on a corporation or labor union, Brief for Respondent 36—we cannot say that the fine of $10,000 imposed on Local 70 in this case was a deprivation of such magnitude that a jury should have been interposed to guard against bias or mistake. This union, the respondent suggests, collects dues from some 13,000 persons; and although the fine is not insubstantial, it is not of such magnitude that the union was deprived of whatever right to jury trial it might have under the Sixth Amendment. We thus affirm the judgment of the Court of Appeals.

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

I

I believe that petitioners are entitled to trial by jury under 18 U. S. C. § 3692, which provides that, with certain exceptions not here material:

> "In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . ."

In enacting this language in 1948, Congress reaffirmed the purpose originally expressed in § 11 of the Norris-LaGuardia Act, 47 Stat. 72, 29 U. S. C. § 111 (1946 ed.). That Act was intended to shield the organized labor movement from the intervention of a federal judiciary perceived by some as hostile to labor. The Act severely constrained the power of a federal court to issue an injunction against any person "participating or interested in a labor dispute." Section 11 provided for trial by jury in "all cases arising under this Act in which a person shall be charged with contempt." In the context of the case now before us, I view this section as affording, at the very least, a jury trial in any criminal contempt proceeding involving an alleged violation of an injunction issued against a participant in a "labor dispute." Any such injunction issued by a federal court was one "arising under" the Act, for it could have been issued only in accordance with the Act's prescriptions.[1] The evident congressional intent was to provide

[1] As initially enacted by the Senate, § 11 contained no "arising under" language and would have applied in all criminal contempt proceedings, whether or not involving an injunction issued in a

for the interposition of a jury when disobedience of such an injunction was alleged.[2]

For the reasons stated by MR. JUSTICE STEWART, *post,* at 485–486, I am persuaded that §§ 10 (h) and 10 (*l*) of the National Labor Relations Act made inapplicable only the anti-injunction provisions of the Norris-LaGuardia Act and did not disturb § 11. The broad mandate of § 11, to afford trial by jury in a contempt proceeding involving an injunction issued in a labor dispute, was thus continued in § 3692.[3] See *Green* v. *United States,* 356 U. S. 165, 217 (1958) (Black, J., dissenting).

II

I would reverse the judgment against Local 70 on constitutional grounds.[4] Article III, § 2, of the Constitution provides that "[t]he Trial of all Crimes, except

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labor dispute. See S. Rep. No. 163, 72d Cong., 1st Sess., 23 (1932); 75 Cong. Rec. 4510–4511, 4757–4761 (1932). The "arising under" language was added by the House-Senate conferees to restrict the scope of § 11 to labor disputes. See *id.,* at 6336–6337, 6450.

[2] This construction is consistent with the remark in *United States* v. *Mine Workers,* 330 U. S. 258, 298 (1947), that "§ 11 is not operative here, for it applies only to cases 'arising under this Act,' and we have already held that the restriction upon injunctions imposed by the Act do [*sic*] not govern this case." As the entire sentence makes clear, § 11 was "not operative" because the Court had found that the underlying dispute between the Government and the Mine Workers was not the kind of "labor dispute" to which the Norris-LaGuardia Act had been addressed. See 330 U. S., at 274–280. See also *id.,* at 328–330 (Black and DOUGLAS, JJ., concurring and dissenting).

[3] We deal here with criminal contempt proceedings. Whether § 3692 affords trial by jury in civil contempt proceedings is a question not presented here and on which, accordingly, I express no opinion.

[4] Petitioner Muniz apparently decided not to raise the constitutional issue in this Court; our grant of certiorari on the issue thus extended only to Local 70. 419 U. S. 992 (1974).

in Cases of Impeachment, shall be by Jury . . . ." And the Sixth Amendment provides in pertinent part:

> "In *all* criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." (Emphasis added.)

The Court fails to give effect to this language when it declares that a $10,000 fine is not "of such magnitude that a jury should have been interposed to guard against bias or mistake." *Ante,* at 477. I have previously protested this Court's refusal to recognize a right to jury trial in cases where it deems an offense to be "petty." [5] But even the "petty offense" exception cannot justify today's result, for it is impossible fairly to characterize either the offense or its penalty as "petty." [6] Disobedience of an injunction obtained by the Board is hardly a transgression trivial by its nature; and the imposition of a $10,000 fine is not a matter most locals would take lightly. In any event, the Constitution deprives us of the power to grant or withhold trial by jury depending upon our assessment of the substantiality of the penalty. To the argument that the Framers could not have intended to provide trial by jury in cases involving only

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[5] *E. g., Baldwin* v. *New York,* 399 U. S. 66, 74–76 (1970) (Black, J., joined by DOUGLAS, J., concurring in judgment); *Frank* v. *United States,* 395 U. S. 147, 159–160 (1969) (Black, J., joined by DOUGLAS, J., dissenting). See also *Johnson* v. *Nebraska,* 419 U. S. 949 (1974) (DOUGLAS, J., dissenting from denial of certiorari).

[6] As noted in my dissenting opinion in *Cheff* v. *Schnackenberg,* 384 U. S. 373, 386–391 (1966), the "petty offense" doctrine began as an effort to identify offenses that were by their nature "petty," and the punishment prescribed or imposed was one factor to be considered in characterizing the offense. Under the Court's current formulation, the penalty is of controlling significance. See *Codispoti* v. *Pennsylvania,* 418 U. S. 506, 512 (1974).

"small" fines and imprisonment, the response of Justices McReynolds and Butler in *District of Columbia* v. *Clawans,* 300 U. S. 617, 633–634 (1937) (separate opinion), is apt:

> "In a suit at common law to recover above $20.00, a jury trial is assured. And to us, it seems improbable that while providing for this protection in such a trifling matter the framers of the Constitution intended that it might be denied where imprisonment for a considerable time or liability for fifteen times $20.00 confronts the accused."

I would follow the clear command of Art. III and the Sixth Amendment and reverse the judgment as to Local 70.

MR. JUSTICE STEWART, with whom MR. JUSTICE MARSHALL and MR. JUSTICE POWELL join, dissenting.

In 1948 Congress repealed § 11 of the Norris-LaGuardia Act, 47 Stat. 72, 29 U. S. C. § 111 (1946 ed.), which provided a right to a jury trial in cases of contempt arising under that Act, and added § 3692 to Title 18 of the United States Code, broadly guaranteeing a jury trial "[i]n all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute." I cannot agree with the Court's conclusion that this congressional action was without any significance and that § 3692 does not apply to any contempt proceedings involving injunctions that may be issued pursuant to the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.* Accordingly, I would reverse the judgment before us.

The contempt proceedings in the present case arose out of a dispute between Local 21 of the International Typographical Union and the San Rafael Independent Jour-

nal. Local 21 represents the Independent Journal's composing room employees. Following expiration of the old collective-bargaining agreement between Local 21 and the Independent Journal, negotiations for a new agreement reached an impasse. As a result, Local 21 instituted strike action against the Independent Journal. See *San Francisco Typographical Union No. 21*, 188 N. L. R. B. 673, enforced, 465 F. 2d 53 (CA9). The primary strike escalated into illegal secondary boycott activity, in which four other unions, including the petitioner Local 70, participated. The National Labor Relations Board, through its Regional Director, obtained an injunction pursuant to § 10 (*l*) of the National Labor Relations Act, as added, 61 Stat. 149, and as amended, 29 U. S. C. § 160 (*l*), to bring a halt to that secondary activity. When the proscribed secondary conduct continued, apparently in willful disobedience of the § 10 (*l*) injunction, criminal contempt proceedings were instituted. See *ante*, at 456–457.

Section 3692 unambiguously guaranteees a right to a jury trial in such criminal contempt proceedings. The section provides in pertinent part:

> "In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed."

Section 3692 thus expressly applies to more than just those cases of contempt arising under the Norris-LaGuardia Act. By its own terms the section encompasses *all* cases of contempt arising under any of the several *laws* of the United States governing the issuance of injunctions in cases of a "labor dispute." Section 10 (*l*) of

the National Labor Relations Act, which authorized the injunction issued by the District Court, is, in the context of this case, most assuredly one of those laws.

Section 10 (*l*) requires the Board's regional official to petition the appropriate district court for injunctive relief pending final Board adjudication when he has "reasonable cause" to believe that a labor organization or its agents have engaged in certain specified unfair labor practices.[1] Although not all unfair labor practices potentially subject to § 10 (*l*) injunctions need arise out of a "labor dispute," both the primary strike and the secondary activity in this case concerned the "terms or conditions of employment" of Local 21 members. Thus, the injunction and subsequent contempt proceedings clearly involved a "labor dispute" as that term is defined in the Norris-LaGuardia Act and the National Labor Relations Act.[2] Accordingly, § 10 (*l*) is here a law governing the issuance of an injunction in

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[1] Section 10 (*l*), as enacted in 1947, 61 Stat. 149, provided that whenever the Board's regional official has "reasonable cause" to believe the truth of a charge of illegal secondary boycotting or minority picketing, the official "shall," on behalf of the Board, petition a district court for appropriate injunctive relief pending final Board adjudication. Once reasonable cause is found, a Board petition for temporary relief under § 10 (*l*) is mandatory. See S. Rep. No. 105, 80th Cong., 1st Sess., 8, 27. Congress in 1959 added charges of illegal hot cargo agreements and recognitional picketing to the mandatory injunction provision of § 10 (*l*). 73 Stat. 544.

[2] "Labor dispute" as defined for the purpose of § 11 of the Norris-LaGuardia Act, upon which § 3692 was based, included "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 47 Stat. 73. Section 2 (9) of the National Labor Relations Act, 29 U. S. C. § 152 (9), defines "labor dispute" in virtually identical language.

a case growing out of a labor dispute, and the criminal contempt proceedings against the petitioners clearly come within the explicit reach of § 3692.[3]

There is nothing in the rather meager legislative history of § 3692 to indicate that, despite the comprehensive language of the section, Congress intended that it was to apply only to injunctions covered by the Norris-LaGuardia Act. The revisers did not say that § 3692 was intended to be merely a recodification of § 11 of the Norris-LaGuardia Act.[4] Rather, the revisers said that the section was "based on" § 11 and then noted without additional comment the change in language from reference to specific sections of Norris-LaGuardia to the more inclusive "laws of the United States . . . ." H. R. Rep. No. 304, 80th Cong., 1st Sess., A176. In contrast, although the recodification of 18 U. S. C. § 402, dealing with contempts constituting crimes, was also "based on" prior law, the revisers specifically noted that "[i]n transferring these sections to this title and in consolidating them numerous changes of phraseology were

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[3] While the respondent concedes that unfair labor practices often arise out of a "labor dispute," he argues that the National Labor Relations Act is not essentially a law "governing the issuance of injunctions or restraining orders" in cases "involving or growing out of a labor dispute." Although it may be true that not all provisions of the Act authorizing restraining orders are properly classified as such laws, it is clear that Congress concluded that at least some provisions were. Otherwise, there would have been no reason for Congress to have specifically exempted the jurisdiction of courts "sitting in equity" under § 10 of the Act from the limitations of Norris-LaGuardia, which apply only in cases involving requests for injunctive relief growing out of a labor dispute. See *In re Union Nacional de Trabajadores,* 502 F. 2d 113, 118 (CA1).

[4] Any such intention would be inconsistent with the decision to repeal § 11 and to replace it with a broadly worded provision in the title of the United States Code dealing generally with "Crimes and Criminal Procedure."

necessary which do not, however, change their meaning or substance." H. R. Rep. No. 304, *supra,* at A30; 18 U. S. C., p. 4192. The brief legislative history of § 3692 is, accordingly, completely consistent with the plain meaning of the words of that section.

Nothing in § 10 (*l*), or in any other provision of the National Labor Relations Act, requires that § 3692 be given any different meaning in cases involving injunctions issued pursuant to the Act. To be sure, § 10 (*l*) provides that, upon the filing of a Board petition for a temporary injunction, "the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law . . . ." But requiring a jury trial prior to finding a union or union member in criminal contempt for violation of a § 10 (*l*) injunction is entirely compatible with that provision. Although such a reading of § 3692 provides procedural protection to the alleged contemnor, it in no way limits the *jurisdiction* of the district court to grant an injunction at the request of the Board.

Similarly, § 10 (h) does not indicate a congressional intent to eliminate the jury trial requirement for criminal contempts arising from disobedience of injunctions issued pursuant to the National Labor Relations Act.[5] That

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[5] It may be questioned whether § 10 (h) has any relevance at all to the issue before us. As enacted in 1935, § 10 (h) was concerned solely with the jurisdiction of the courts of appeals (and district courts "if all the . . . courts of appeals to which application may be made are in vacation," § 10 (e)) to modify and enforce Board orders *following* an administrative hearing and entry of findings by the Board. Section 10 (h) was retained without significant change at the time of the 1947 Taft-Hartley amendments to the National Labor Relations Act: "Sections 10 (g), (h), and (i) of the present act, concerning the effect upon the Board's orders of enforcement and review proceedings, making inapplicable the provisions of the

section provides in part that "[w]hen granting appropriate temporary relief or a restraining order, . . . the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101–115)." Although § 10 (h) thus cites parenthetically all the sections of the Norris-LaGuardia Act, including § 11's jury trial provision, which was codified at 29 U. S. C. § 111, it does so solely as an additional means of identifying the Act. Substantively § 10 (h), like § 10 (*l*), provides only that the *jurisdiction* of equity courts shall not be limited by the Norris-LaGuardia Act. But Norris-LaGuardia, as its title indicates, was enacted to limit jurisdiction "and for other purposes." Section 11, upon which § 3692 was based, was not concerned with jurisdiction; it provided *procedural* protections to alleged contemnors, one of the Act's "other purposes."

In contrast, when Congress provided for the issuance of injunctions during national emergencies as part of the Taft-Hartley Act, 29 U. S. C. §§ 176–180, it did not merely state that the jurisdiction of district courts under those circumstances is not limited by Norris-LaGuardia. Rather, it provided simply and broadly that all of the provisions of that Act are inapplicable. 29 U. S. C. § 178 (b).[6]

Norris-LaGuardia Act in proceedings before the courts, were unchanged either by the House bill or by the Senate amendment, and are carried into the conference agreement." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (House Managers' statement), 57. The section would thus seem at the most to be of limited relevance in determining congressional intent concerning the procedures to be used in district courts issuing and enforcing § 10 (*l*) injunctions *prior* to final adjudication of unfair labor practice charges by the Board.

[6] The principal piece of legislative history offered as evidence of an affirmative congressional intent to free from the requirements of

If, contrary to the above discussion, there is any ambiguity about § 3692, it should nonetheless be read as extending a right to a jury trial in the criminal contempt proceedings now before us under the firmly established canon of statutory construction mandating that any ambiguity concerning criminal statutes is to be resolved in favor of the accused. See, *e. g., United States* v. *Bass,* 404 U. S. 336, 347; *Rewis* v. *United States,* 401 U. S. 808, 812; *Smith* v. *United States,* 360 U. S. 1, 9. On the other hand, there is no sound policy argument for limiting the scope of § 3692. A guarantee of the right to a jury trial in cases of criminal contempt for violation of injunctions issued pursuant to § 10 (*l*) does not restrict the ability of the Board's regional official to seek, or the power of the District Court to grant, temporary injunctive relief to bring an immediate halt to secondary boycotts and recognitional picketing pending adjudication of unfair labor practice charges before the Board. Nor does it interfere with the authority of the District Court to insure prompt compliance with its injunction through the use of coercive civil contempt sanctions.[7] Indeed,

Norris-LaGuardia criminal contempt proceedings for violations of a § 10 (*l*) injunction is a statement by Senator Ball made during debate over the Senator's proposed amendment to that section. See 93 Cong. Rec. 4834. Particularly in view of the complete absence of any support for Senator Ball's expansive interpretation of §10 (*l*) in the committee and conference reports, see, *e. g.,* S. Rep. No. 105, 80th Cong., 1st Sess., 8, 27; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (House Managers' statement), 57, that individual expression of opinion is without significant weight in the interpretation of the statute. *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 493-494; *Lapina* v. *Williams,* 232 U. S. 78, 90.

[7] On its face § 3692, which guarantees to "the accused" the right to a speedy and public trial, by an impartial jury, in language identical to the Sixth Amendment's guarantee of a jury trial in criminal cases, appears to be limited to trials for criminal contempt. That construction is also consistent with the decision of Congress to place

construing § 3692 as it is written, so as to include this kind of an injunction issued pursuant to the National Labor Relations Act, would not even affect the power of the court to impose criminal contempt sanctions. It would only require that prior to imposition of criminal punishment for violation of a court order the necessary facts must be found by an impartial jury, rather than by the judge whose order has been violated.[8]

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the provision in Title 18, dealing with crimes and criminal procedure. Moreover, while it is clear that a trial for criminal contempt is an independent proceeding and "no part of the original cause," *Michaelson* v. *United States ex rel. Chicago, St. P., M. & O. R. Co.*, 266 U. S. 42, 64, civil contempt proceedings to insure compliance with an injunction are extensions of the original equitable cause of action. See *id.*, at 64–65. It is therefore arguable that § 10 (*l*)'s explicit statement that the "jurisdiction" of the district courts shall not be affected by "any other provision of law" renders inapplicable any otherwise relevant statutory requirement of a jury trial for civil contempts. See *In re Union Nacional de Trabajadores*, 502 F. 2d, at 119–121.

[8] Although injunctive relief under §§ 10 (j) and (*l*) is sought by the Board acting on behalf of the public rather than to vindicate private economic interests, this fact has little significance in considering the policy justifications for requiring a jury trial in criminal contempt proceedings. Regardless of whether the Board or an employer has sought the injunction, in the absence of a jury trial the judge who granted the order will be given complete authority to impose criminal punishment if he finds that his injunction has been deliberately disobeyed. The existence of this unbridled power in district court judges prior to 1932 was one of the principal factors leading to enactment of the Norris-LaGuardia Act, and in particular passage of the § 11 jury trial requirement. See generally A. Cox & D. Bok, Cases and Materials on Labor Law 75–76 (7th ed.). Accordingly, the accommodation of § 10 (*l*) and § 3692 "which will give the fullest possible effect to the central purposes of both [statutes]," *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, 216 (BRENNAN, J., dissenting), is to recognize the Board's power to seek temporary injunctive relief under § 10 (*l*) without regard to the limitations of Norris-LaGuardia, and to permit the issuing court to coerce

In sum, the plain language of § 3692 and the absence of any meaningful contradictory legislative history, together with the established method of construing criminal statutes, require that § 3692 be interpreted to include a right to a jury trial in criminal contempt proceedings for violation of § 10 (*l*) injunctions. Accordingly, I would reverse the judgment of the Court of Appeals.

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obedience through civil contempt proceedings. But when the court deems it necessary to impose after-the-fact punishment through criminal contempt proceedings, § 3692 must be read to mean what it says—the accused contemnor has the right to a jury trial. See *In re Union Nacional de Trabajadores, supra,* at 121.

WARTH ET AL. v. SELDIN ET AL.

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

No. 73-2024. Argued March 17, 1975—Decided June 25, 1975

This action for declaratory and injunctive relief and damages was brought by certain of the petitioners against respondent town of Penfield (a suburb of Rochester, N. Y.), and respondent members of Penfield's Zoning, Planning, and Town Boards, claiming that the town's zoning ordinance, by its terms and as enforced, effectively excluded persons of low and moderate income from living in the town, in violation of petitioners' constitutional rights and of 42 U. S. C. §§ 1981, 1982, and 1983. Petitioners consist of both the original plaintiffs—(1) Metro-Act of Rochester, a not-for-profit corporation among whose purposes is fostering action to alleviate the housing shortage for low- and moderate-income persons in the Rochester area; (2) several individual Rochester taxpayers; and (3) several Rochester area residents with low or moderate incomes who are also members of minority racial or ethnic groups—and Rochester Home Builders Association (Home Builders), embracing a number of residential construction firms in the Rochester area, which unsuccessfully sought to intervene as a party-plaintiff, and the Housing Council in the Monroe County Area (Housing Council), a not-for-profit corporation consisting of a number of organizations interested in housing problems, which was unsuccessfully sought to be added as a party-plaintiff. The District Court dismissed the complaint on the ground, *inter alia,* that petitioners lacked standing to prosecute the action, and the Court of Appeals affirmed. *Held:* Whether the rules of standing are considered as aspects of the constitutional requirement that a plaintiff must make out a "case or controversy" within the meaning of Art. III, or, apart from such requirement, as prudential limitations on the courts' role in resolving disputes involving "generalized grievances" or third parties' legal rights or interests, none of the petitioners has met the threshold requirement of such rules that to have standing a complainant must clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers. Pp. 498–518.

(a) As to petitioner Rochester residents who assert standing as persons of low or moderate income and, coincidentally, as members of minority racial or ethnic groups, the facts alleged fail to support an actionable causal relationship between Penfield's zoning practices and these petitioners' alleged injury. A plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that such practices harm *him,* and that he personally would benefit in a tangible way from the court's intervention. Here, these petitioners rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief. Pp. 502–508.

(b) With respect to petitioners who assert standing on the basis of their status as Rochester taxpayers, claiming that they are suffering economic injury through increased taxes resulting from Penfield's zoning practices having forced Rochester to provide more tax-abated low- or moderate-cost housing than it otherwise would have done, the line of causation between Penfield's actions and such injury is not apparent. But even assuming that these petitioners could establish that the zoning practices harm them, the basis of their claim is that the practices violate the constitutional and statutory rights of third parties—persons of low and moderate income who allegedly are excluded from Penfield. Hence, their claim falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves. Pp. 508–510.

(c) Petitioner Metro-Act's claims to standing as a Rochester taxpayer and on behalf of its members who are Rochester taxpayers or persons of low or moderate income, are precluded for the reasons applying to the denial of standing to the individual petitioner Rochester taxpayers and persons of low and moderate income. In addition, with respect to Metro-Act's claim to standing because 9% of its membership is composed of Penfield residents, prudential considerations strongly counsel against according such residents or Metro-Act standing, where the complaint is that they have been harmed indirectly by the exclusion of others, thus attempting, in the absence of a showing of any exception allowing such a claim, to raise the putative rights of third parties. *Trafficante* v. *Metropolitan Life Ins.*, 409 U. S. 205, distinguished. Pp. 512–514.

(d) Petitioner Home Builders, which alleges no monetary injury to itself, has no standing to claim damages on behalf of its members, since whatever injury may have been suffered is peculiar to the individual member concerned, thus requiring individualized proof of both the fact and extent of injury and individual awards. Nor does Home Builders have standing to claim prospective relief, absent any allegation of facts sufficient to show the existence of any injury to members of sufficient immediacy and ripeness to warrant judicial intervention. Pp. 514–516.

(e) Petitioner Housing Council has no standing, where the complaint and record do not indicate that any of its members, with one exception, has made any effort involving Penfield, has taken any steps toward building there, or had any dealings with respondents. With respect to the one exception, this petitioner averred no basis for inferring that an earlier controversy between it and respondents remained a live, concrete dispute. Pp. 516–517.

495 F. 2d 1187, affirmed.

Powell, J., delivered the opinion of the Court, in which Burger, C. J., and Stewart, Blackmun, and Rehnquist, JJ., joined. Douglas, J., filed a dissenting opinion, *post*, p. 518. Brennan, J., filed a dissenting opinion, in which White and Marshall, JJ., joined, *post*, p. 519.

Emmelyn Logan-Baldwin argued the cause for petitioners. With her on the briefs were *Sanford Liebschutz* and *Michael Nelson.*

James M. Hartman argued the cause for respondents. With him on the brief were *Douglas S. Gates, J. William Ernstrom,* and *Luther C. Nadler.**

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*Briefs of *amici curiae* urging reversal were filed by *Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston,* and *Norman J. Chachkin* for the N. A. A. C. P. Legal Defense and Educational Fund, Inc.; by *Martin E. Sloane* and *Arthur D. Wolf* for the National Committee Against Discrimination in Housing; and by *J. Harold Flannery, Paul R. Dimond,* and *William E. Caldwell* for the Lawyers' Committee for Civil Rights Under Law.

David H. Moskowitz filed a brief for Regional Housing Legal Services, Inc., as *amicus curiae.*

MR. JUSTICE POWELL delivered the opinion of the Court.

Petitioners, various organizations and individuals resident in the Rochester, N. Y., metropolitan area, brought this action in the District Court for the Western District of New York against the town of Penfield, an incorporated municipality adjacent to Rochester, and against members of Penfield's Zoning, Planning, and Town Boards. Petitioners claimed that the town's zoning ordinance, by its terms and as enforced by the defendant board members, respondents here, effectively excluded persons of low and moderate income from living in the town, in contravention of petitioners' First, Ninth, and Fourteenth Amendment rights and in violation of 42 U. S. C. §§ 1981, 1982, and 1983. The District Court dismissed the complaint and denied a motion to add petitioner Housing Council in the Monroe County Area, Inc., as party-plaintiff and also a motion by petitioner Rochester Home Builders Association, Inc., for leave to intervene as party-plaintiff. The Court of Appeals for the Second Circuit affirmed, holding that none of the plaintiffs, and neither Housing Council nor Home Builders Association, had standing to prosecute the action. 495 F. 2d 1187 (1974). We granted the petition for certiorari. 419 U. S. 823 (1974). For reasons that differ in certain respects from those upon which the Court of Appeals relied, we affirm.

I

Petitioners Metro-Act of Rochester, Inc., and eight individual plaintiffs, on behalf of themselves and all persons similarly situated,[1] filed this action on January 24,

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[1] Plaintiffs claimed to represent, pursuant to Fed. Rule Civ. Proc. 23 (b)(2), classes constituting "all taxpayers of the City of Rochester, all low and moderate income persons residing in the City of Rochester, all black and/or Puerto Rican/Spanish citizens residing

1972, averring jurisdiction in the District Court under 28 U. S. C. §§ 1331 and 1343. The complaint identified Metro-Act as a not-for-profit New York corporation, the purposes of which are "to alert ordinary citizens to problems of social concern; . . . to inquire into the reasons for the critical housing shortage for low and moderate income persons in the Rochester area and to urge action on the part of citizens to alleviate the general housing shortage for low and moderate income persons." [2] Plaintiffs Vinkey, Reichert, Warth, and Harris were described as residents of the city of Rochester, all of whom owned real property in and paid property taxes to that city.[3] Plaintiff Ortiz, "a citizen of Spanish/Puerto Rican extraction," App. 7, also owned real property in and paid taxes to Rochester. Ortiz, however, resided in Wayland, N. Y., some 42 miles from Penfield where he was employed.[4] The complaint described plaintiffs Broadnax, Reyes, and Sinkler as residents of Rochester and "persons fitting within the classification of low and moderate income as hereinafter defined. . . ." [5] *Ibid.* Al-

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in the City of Rochester and all persons employed but excluded from living in the Town of Penfield who are affected or may in the future be affected by the defendants' policies and practices. . . ." App. 9.

[2] *Id.*, at 8–9.

[3] Plaintiff Harris was further described in the complaint as "a negro person who is denied certain rights by virtue of her race. . . ." App. 5. We find no indication in the record that Harris had either the desire or intent to live in Penfield were suitable housing to become available. Indeed, petitioners now appear to claim standing for Harris only on the ground that she is a taxpayer of Rochester. See Brief for Petitioners 9, 12.

[4] According to Ortiz' affidavit, submitted in answer to respondents' motion to dismiss, he was employed in Penfield from 1966 to May 1972. App. 366–367.

[5] In fact, however, the complaint nowhere defines the term "low and moderate income" beyond the parenthetical phrase "without the capital requirements to purchase real estate." *E. g., id.*, at 18.

though the complaint does not expressly so state, the record shows that Broadnax, Reyes, and Sinkler are members of ethnic or racial minority groups: Reyes is of Puerto Rican ancestry; Broadnax and Sinkler are Negroes.

Petitioners' complaint alleged that Penfield's zoning ordinance, adopted in 1962, has the purpose and effect of excluding persons of low and moderate income from residing in the town. In particular, the ordinance allocates 98% of the town's vacant land to single-family detached housing, and allegedly by imposing unreasonable requirements relating to lot size, setback, floor area, and habitable space, the ordinance increases the cost of single-family detached housing beyond the means of persons of low and moderate income. Moreover, according to petitioners, only 0.3% of the land available for residential construction is allocated to multifamily structures (apartments, townhouses, and the like), and even on this limited space, housing for low- and moderate-income persons is not economically feasible because of low density and other requirements. Petitioners also alleged that "in furtherance of a policy of exclusionary zoning," *id.*, at 22, the defendant members of Penfield's Town, Zoning, and Planning Boards had acted in an arbitrary and discriminatory manner: they had delayed action on proposals for low- and moderate-cost housing for inordinate periods of time; denied such proposals for arbitrary and insubstantial reasons; refused to grant necessary variances and permits, or to allow tax abatements; failed to provide necessary support services for low- and moderate-cost housing projects; and had

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In addition to the inadequacy of this definition, the record discloses wide variations in the income, housing needs, and money available for housing among the various "low and moderate income" plaintiffs. See Part III, *infra*.

amended the ordinance to make approval of such projects virtually impossible.

In sum, petitioners alleged that, in violation of their "rights, privileges and immunities secured by the Constitution and laws of the United States," *id.*, at 17, the town and its officials had made "practically and economically impossible the construction of sufficient numbers of low and moderate income . . . housing in the Town of Penfield to satisfy the minimum housing requirements of both the Town of Penfield and the metropolitan Rochester area . . . ."[6] Petitioners alleged, moreover, that by precluding low- and moderate-cost housing, the town's zoning practices also had the effect of excluding persons of minority racial and ethnic groups, since most such persons have only low or moderate incomes.

Petitioners further alleged certain harm to themselves. The Rochester property owners and taxpayers—Vinkey, Reichert, Warth, Harris, and Ortiz—claimed that because of Penfield's exclusionary practices, the city of Rochester had been forced to impose higher tax rates on them and others similarly situated than would otherwise have been necessary. The low- and moderate-income, minority plaintiffs—Ortiz, Broadnax, Reyes, and Sinkler—claimed that Penfield's zoning practices had prevented them from acquiring, by lease or purchase, residential property in the town, and thus had forced them and their families to reside in less attractive environments. To relieve these various harms, petitioners asked the District Court to declare the Penfield ordinance unconstitutional, to enjoin the defendants from enforcing the ordinance, to order the defendants to enact and administer a new ordinance designed to alleviate the effects of their past actions, and to award $750,000 in actual and exemplary damages.

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[6] App. 25–26.

On May 2, 1972, petitioner Rochester Home Builders Association, an association of firms engaged in residential construction in the Rochester metropolitan area, moved the District Court for leave to intervene as a party-plaintiff. In essence, Home Builders' intervenor complaint repeated the allegations of exclusionary zoning practices made by the original plaintiffs. It claimed that these practices arbitrarily and capriciously had prevented its member firms from building low- and moderate-cost housing in Penfield, and thereby had deprived them of potential profits. Home Builders prayed for equitable relief identical in substance to that requested by the original plaintiffs, and also for $750,000 in damages.[7] On June 7, 1972, Metro-Act and the other original plaintiffs moved to join petitioner Housing Council in the Monroe County Area, Inc., as a party plaintiff. Housing Council is a not-for-profit New York corporation, its membership comprising some 71 public and private organizations interested in housing problems. An affidavit accompanying the motion stated that 17 of Housing Council's member groups were or hoped to be involved in the development of low- and moderate-cost housing, and that one of its members—the Penfield Better Homes Corp.—"is and has been actively attempting to develop moderate income housing" in Penfield, "but has been stymied by its inability to secure the necessary approvals . . . ."[8]

Upon consideration of the complaints and of extensive supportive materials submitted by petitioners, the District Court held that the original plaintiffs, Home Builders, and Housing Council lacked standing to prosecute

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[7] Home Builders also asked the District Court to enjoin the defendants from carrying out threatened retaliation against its members if Home Builders joined this litigation.

[8] *Id.*, at 174.

the action, that the original complaint failed to state a claim upon which relief could be granted, that the suit should not proceed as a class action, and that, in the exercise of discretion, Home Builders should not be permitted to intervene. The court accordingly denied the motion to add Housing Council as a party-plaintiff, denied Home Builders' motion to intervene, and dismissed the complaint. The Court of Appeals affirmed, reaching only the standing questions.

II

We address first the principles of standing relevant to the claims asserted by the several categories of petitioners in this case. In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. *E. g., Barrows* v. *Jackson,* 346 U. S. 249, 255–256 (1953). In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society. See *Schlesinger* v. *Reservists to Stop the War,* 418 U. S. 208, 221–227 (1974); *United States* v. *Richardson,* 418 U. S. 166, 188–197 (1974) (POWELL, J., concurring).

In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on

his behalf. *Baker* v. *Carr,* 369 U. S. 186, 204 (1962).[9] The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action . . . ." *Linda R. S.* v. *Richard D.,* 410 U. S. 614, 617 (1973). See *Data Processing Service* v. *Camp,* 397 U. S. 150, 151–154 (1970).[10]

Apart from this minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers. First, the Court has held that when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. *E. g., Schlesinger* v. *Reservists to Stop the War, supra; United States* v. *Richardson, supra; Ex parte Lévitt,* 302 U. S. 633, 634 (1937). Second, even when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *E. g., Tileston* v. *Ullman,* 318 U. S. 44 (1943). See *United States* v. *Raines,* 362 U. S. 17 (1960); *Barrows* v.

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[9] See P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 156 (2d ed. 1973).

[10] The standing question thus bears close affinity to questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial intervention—and of mootness—whether the occasion for judicial intervention persists. *E. g., Lake Carriers' Assn.* v. *MacMullan,* 406 U. S. 498 (1972); *Hall* v. *Beals,* 396 U. S. 45 (1969). See *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 154–156 (1951) (Frankfurter, J., concurring).

Jackson, supra. Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights. See, *e. g., Schlesinger* v. *Reservists to Stop the War,* 418 U. S., at 222.[11]

Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, *e. g., Flast* v. *Cohen,* 392 U. S. 83, 99 (1968), it often turns on the nature and source of the claim asserted. The actual or threatened injury required by Art. III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing . . . ." See *Linda R. S.* v. *Richard D., supra,* at 617 n. 3; *Sierra Club* v. *Morton,* 405 U. S. 727, 732 (1972). Moreover, the source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes. Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.[12] In some circumstances, counter-

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[11] Cf. Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv. L. Rev. 645 (1973).

[12] A similar standing issue arises when the litigant asserts the rights of third parties defensively, as a bar to judgment against him. *E. g., Barrows* v. *Jackson,* 346 U. S. 249 (1953); *McGowan* v. *Maryland,* 366 U. S. 420, 429–430 (1961). In such circumstances, there is no Art. III standing problem; but the prudential question is governed by considerations closely related to the question whether a person in the litigant's position would have a right of action on the claim. See Part IV, *infra.*

vailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties. See *United States* v. *Raines,* 362 U. S., at 22–23. In such instances, the Court has found, in effect, that the constitutional or statutory provision in question implies a right of action in the plaintiff. See *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); *Sullivan* v. *Little Hunting Park, Inc.,* 396 U. S. 229, 237 (1969). See generally Part IV, *infra.* Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. *E. g., United States* v. *SCRAP,* 412 U. S. 669 (1973). But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim. *E. g., Sierra Club* v. *Morton, supra,* at 737; *FCC* v. *Sanders Radio Station,* 309 U. S. 470, 477 (1940).

One further preliminary matter requires discussion. For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. *E. g., Jenkins* v. *McKeithen,* 395 U. S. 411, 421–422 (1969). At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this oppor-

tunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.

III

With these general considerations in mind, we turn first to the claims of petitioners Ortiz, Reyes, Sinkler, and Broadnax, each of whom asserts standing as a person of low or moderate income and, coincidentally, as a member of a minority racial or ethnic group. We must assume, taking the allegations of the complaint as true, that Penfield's zoning ordinance and the pattern of enforcement by respondent officials have had the purpose and effect of excluding persons of low and moderate income, many of whom are members of racial or ethnic minority groups. We also assume, for purposes here, that such intentional exclusionary practices, if proved in a proper case, would be adjudged violative of the constitutional and statutory rights of the persons excluded.

But the fact that these petitioners share attributes common to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners themselves have been excluded, or that the respondents' assertedly illegal actions have violated their rights. Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, "none may seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton,* 414 U. S. 488, 494 (1974). See, *e. g., Bailey* v. *Patterson,* 369 U. S. 31, 32–33 (1962).

In their complaint, petitioners Ortiz, Reyes, Sinkler, and Broadnax alleged in conclusory terms that they are among the persons excluded by respondents' actions.[13] None of them has ever resided in Penfield; each claims at least implicitly that he desires, or has desired, to do so. Each asserts, moreover, that he made some effort, at some time, to locate housing in Penfield that was at once within his means and adequate for his family's needs. Each claims that his efforts proved fruitless.[14]

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[13] Petitioner Ortiz also alleged that as a result of such exclusion he had to incur substantial commuting expenses between his residence and his former place of employment in Penfield; and, in supporting affidavits, each petitioner recites at some length the disadvantages of his or her present housing situation and how that situation might be improved were residence in Penfield possible. For purposes of standing, however, it is the exclusion itself that is of critical importance, since exclusion alone would violate the asserted rights quite apart from any objective or subjective disadvantage that may flow from it.

[14] In his affidavit submitted in opposition to respondents' motion to dismiss, petitioner Ortiz stated:

"Since my job at that time and continuing until May of 1972 was in the Town of Penfield, I initiated inquiries about renting and/or buying a home in the Town of Penfield. However, because of my income being low or moderate, I found that there were no apartment units large enough to house my family of wife and seven children, nor were there apartment units that were available reasonably priced so that I could even afford to rent the largest apartment unit. I have been reading ads in the Rochester metropolitan newspapers since coming to Rochester in 1966 and during that time and to the present time, I have not located either rental housing or housing to buy in Penfield." App. 37.

Petitioner Reyes averred that, for some time before locating and purchasing their present residence in Rochester, she and her husband had searched for a suitable residence in suburban communities: "[O]ur investigation for housing included the Rochester bedroom communities of Webster, Irondequoit, Penfield and Perinton. Our search over a period of two years led us to no possible purchase in any of these towns." *Id.*, at 428. Petitioner Sinkler stated

We may assume, as petitioners allege, that respondents' actions have contributed, perhaps substantially, to the cost of housing in Penfield. But there remains the question whether petitioners' inability to locate suitable housing in Penfield reasonably can be said to have resulted, in any concretely demonstrable way, from respondents' alleged constitutional and statutory infractions. Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed. *Linda R. S.* v. *Richard D.*, 410 U. S. 614 (1973).

We find the record devoid of the necessary allegations. As the Court of Appeals noted, none of these petitioners has a present interest in any Penfield property; none is himself subject to the ordinance's strictures; and none has ever been denied a variance or permit by respondent officials. 495 F. 2d, at 1191. Instead, petitioners claim that respondents' enforcement of the ordinance against third parties—developers, builders, and the like—has had the consequence of precluding the construction of housing suitable to their needs at prices they might be able to afford. The fact that the harm to petitioners may have resulted indirectly does not in itself preclude stand-

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that she had "searched for alternate housing in the Rochester metropolitan area," including the town of Penfield, and had found that "a black person has no choice of housing . . . ." In particular, "there are no apartments available in the Town of Penfield which a person of my income level can afford." *Id.*, at 452–453. Petitioner Broadnax said only that she had "bought newspapers and read ads and walked to look for apartments until I found the place where I now reside. I found that there was virtually no choice of housing in the Rochester area." *Id.*, at 407.

ing. When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights. *E. g., Roe* v. *Wade,* 410 U. S. 113, 124 (1973). But it may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.

Here, by their own admission, realization of petitioners' desire to live in Penfield always has depended on the efforts and willingness of third parties to build low- and moderate-cost housing. The record specifically refers to only two such efforts: that of Penfield Better Homes Corp., in late 1969, to obtain the rezoning of certain land in Penfield to allow the construction of subsidized cooperative townhouses that could be purchased by persons of moderate income; and a similar effort by O'Brien Homes, Inc., in late 1971.[15] But

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[15] Penfield Better Homes contemplated a series of one- to three-bedroom units and hoped to sell them—at that time—to persons who earned from $5,000 to $8,000 per year. The Penfield Planning Board denied the necessary variance on September 9, 1969, because of incompatibility with the surrounding neighborhood, projected traffic congestion, and problems of severe soil erosion during construction. *Id.,* at 629–633, 849–859, 883–884. O'Brien Homes, Inc., projected 51 buildings, each containing four family units, designed for single people and small families, and capable of being purchased by persons "of low income and accumulated funds" and "of moderate income with limited funds for down payment . . . ." *Id.,* at 634. The variance for this project was denied by the Planning Board on October 12, 1971; a revision of the proposal was reconsidered by the Planning Board in April 1972, and, from all indications of record, apparently remains under consideration. The record also indicates the existence of several proposals for "planned unit developments"; but we are not told whether these projects

the record is devoid of any indication that these projects, or other like projects, would have satisfied petitioners' needs at prices they could afford, or that, were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners. Indeed, petitioners' descriptions of their individual financial situations and housing needs suggest precisely the contrary—that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts.[16] In

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would allow sale at prices that persons of low or moderate income are likely to be able to afford. There is, more importantly, not the slightest suggestion that they would be adequate, and of sufficiently low cost, to meet these petitioners' needs.

[16] Ortiz states in his affidavit that he is now purchasing and resides in a six-bedroom dwelling in Wayland, N. Y.; and that he owns and receives rental income from a house in Rochester. He is concerned with finding a house or apartment large enough for himself, his wife, and seven children, but states that he can afford to spend a maximum of $120 per month for housing. *Id.*, at 370. Broadnax seeks a four-bedroom house or apartment for herself and six children, and can spend a maximum of about $120 per month for housing. *Id.*, at 417–418. Sinkler also states that she can spend $120 per month for housing for herself and two children. *Id.*, at 452–453. Thus, at least in the cases of Ortiz and Broadnax, it is doubtful that their stated needs could have been satisfied by the small housing units contemplated in the only moderate-cost projects specifically described in the record. Moreover, there is no indication that any of the petitioners had the resources necessary to acquire the housing available in the projects. The matter is left entirely obscure. The income and housing budget figures supplied in petitioners' affidavits are presumably for the year 1972. The vague description of the proposed O'Brien development strongly suggests that the units, even if adequate for their needs, would have been beyond the means at least of Sinkler and Broadnax. See n. 15, *supra*. The Penfield Better Homes projected price figures were for 1969, and must be assumed—even if subsidies might still be available—to have increased substantially by 1972, when the complaint was filed. Petitioner Reyes presents a special case: she states that her family

short, the facts alleged fail to support an actionable causal relationship between Penfield's zoning practices and petitioners' asserted injury.

In support of their position, petitioners refer to several decisions in the District Courts and Courts of Appeals, acknowledging standing in low-income, minority-group plaintiffs to challenge exclusionary zoning practices.[17] In those cases, however, the plaintiffs challenged zoning restrictions as applied to particular projects that would supply housing within their means, and of which they were intended residents. The plaintiffs thus were able to demonstrate that unless relief from assertedly illegal actions was forthcoming, their immediate and personal interests would be harmed. Petitioners here assert no like circumstances. Instead, they rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief.

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has an income of over $14,000 per year, that she can afford $231 per month for housing, and that, in the past and apparently now, she wants to purchase a residence. As noted above, see n. 5, *supra,* the term "low and moderate income" is nowhere defined in the complaint; but Penfield Better Homes defined the term as between $5,000 and $8,000 per year. See n. 15, *supra.* Since that project was to be subsidized, presumably petitioner Reyes would have been ineligible. There is no indication that in nonsubsidized projects, removal of the challenged zoning restrictions—in 1972—would have reduced the price on new single-family residences to a level that petitioner Reyes thought she could afford.

[17] See, *e. g., Park View Heights Corp.* v. *City of Black Jack,* 467 F. 2d 1208 (CA8 1972); *Crow* v. *Brown,* 457 F. 2d 788 (CA5 1972), aff'g 332 F. Supp. 382 (ND Ga. 1971); *Kennedy Park Homes Assn.* v. *City of Lackawanna,* 436 F. 2d 108 (CA2 1970), cert. denied, 401 U. S. 1010 (1971); *Dailey* v. *City of Lawton,* 425 F. 2d 1037 (CA10 1970). Cf. *United Farmworkers of Florida Housing Project, Inc.* v. *City of Delray Beach,* 493 F. 2d 799 (CA5 1974).

We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him,* and that he personally would benefit in a tangible way from the court's intervention.[18] Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of "a real need to exercise the power of judicial review" or that relief can be framed "no broader than required by the precise facts to which the court's ruling would be applied." *Schlesinger* v. *Reservists to Stop the War,* 418 U. S., at 221-222.

IV

The petitioners who assert standing on the basis of their status as taxpayers of the city of Rochester present a different set of problems. These "taxpayer-petitioners" claim that they are suffering economic injury consequent to Penfield's allegedly discriminatory and exclusionary zoning practices. Their argument, in brief, is that Penfield's persistent refusal to allow or to facilitate construction of low- and moderate-cost housing forces the city of Rochester to provide more such housing than it otherwise would do; that to provide such housing, Rochester must allow certain tax abatements; and

[18] This is not to say that the plaintiff who challenges a zoning ordinance or zoning practices must have a present contractual interest in a particular project. A particularized personal interest may be shown in various ways, which we need not undertake to identify in the abstract. But usually the initial focus should be on a particular project. See, *e. g.,* cases cited in n. 17, *supra.* We also note that zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities. They are, of course, subject to judicial review in a proper case. But citizens dissatisfied with provisions of such laws need not overlook the availability of the normal democratic process.

that as the amount of tax-abated property increases, Rochester taxpayers are forced to assume an increased tax burden in order to finance essential public services.

"Of course, pleadings must be something more than an ingenious academic exercise in the conceivable." *United States* v. *SCRAP,* 412 U. S., at 688. We think the complaint of the taxpayer-petitioners is little more than such an exercise. Apart from the conjectural nature of the asserted injury, the line of causation between Penfield's actions and such injury is not apparent from the complaint. Whatever may occur in Penfield, the injury complained of—increases in taxation—results only from decisions made by the appropriate Rochester authorities, who are not parties to this case.

But even if we assume that the taxpayer-petitioners could establish that Penfield's zoning practices harm them,[19] their complaint nonetheless was properly dismissed. Petitioners do not, even if they could, assert any personal right under the Constitution or any statute to be free of action by a neighboring municipality that may have some incidental adverse effect on Rochester. On the contrary, the only basis of the taxpayer-petitioners' claim is that Penfield's zoning ordinance and practices violate the constitutional and statutory rights of third parties, namely, persons of low and moderate income who are said to be excluded from Penfield. In short the claim of these petitioners falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves. As we have observed above, this rule of judicial self-governance is subject to exceptions, the most prominent of which is that Congress may remove it by statute. Here, how-

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[19] Cf. *United States* v. *SCRAP,* 412 U. S. 669, 688–690 (1973). But see *Roe* v. *Wade,* 410 U. S. 113, 127–129 (1973).

ever, no statute expressly or by clear implication grants a right of action, and thus standing to seek relief, to persons in petitioners' position. In several cases, this Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights. See, *e. g., Doe* v. *Bolton,* 410 U. S. 179, 188 (1973); *Griswold* v. *Connecticut,* 381 U. S. 479, 481 (1965); *Barrows* v. *Jackson,* 346 U. S. 249 (1953). But the taxpayer-petitioners are not themselves subject to Penfield's zoning practices. Nor do they allege that the challenged zoning ordinance and practices preclude or otherwise adversely affect a relationship existing between them and the persons whose rights assertedly are violated. *E. g., Sullivan* v. *Little Hunting Park, Inc.,* 396 U. S., at 237; *NAACP* v. *Alabama,* 357 U. S. 449, 458–460 (1958); *Pierce* v. *Society of Sisters,* 268 U. S., at 534–536. No relationship, other than an incidental congruity of interest, is alleged to exist between the Rochester taxpayers and persons who have been precluded from living in Penfield. Nor do the taxpayer-petitioners show that their prosecution of the suit is necessary to insure protection of the rights asserted, as there is no indication that persons who in fact have been excluded from Penfield are disabled from asserting their own right in a proper case.[20] In sum, we discern no justification for recognizing in the Rochester taxpayers a right of action on the asserted claim.

V

We turn next to the standing problems presented by the petitioner associations—Metro-Act of Rochester,

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[20] See generally Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599 (1962). Cf. *Bigelow* v. *Virginia,* 421 U. S. 809, 815–817 (1975).

Inc., one of the original plaintiffs; Housing Council in the Monroe County Area, Inc., which the original plaintiffs sought to join as a party-plaintiff; and Rochester Home Builders Association, Inc., which moved in the District Court for leave to intervene as plaintiff. There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. Moreover, in attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties. *E. g., NAACP* v. *Alabama, supra,* at 458–460; *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 183–187 (1951) (Jackson, J., concurring). With the limited exception of Metro-Act, however, none of the associational petitioners here has asserted injury to itself.

Even in the absence of injury to itself, an association may have standing solely as the representative of its members. *E. g., National Motor Freight Assn.* v. *United States,* 372 U. S. 246 (1963). The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy. See *Sierra Club* v. *Morton,* 405 U. S. 727 (1972). The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. *Id.,* at 734–741. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

A

Petitioner Metro-Act's claims to standing on its own behalf as a Rochester taxpayer, and on behalf of its members who are Rochester taxpayers or persons of low or moderate income, are precluded by our holdings in Parts III and IV, *supra,* as to the individual petitioners, and require no further discussion. Metro-Act also alleges, however, that 9% of its membership is composed of present residents of Penfield. It claims that, as a result of the persistent pattern of exclusionary zoning practiced by respondents and the consequent exclusion of persons of low and moderate income, those of its members who are Penfield residents are deprived of the benefits of living in a racially and ethnically integrated community. Referring to our decision in *Trafficante* v. *Metropolitan Life Ins. Co.,* 409 U. S. 205 (1972), Metro-Act argues that such deprivation is a sufficiently palpable injury to satisfy the Art. III case-or-controversy requirement, and that it has standing as the representative of its members to seek redress.

We agree with the Court of Appeals that *Trafficante* is not controlling here. In that case, two residents of an apartment complex alleged that the owner had discriminated against rental applicants on the basis of race, in violation of § 804 of the Civil Rights Act of 1968, 82 Stat. 83, 42 U. S. C. § 3604. They claimed that, as a result of such discrimination, "they had been injured in that (1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto.'" 409 U. S., at 208. In light of the clear congressional purpose

in enacting the 1968 Act, and the broad definition of "person aggrieved" in § 810 (a), 42 U. S. C. § 3610 (a), we held that petitioners, as "person[s] who claim[ed] to have been injured by a discriminatory housing practice," had standing to litigate violations of the Act. We concluded that Congress had given residents of housing facilities covered by the statute an actionable right to be free from the adverse consequences to them of racially discriminatory practices directed at and immediately harmful to others. 409 U. S., at 212.

Metro-Act does not assert on behalf of its members any right of action under the 1968 Civil Rights Act, nor can the complaint fairly be read to make out any such claim.[21] In this, we think, lies the critical distinction between *Trafficante* and the situation here. As we have

[21] The *amicus* brief of the Lawyers' Committee for Civil Rights under Law argues, to the contrary, that petitioners' allegations do state colorable claims under the 1968 Act, and that Metro-Act's Penfield members are "person[s] aggrieved" within the meaning of § 810 (a). It is significant, we think, that petitioners nowhere adopt this argument. As we read the complaint, petitioners have not alleged that respondents "refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person *because of race, color, . . . or national origin,*" or that they "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, *because of race, color, . . . or national origin.*" 42 U. S. C. §§ 3604 (a) and (b) (emphasis added). Instead, the gravamen of the complaint is that the challenged zoning practices have the purpose and effect of excluding persons of low and moderate income from residing in the town, and that this in turn has the consequence of excluding members of racial or ethnic minority groups. This reading of the complaint is confirmed by petitioners' brief in this Court. Brief for Petitioners 41. We intimate no view as to whether, had the complaint alleged purposeful racial or ethnic discrimination, Metro-Act would have stated a claim under § 804. See *Park View Heights Corp.* v. *City of Black Jack,* 467 F. 2d 1208 (CA8 1972).

observed above, Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute. *Linda R. S.* v. *Richard D.*, 410 U. S., at 617 n. 3, citing *Trafficante* v. *Metropolitan Life Ins., Co., supra,* at 212 (WHITE, J., concurring). No such statute is applicable here.

Even if we assume, *arguendo,* that apart from any statutorily created right the asserted harm to Metro-Act's Penfield members is sufficiently direct and personal to satisfy the case-or-controversy requirement of Art. III, prudential considerations strongly counsel against according them or Metro-Act standing to prosecute this action. We do not understand Metro-Act to argue that Penfield residents themselves have been denied any constitutional rights, affording them a cause of action under 42 U. S. C. § 1983. Instead, their complaint is that they have been harmed indirectly by the exclusion of others. This is an attempt to raise putative rights of third parties, and none of the exceptions that allow such claims is present here.[22] In these circumstances, we conclude that it is inappropriate to allow Metro-Act to invoke the judicial process.

B

Petitioner Home Builders, in its intervenor-complaint, asserted standing to represent its member firms engaged in the development and construction of residential housing in the Rochester area, including Penfield. Home Builders alleged that the Penfield zoning restrictions,

[22] Metro-Act does not allege that a contractual or other relationship protected under §§ 1981 and 1982 existed between its Penfield members and any particular person excluded from residing in the town, nor that any such relationship was either punished or disrupted by respondents. See *Sullivan* v. *Little Hunting Park,* 396 U. S. 229, 237 (1969).

together with refusals by the town officials to grant variances and permits for the construction of low- and moderate-cost housing, had deprived some of its members of "substantial business opportunities and profits." App. 156. Home Builders claimed damages of $750,000 and also joined in the original plaintiffs' prayer for declaratory and injunctive relief.

As noted above, to justify any relief the association must show that it has suffered harm, or that one or more of its members are injured. *E. g., Sierra Club* v. *Morton,* 405 U. S. 727 (1972). But, apart from this, whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind. *E.g., National Motor Freight Assn.* v. *United States,* 372 U. S. 246 (1963). See *Data Processing Service* v. *Camp,* 397 U. S. 150 (1970). Cf. Fed. Rule Civ. Proc. 23 (b)(2).

The present case, however, differs significantly as here an association seeks relief in damages for alleged injuries to its members. Home Builders alleges no monetary injury to itself, nor any assignment of the damages claims of its members. No award therefore can be made to the association as such. Moreover, in the circumstances of this case, the damages claims are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individual-

ized proof. Thus, to obtain relief in damages, each member of Home Builders who claims injury as a result of respondents' practices must be a party to the suit, and Home Builders has no standing to claim damages on his behalf.

Home Builders' prayer for prospective relief fails for a different reason. It can have standing as the representative of its members only if it has alleged facts sufficient to make out a case or controversy had the members themselves brought suit. No such allegations were made. The complaint refers to no specific project of any of its members that is currently precluded either by the ordinance or by respondents' action in enforcing it. There is no averment that any member has applied to respondents for a building permit or a variance with respect to any current project. Indeed, there is no indication that respondents have delayed or thwarted any project currently proposed by Home Builders' members, or that any of its members has taken advantage of the remedial processes available under the ordinance. In short, insofar as the complaint seeks prospective relief, Home Builders has failed to show the existence of any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention. See, *e. g., United Public Workers* v. *Mitchell,* 330 U. S. 75, 86-91 (1947); *Maryland Cas. Co.* v. *Pacific Coal & Oil Co.,* 312 U. S. 270, 273 (1941).

A like problem is presented with respect to petitioner Housing Council. The affidavit accompanying the motion to join it as plaintiff states that the Council includes in its membership "at least seventeen" groups that have been, are, or will be involved in the development of low- and moderate-cost housing. But, with one exception, the complaint does not suggest that any of these groups has focused its efforts on Penfield or has any specific

plan to do so. Again with the same exception, neither the complaint nor any materials of record indicate that any member of Housing Council has taken any step toward building housing in Penfield, or has had dealings of any nature with respondents. The exception is the Penfield Better Homes Corp. As we have observed above, it applied to respondents in late 1969 for a zoning variance to allow construction of a housing project designed for persons of moderate income. The affidavit in support of the motion to join Housing Council refers specifically to this effort, and the supporting materials detail at some length the circumstances surrounding the rejection of Better Homes' application. It is therefore possible that in 1969, or within a reasonable time thereafter, Better Homes itself and possibly Housing Council as its representative would have had standing to seek review of respondents' action. The complaint, however, does not allege that the Penfield Better Homes project remained viable in 1972 when this complaint was filed, or that respondents' actions continued to block a then-current construction project.[23] In short, neither the complaint nor the record supplies any basis from which to infer that the controversy between respondents and Better Homes, however vigorous it may once have been, remained a live, concrete dispute when this complaint was filed.

VI

The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of pru-

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[23] If it had been averred that the zoning ordinance or respondents were unlawfully blocking a pending construction project, there would be a further question as to whether Penfield Better Homes had employed available administrative remedies, and whether it should be required to do so before a federal court can intervene.

dential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers. We agree with the District Court and the Court of Appeals that none of the petitioners here has met this threshold requirement. Accordingly, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

With all respect, I think that the Court reads the complaint and the record with antagonistic eyes. There are in the background of this case continuing strong tides of opinion touching on very sensitive matters, some of which involve race, some class distinctions based on wealth.

A clean, safe, and well-heated home is not enough for some people. Some want to live where the neighbors are congenial and have social and political outlooks similar to their own. This problem of sharing areas of the community is akin to that when one wants to control the kind of person who shares his own abode. Metro-Act of Rochester, Inc., and the Housing Council in the Monroe County Area, Inc.—two of the associations which bring this suit—do in my opinion represent the communal feeling of the actual residents and have standing.

The associations here are in a position not unlike that confronted by the Court in *NAACP* v. *Alabama,* 357 U. S. 449 (1958). Their protest against the creation of this segregated community expresses the desire of their members to live in a desegregated community—a desire which gives standing to sue under the Civil Rights Act

of 1968 as we held in *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205 (1972). Those who voice these views here seek to rely on other Civil Rights Acts and on the Constitution, but they too should have standing, by virtue of the dignity of their claim, to have the case decided on the merits.

Standing has become a barrier to access to the federal courts, just as "the political question" was in earlier decades. The mounting caseload of federal courts is well known. But cases such as this one reflect festering sores in our society; and the American dream teaches that if one reaches high enough and persists there is a forum where justice is dispensed. I would lower the technical barriers and let the courts serve that ancient need. They can in time be curbed by legislative or constitutional restraints if an emergency arises.

We are today far from facing an emergency. For in all frankness, no Justice of this Court need work more than four days a week to carry his burden. I have found it a comfortable burden carried even in my months of hospitalization.

As MR. JUSTICE BRENNAN makes clear in his dissent, the alleged purpose of the ordinance under attack was to preclude low- and moderate-income people and non-whites from living in Penfield. The zoning power is claimed to have been used here to foist an un-American community model on the people of this area. I would let the case go to trial and have all the facts brought out. Indeed, it would be better practice to decide the question of standing only when the merits have been developed.

I would reverse the Court of Appeals.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

In this case, a wide range of plaintiffs, alleging various kinds of injuries, claimed to have been affected by the

Penfield zoning ordinance, on its face and as applied, and by other practices of the defendant officials of Penfield. Alleging that as a result of these laws and practices low- and moderate-income and minority people have been excluded from Penfield, and that this exclusion is unconstitutional, plaintiffs sought injunctive, declaratory, and monetary relief. The Court today, in an opinion that purports to be a "standing" opinion but that actually, I believe, has overtones of outmoded notions of pleading and of justiciability, refuses to find that any of the variously situated plaintiffs can clear numerous hurdles, some constructed here for the first time, necessary to establish "standing." While the Court gives lip service to the principle, oft repeated in recent years,[1] that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal," *ante,* at 500, in fact the opinion, which tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional, can be explained only by an indefensible hostility to the claim on the merits. I can appreciate the Court's reluctance to adjudicate the complex and difficult legal questions involved in determining the constitutionality of practices which assertedly limit residence in a particular municipality to those who are white and relatively well off, and I also understand that the merits of this case could involve grave sociological and political ramifications. But courts cannot refuse to hear a case on the merits merely because they would prefer not to, and it is quite clear, when the record is viewed with dispassion, that at least three of the groups of plaintiffs have made

[1] *Flast* v. *Cohen,* 392 U. S. 83, 99 (1968); *Data Processing Service* v. *Camp,* 397 U. S. 150, 153, 158 (1970); *Schlesinger* v. *Reservists to Stop the War,* 418 U. S. 208, 225 n. 15 (1974). See *Barlow* v. *Collins,* 397 U. S. 159, 176 (1970) (opinion of BRENNAN, J.).

allegations, and supported them with affidavits and documentary evidence, sufficient to survive a motion to dismiss for lack of standing.[2]

I

Before considering the three groups I believe clearly to have standing—the low-income, minority plaintiffs, Rochester Home Builders Association, Inc., and the Housing Council in the Monroe County Area, Inc.—it will be helpful to review the picture painted by the allegations as a whole, in order better to comprehend the interwoven interests of the various plaintiffs. Indeed, one glaring defect of the Court's opinion is that it views each set of plaintiffs as if it were prosecuting a separate lawsuit, refusing to recognize that the interests are intertwined, and that the standing of any one group must take into account its position vis-à-vis the others. For example, the Court says that the low-income minority plaintiffs have not alleged facts sufficient to show that but for the exclusionary practices claimed, they would be able to reside in Penfield. The Court then intimates that such a causal relationship could be shown only if "the initial focus [is] on a particular project." *Ante,* at 508 n. 18. Later, the Court objects to the ability of the Housing Council to prosecute the suit on behalf of its member, Penfield Better Homes Corp., *despite* the fact that Better Homes *had* displayed an interest in a particular project, because that project was no longer live. Thus, we must suppose that even if the low-income plaintiffs had alleged a desire to live in the Better Homes project, that allegation would

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[2] Because at least three groups of plaintiffs have, in my view, alleged standing sufficient to require this lawsuit to proceed to discovery and trial, I do not deal in this dissent with the standing of the remaining petitioners.

be insufficient because it appears that that particular project might never be built. The rights of low-income minority plaintiffs who desire to live in a locality, then, seem to turn on the willingness of a third party to litigate the legality of preclusion of a particular project, despite the fact that the third party may have no economic incentive to incur the costs of litigation with regard to one project, and despite the fact that the low-income minority plaintiffs' interest is *not* to live in a particular project but to live somewhere in the town in a dwelling they can afford.

Accepting, as we must, the various allegations and affidavits as true, the following picture emerges: The Penfield zoning ordinance, by virtue of regulations concerning "lot area, set backs, . . . population density, density of use, units per acre, floor area, sewer requirements, traffic flow, ingress and egress[, and] street location," makes "practically and economically impossible the construction of sufficient numbers of low and moderate income" housing. App. 25. The *purpose* of this ordinance was to preclude low- and moderate-income people and nonwhites from living in Penfield, *id.,* at 15, and, particularly because of refusals to grant zoning variances and building permits and by using special permit procedures and other devices, *id.,* at 17, the defendants succeeded in keeping "low and moderate income persons . . . and non-white persons . . . from residing within . . . Penfield." *Id.,* at 18.

As a result of these practices, various of the plaintiffs were affected in different ways. For example, plaintiffs Ortiz, Reyes, Sinkler, and Broadnax, persons of low or moderate income and members of minority groups, alleged that *"as a result"* of respondents' exclusionary scheme, *id.,* at 18, 21, 23–24, 26, 29 (emphasis supplied), they could not live in Penfield, although they

desired and attempted to do so, and consequently incurred greater commuting costs, lived in substandard housing, and had fewer services for their families and poorer schools for their children than if they had lived in Penfield. Members of the Rochester Home Builders Association were prevented from constructing homes for low- and moderate-income people in Penfield, *id.*, at 153, harming them economically. And Penfield Better Homes, a member of the Housing Council, was frustrated in its attempt to build moderate-income housing, *id.*, at 174.

Thus, the portrait which emerges from the allegations and affidavits is one of total, purposeful, intransigent exclusion of certain classes of people from the town, pursuant to a conscious scheme never deviated from. Because of this scheme, those interested in building homes for the excluded groups were faced with insurmountable difficulties, and those of the excluded groups seeking homes in the locality quickly learned that their attempts were futile. Yet, the Court turns the very success of the allegedly unconstitutional scheme into a barrier to a lawsuit seeking its invalidation. In effect, the Court tells the low-income minority and building company plaintiffs they will not be permitted to prove what they have alleged—that they could and would build and live in the town if changes were made in the zoning ordinance and its application—because they have not succeeded in breaching, before the suit was filed, the very barriers which are the subject of the suit.

II

Low-income and Minority Plaintiffs

As recounted above, plaintiffs Ortiz, Broadnax, Reyes, and Sinkler alleged that "as a result" of respondents' exclusionary practices, they were unable, despite at-

tempts, to find the housing they desired in Penfield, and consequently have incurred high commuting expenses, received poorer municipal services,[3] and, in some instances, have been relegated to live in substandard housing.[4] The Court does not, as it could not, suggest that

[3] Specifically, petitioner Ortiz claims, among other things, that the Penfield schools offer a much broader curriculum, including vocational education, than the school his children attend, as well as special tutoring and counseling programs not available to his children. Penfield also provides a comprehensive recreational program, while his community offers very little, and a full-time, comprehensive public library, while his community has only limited library services. App. 377–400.

Petitioner Broadnax claimed that if she lived in Penfield, there would be playgrounds for her children, effective police protection, and adequate garbage disposal, all of which are lacking in her present community. *Id.*, at 419. As a result, her children are not safe and there are mice, rats, and roaches in her house. *Id.*, at 416–417, 419.

Petitioner Reyes stated, similarly, that she is currently living with inadequate police protection, *id.*, at 426, and sending her children to inferior schools, *id.*, at 433.

Finally, petitioner Sinkler also said that in her current home, police protection is inadequate, *id.*, at 443, there are no play areas for children, *id.*, at 449, and the schools are totally inadequate. *Id.*, at 454.

These are only summaries of the affidavits, which are quite specific in detailing the inadequacies of petitioners' current communities and the injuries suffered thereby as well as, in Ortiz' affidavit, the services provided by Penfield which would alleviate many of these problems.

[4] Petitioner Broadnax said that because of the poor choice of housing available at her income, she was forced to rent an apartment which has "many leaks in the roof, bad wiring, roach infestation, rat and mice infestation, crumbling house foundation, broken front door, broken hot water heater, etc." *Id.*, at 410. As a result, aside from the ordinary dangers such conditions obviously present, one son's asthma condition has been exacerbated. *Id.*, at 413.

Petitioner Sinkler stated that, again because only housing in

the injuries, if proved, would be insufficient to give petitioners the requisite "personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues," *Baker* v. *Carr,* 369 U. S. 186, 204 (1962); *Flast* v. *Cohen,* 392 U. S. 83, 99 (1968). Rather, it is abundantly clear that the harm *alleged* satisfies the "injury in fact, economic or otherwise," *Data Processing Service* v. *Camp,* 397 U. S. 150, 152 (1970), requirement which is prerequisite to standing in federal court. The harms claimed—consisting of out-of-pocket losses as well as denial of specifically enumerated services available in Penfield but not in these petitioners' present communities, see nn. 3 and 4, *supra*—are obviously *more* palpable and concrete than those held sufficient to sustain standing in other cases. See *United States* v. *SCRAP,* 412 U. S. 669, 686 (1973); *Sierra Club* v. *Morton,* 405 U. S. 727, 735 n. 8, 738, and n. 13 (1972). Cf. *Data Processing, supra,* at 154.

Instead, the Court insists that these petitioners' allegations are insufficient to show that the harms suffered were *caused* by respondents' allegedly unconstitutional practices, because "their inability to reside in Penfield [may be] the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts." *Ante,* at 506.

True, this Court has held that to maintain standing, a plaintiff must not only allege an injury but must also assert a " 'direct' relationship between the alleged injury

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Rochester central city is available to moderate-income, minority people, she is living in a seventh-floor apartment with exposed radiator pipes, no elevator, and no screens, and violence, theft, and sexual attacks are frequent. *Id.,* at 441–446.

Once again, the above are short summaries of long, detailed accounts of the harms suffered.

and the claim sought to be adjudicated," *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 618 (1973)—that is, "[t]he 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 supplied); *Linda R. S.*, *supra*, at 618. But as the allegations recited above show, these petitioners have alleged precisely what our cases require—that *because* of the exclusionary practices of respondents, they cannot live in Penfield and have suffered harm.[5]

Thus, the Court's real holding is not that these petitioners have not *alleged* an injury resulting from respondents' action, but that they are not to be allowed to prove one, because "realization of petitioners' desire to live in Penfield always has depended on the efforts and willingness of third parties to build low- and moderate-cost housing," *ante*, at 505, and "the record is devoid of any indication that . . . [any] projects, would have satisfied petitioners' needs at prices they could afford." *Ante*, at 506.

Certainly, this is not the sort of demonstration that can or should be required of petitioners at this preliminary stage. In *SCRAP*, *supra*, a similar challenge was made: it was claimed that the allegations were vague, 412 U. S., at 689 n. 15, and that the causation theory

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[5] This case is quite different from *Linda R. S.* v. *Richard D.* In *Linda R. S.*, the problem was that even if everything alleged were proved, it was still quite possible that petitioner's husband would not be prosecuted for nonsupport, or that, if prosecuted, he would still not contribute to his children's support. Nothing which could be proved at trial could possibly show otherwise. Here, if these petitioners prove what they have alleged, they will have shown that respondents' actions did cause their injury.

asserted was untrue, *id.*, at 689. We said: "If . . . these allegations were in fact untrue, then the appellants should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact. We cannot say . . . that the appellees could not prove their allegations which, if proved, would place them squarely among those persons injured in fact." *Id.*, at 689–690.[6] See also *Jenkins* v. *McKeithen*, 395 U. S. 411, 421–422 (1969).

Here, the very fact that, as the Court stresses, these petitioners' claim rests in part upon proving the intentions and capabilities of third parties to build in Penfield suitable housing which they can afford, coupled with the exclusionary character of the claim on the merits, makes it particularly inappropriate to assume that these petitioners' lack of specificity reflects a fatal weakness in their theory of causation.[7] Obviously they cannot be ex-

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[6] There is some suggestion made in the briefs that, by virtue of the inclusion in the record of affidavits and documents, the motion to dismiss was, under Fed. Rule Civ. Proc. 12 (b), converted into a Rule 56 motion for summary judgment. In terms, the portion of Rule 12 (b) concerning conversion to a Rule 56 motion applies only to a motion to dismiss for failure to state a cause of action, and not to a motion to dismiss for other reasons. At any rate, respondents filed no counter-affidavits proper under Rule 56 (e), so that even if Rule 56 were applied, respondents have not at this stage disproved the allegations.

[7] The Court, glancing at the projects mentioned in the record which might have been built but for the exclusionary practices alleged, concludes that petitioners Ortiz and Broadnax earned too little to afford suitable housing in them, and that petitioner Reyes earned too much. *Ante*, at 506–507, n. 16. As the Court implicitly acknowledges, petitioner Sinkler at least may well have been able to live in the Better Homes Project. Further, there appears in the record as it stands a report of the Penfield Housing Task Force on Moderate Income Housing, App. 487–581, prepared for the Pen-

pected, prior to discovery and trial, to know the future plans of building companies, the precise details of the housing market in Penfield, or everything which has transpired in 15 years of application of the Penfield zoning ordinance, including every housing plan suggested and refused. To require them to allege such facts is to require them to prove their case on paper in order to get into court at all, reverting to the form of fact pleading long abjured in the federal courts. This Court has not required such unachievable specificity in standing cases in the past, see *SCRAP, supra,* and *Jenkins, supra,* and the fact that it does so now can only be explained by an indefensible determination by the Court to close the doors of the federal courts to claims of this kind. Understandably, today's decision will be read as revealing hostility to breaking down even unconstitutional zoning

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field Town Board itself, which defines "*moderate income families* as families having incomes between $5,500 and $11,000 per year, depending on the size of the family," *id.,* at 492, and moderate-income housing as housing "priced below $20,000 or [carrying] a rental price of less than $150 a month," *id.,* at 493. See also, with respect to "low income," *id.,* at 527. Thus, while the Court might not know what was meant by "low" and "moderate" income housing, *ante,* at 494–495, n. 5, and 506–507, n. 16, respondents clearly did. The petitioners here under discussion fell within the Board's own definition of moderate-income families, except for petitioner Reyes, who alleges that she could afford a house for $20,000 but not more. App. 428. And the Task Force Report *does* set out, *id.,* at 503–516, changes in the zoning ordinance and its application which could result in housing which moderate-income people could afford, even to the extent of setting out a budget provided by a builder for a house costing $18,900, *id.,* at 507. The causation theory which the Court finds improbable, then, was adopted by a task force of the Town Board itself. Of course, we do not know at this stage whether the particular named plaintiffs would *certainly* have benefited from the changes recommended by the task force, but at least there is a good chance that, after discovery and trial, they could show they would.

barriers that frustrate the deep human yearning of low-income and minority groups for decent housing they can afford in decent surroundings, see nn. 3 and 4, *supra*.

III

Associations Including Building Concerns

Two of the petitioners are organizations among whose members are building concerns. Both of these organizations, Home Builders and Housing Council, alleged that these concerns have attempted to build in Penfield low- and moderate-income housing, but have been stymied by the zoning ordinance and refusal to grant individual relief therefrom.

Specifically, Home Builders, a trade association of concerns engaged in constructing and maintaining residential housing in the Rochester area, alleged that "[d]uring the past 15 years, over 80% of the private housing units constructed in the Town of Penfield have been constructed by [its] members." App. 147. Because of respondents' refusal to grant relief from Penfield's restrictive housing statutes, members of Home Builders could not proceed with planned low- and moderate-income housing projects, *id.*, at 157, and thereby lost profits. *Id.*, at 156.

Housing Council numbers among its members at least 17 groups involved in the development and construction of low- and middle-income housing. In particular, one member, Penfield Better Homes, "*is* and has been actively attempting to develop moderate income housing in . . . Penfield" (emphasis supplied), *id.*, at 174, but has been unable to secure the necessary approvals. *Ibid.*

The Court finds that these two organizations lack standing to seek prospective relief for basically the same reasons: none of their members is, as far as the allegations show, *currently* involved in developing a *particular*

project. Thus, Home Builders has "failed to show the existence of any injury to its members *of sufficient immediacy and ripeness* to warrant judicial intervention," *ante,* at 516 (emphasis supplied), while "the controversy between respondents and Better Homes, however vigorous it may once have been, [has not] remained a live, concrete dispute." *Ante,* at 517.

Again, the Court ignores the thrust of the complaints and asks petitioners to allege the impossible. According to the allegations, the building concerns' experience in the past with Penfield officials has shown any plans for low- and moderate-income housing to be futile for, again according to the allegations, the respondents are engaged in a purposeful, conscious scheme to exclude such housing. Particularly with regard to a low- or moderate-income project, the cost of litigating, with respect to any particular project, the legality of a refusal to approve it may well be prohibitive. And the merits of the exclusion of this or that project is not at the heart of the complaint; the claim is that respondents will not approve *any* project which will provide residences for low- and moderate-income people.

When this sort of pattern-and-practice claim is at the heart of the controversy, allegations of past injury, which members of both of these organizations have clearly made, and of a future intent, if the barriers are cleared, again to develop suitable housing for Penfield, should be more than sufficient. The past experiences, if proved at trial, will give credibility and substance to the claim of interest in future building activity in Penfield. These parties, if their allegations are proved, certainly have the requisite personal stake in the outcome of *this* controversy, and the Court's conclusion otherwise is only a conclusion that *this* controversy may not be litigated in a federal court.

I would reverse the judgment of the Court of Appeals.

Syllabus

UNITED STATES v. PELTIER

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

No. 73-2000. Argued February 18, 1975—Decided June 25, 1975

This Court's decision in *Almeida-Sanchez* v. *United States,* 413 U. S. 266, which held that a warrantless automobile search, conducted about 25 air miles from the Mexican border by Border Patrol agents acting without probable cause, contravened the Fourth Amendment, does not apply to Border Patrol searches like the one in this case, which, though concededly unconstitutional under *Almeida-Sanchez* standards, was conducted prior to June 21, 1973, the date of that decision. The policies underlying the exclusionary rule do not require retroactive application of *Almeida-Sanchez* where, as here, the agents were acting in reliance upon a federal statute supported by longstanding administrative regulations and continuous judicial approval. Pp. 535–542.

500 F. 2d 985, reversed.

Rehnquist, J., delivered the opinion of the Court, in which Burger, C. J., and White, Blackmun, and Powell, JJ., joined. Douglas, J., filed a dissenting opinion, *post,* p. 543. Brennan, J., filed a dissenting opinion, in which Marshall, J., joined, and in Part I of which Stewart, J., joined, *post,* p. 544. Stewart, J., filed a dissenting statement, *post,* p. 543.

William L. Patton argued the cause for the United States. On the brief were *Solicitor General Bork, Acting Assistant Attorney General Keeney, Mark L. Evans,* and *Peter M. Shannon, Jr.*

Sandor W. Shapery, by appointment of the Court, 419 U. S. 1044, argued the cause and filed a brief for respondent.*

**Sanford Jay Rosen* filed a brief for the Mexican American Legal Defense and Educational Fund as *amicus curiae* urging affirmance.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Four months before this Court's decision in *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973), respondent was stopped in his automobile by a roving border patrol, and three plastic garbage bags containing 270 pounds of marihuana were found in the trunk of his car by Border Patrol agents. On the basis of this evidence an indictment was returned charging him with a violation of 84 Stat. 1260, 21 U. S. C. § 841 (a)(1). When respondent's motion to suppress the evidence was denied after a hearing, he stipulated in writing that he "did knowingly and intentionally possess, with intent to distribute, the marijuana concealed in the 1962 Chevrolet which he was driving on February 28, 1973." [1] The District Court found respondent guilty and imposed sentence. On appeal from that judgment, the Court of Appeals for the Ninth Circuit, sitting en banc, reversed the judgment on the ground that the "rule announced by the Supreme Court in Almeida-Sanchez v. United States . . . should be applied to similar cases pending on appeal on the date the Supreme Court's decision was announced." 500 F. 2d 985, 986 (1974) (footnote omitted).[2] We granted the Government's petition for certiorari. 419 U. S. 993 (1974).

In *Almeida-Sanchez, supra,* this Court held that a warrantless automobile search, conducted approximately 25 air miles from the Mexican border by Border Patrol agents, acting without probable cause, was uncon-

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[1] App. 28. The stipulation provided that it "would not [have been] entered into had the [respondent's] motion to suppress in the case been granted." *Ibid.*

[2] The Fifth Circuit had reached a contrary conclusion in *United States* v. *Miller,* 492 F. 2d 37 (1974).

stitutional under the Fourth Amendment.[3] In this case the Government conceded in the Court of Appeals that the search of respondent's automobile approximately 70 air miles from the Mexican border and the seizure of the marihuana were unconstitutional under the standard announced in *Almeida-Sanchez,* but it contended that that standard should not be applied to searches conducted prior to June 21, 1973, the date of the decision in *Almeida-Sanchez.* In an inquiry preliminary to balancing the interests for and against retroactive application, see *Stovall* v. *Denno,* 388 U. S. 293, 297 (1967), the majority of the Court of Appeals first considered whether this Court had "articulated a new doctrine" in *Almeida-Sanchez,* 500 F. 2d, at 987. See, *e. g., Chevron Oil Co.* v. *Huson,* 404 U. S. 97, 106 (1971); *Milton* v. *Wainwright,* 407 U. S. 371, 381–382, n. 2 (1972) (STEWART, J., dissenting). Concluding that *Almeida-Sanchez* overruled no prior decision of this Court and instead "reaffirmed well-established Fourth Amendment standards" that did not "disturb a long-accepted and relied-upon practice," 500 F. 2d, at 988, the Court of Appeals held:

> "[Respondent] is entitled to the benefit of the rule announced in *Almeida-Sanchez,* not because of retroactivity but because of Fourth Amendment principles never deviated from by the Supreme Court." *Id.,* at 989.

The judgment of conviction was reversed, and the case

[3] The Court acknowledged the "power of the Federal Government to exclude aliens from the country" and the constitutionality of "routine inspections and searches of individuals or conveyances seeking to cross our borders." 413 U. S., at 272. While searches of this sort could be conducted "not only at the border itself, but at its functional equivalents as well," *ibid.,* the Court concluded that the search at issue in the case "was of a wholly different sort." *Id.,* at 273.

was remanded to the District Court to suppress the evidence seized from respondent's automobile.

Although expressing some doubt about the applicability of the old law-new law test as a precondition to retroactivity analysis, *id.*, at 990, the six dissenters joined issue with the majority over the proper interpretation of *Almeida-Sanchez.* The dissenters concluded that *Almeida-Sanchez* had announced a new constitutional rule because the decision overruled a consistent line of Courts of Appeals precedent and disrupted a long accepted and widely relied upon administrative practice. Border Patrol agents had conducted roving searches pursuant to congressional authorization, 66 Stat. 233, 8 U. S. C. § 1357 (a)(3), and administrative regulation, 8 CFR § 287.1 (a)(2) (1973), which had been continuously upheld until this Court's decision in *Almeida-Sanchez.* Since *Almeida-Sanchez* stated a new rule, the dissenters concluded that the applicability of that decision to pre-June 21, 1973, roving patrol vehicle searches should be determined by reference to the standards summarized in *Stovall* v. *Denno, supra.*[4] For the reasons expressed in Part II of Judge Wallace's opinion in *United States* v. *Bowen,* 500 F. 2d 960, 975–981 (CA9), cert. granted, 419 U. S. 824 (1974), the dissenters concluded that *Almeida-Sanchez* should be accorded prospective application.

Despite the conceded illegality of the search under the *Almeida-Sanchez* standard, the Government contends that the exclusionary rule should not be mechanically applied in the case now before us because the policies

[4] 388 U. S., at 297: "The criteria guiding resolution of the question [of retroactivity] implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

underlying the rule do not justify its retroactive application to pre-*Almeida-Sanchez* searches. We agree.

I

Since 1965 this Court has repeatedly struggled with the question of whether rulings in criminal cases should be given retroactive effect. In those cases "[w]here the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials," *Williams* v. *United States,* 401 U. S. 646, 653 (1971), the doctrine has quite often been applied retroactively. It is indisputable, however, that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principle would be accorded only prospective application.[5] *Linkletter* v. *Walker,* 381 U. S. 618 (1965); *Johnson* v. *New Jersey,* 384 U. S. 719 (1966); *Stovall* v. *Denno, supra; Fuller* v. *Alaska,* 393 U. S. 80 (1968); *Desist* v. *United States,* 394 U. S. 244 (1969); *Jenkins* v. *Delaware,* 395 U. S. 213

[5] By the time *Linkletter* v. *Walker,* 381 U. S. 618 (1965), was decided, *Mapp* v. *Ohio,* 367 U. S. 643 (1961), had already been applied to three cases pending on direct review at the time *Mapp* was decided. *Ker* v. *California,* 374 U. S. 23 (1963); *Fahy* v. *Connecticut,* 375 U. S. 85 (1963); *Stoner* v. *California,* 376 U. S. 483 (1964). Those cases were decided without discussion of retroactivity principles, and they have not been interpreted as establishing any retroactivity limitation of general applicability. See *Linkletter, supra,* at 622; *Johnson* v. *New Jersey,* 384 U. S. 719, 732 (1966); *Desist* v. *United States,* 394 U. S. 244, 252–253 (1969).

(1969); *Williams* v. *United States, supra; Hill* v. *California,* 401 U. S. 797 (1971).

We think that these cases tell us a great deal about the nature of the exclusionary rule, as well as something about the nature of retroactivity analysis. Decisions of this Court applying the exclusionary rule to unconstitutionally seized evidence have referred to "the imperative of judicial integrity," *Elkins* v. *United States,* 364 U. S. 206, 222 (1960), although the Court has relied principally upon the deterrent purpose served by the exclusionary rule. See *Mapp* v. *Ohio,* 367 U. S. 643 (1961); *Lee* v. *Florida,* 392 U. S. 378 (1968); see also *United States* v. *Calandra,* 414 U. S. 338 (1974); *Michigan* v. *Tucker,* 417 U. S. 433 (1974). And see also Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 668–672 (1970).

When it came time to consider whether those decisions would be applied retroactively, however, the Court recognized that the introduction of evidence which had been seized by law enforcement officials in good-faith compliance with then-prevailing constitutional norms did not make the courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Elkins* v. *United States, supra,* at 223. Thus, while the "imperative of judicial integrity" played a role in this Court's decision to overrule *Wolf* v. *Colorado,* 338 U. S. 25 (1949), see *Mapp* v. *Ohio, supra,* at 659, the *Mapp* decision was not applied retroactively: "Rather than being abhorrent at the time of seizure in this case, the use in state trials of illegally seized evidence had been specifically authorized by this Court in *Wolf.*" *Linkletter* v. *Walker, supra,* at 638 (footnote omitted). Similarly, in *Lee* v. *Florida, supra,* this Court overruled *Schwartz* v. *Texas,* 344 U. S. 199 (1952), and held that evidence seized in violation of § 605 of the Federal Communica-

tions Act of 1934, 48 Stat. 1103, 47 U. S. C. § 605, by state officers could not be introduced into evidence at state criminal trials:

> "[T]he decision we reach today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the 'imperative of judicial integrity.' *Elkins* v. *United States,* 364 U. S. 206, 222. Under our Constitution no court, state or federal, may serve as an accomplice in the willful transgression of 'the Laws of the United States,' laws by which 'the Judges in every State [are] bound . . . .'" 392 U. S., at 385–386 (footnotes omitted).

But when it came time to consider the retroactivity of *Lee,* the Court held that it would not be applied retroactively, saying:

> "Retroactive application of *Lee* would overturn every state conviction obtained in good-faith reliance on *Schwartz.* Since this result is not required by the principle upon which *Lee* was decided, or necessary to accomplish its purpose, we hold that the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee.*" *Fuller* v. *Alaska, supra,* at 81.

The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner. It would seem to follow *a fortiori* from the *Linkletter* and *Fuller* holdings that the "im-

perative of judicial integrity" is also not offended if law enforcement officials reasonably believed in good faith that their *conduct* was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution. For, although the police in *Linkletter* and *Fuller* could not have been expected to foresee the application of the exclusionary rule to state criminal trials, they could reasonably have entertained no similar doubts as to the illegality of their conduct. See *Wolf* v. *Colorado,* 338 U. S., at 27; § 605 of the Federal Communications Act of 1934; cf. *Nardone* v. *United States,* 302 U. S. 379 (1937).

This approach to the "imperative of judicial integrity" does not differ markedly from the analysis the Court has utilized in determining whether the deterrence rationale undergirding the exclusionary rule would be furthered by retroactive application of new constitutional doctrines. See *Linkletter* v. *Walker, supra,* at 636–637; *Fuller* v. *Alaska, supra,* at 81; *Desist* v. *United States, supra,* at 249–251. In *Desist,* the Court explicitly recognized the interrelation between retroactivity rulings and the exclusionary rule: "[W]e simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served." 394 U. S., at 254 n. 24.

This focus in the retroactivity cases on the purposes served by the exclusionary rule is also quite in harmony with the approach taken generally to the exclusionary rule. In *United States* v. *Calandra,* 414 U. S., at 348, we said that the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." It follows that "the application of the rule has been re-

stricted to those areas where its remedial objectives are thought most efficaciously served." *Ibid.* We likewise observed in *Michigan* v. *Tucker,* 417 U. S., at 447:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

The "reliability and relevancy," *Linkletter, supra,* at 639, of the evidence found in the trunk of respondent's car is unquestioned. It was sufficiently damning on the issue of respondent's guilt or innocence that he stipulated in writing that in effect he had committed the offense charged. Whether or not the exclusionary rule should be applied to the roving Border Patrol search conducted in this case, then, depends on whether considerations of either judicial integrity or deterrence of Fourth Amendment violations are sufficiently weighty to require that the evidence obtained by the Border Patrol in this case be excluded.

II

The Border Patrol agents who stopped and searched respondent's automobile were acting pursuant to § 287 (a)(3) of the Immigration and Nationality Act of 1952, 66 Stat. 233, 8 U. S. C. § 1357 (a)(3).[6] That provision,

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[6] Title 8 U. S. C. § 1357 (a)(3):

"Any officer or employee of the Service authorized under regula-

which carried forward statutory authorization dating back to 1946, 60 Stat. 865, 8 U. S. C. § 110 (1946 ed.),[7] authorizes appropriately designated Immigration and Naturalization officers to search vehicles "within a reasonable distance from any external boundary of the United States" without a warrant. Pursuant to this statutory authorization, regulations were promulgated fixing the "reasonable distance," as specified in § 287 (a)(3), at "100 air miles from any external boundary of the United States," 22 Fed. Reg. 9808 (1957), as amended, 29 Fed. Reg. 13244 (1964), 8 CFR § 287.1 (a)(2) (1973).

Between 1952 and *Almeida-Sanchez*, roving Border Patrol searches under § 287 (a)(3) were upheld repeatedly against constitutional attack.[8] Dicta in many

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tions prescribed by the Attorney General shall have power without warrant—

. . . . .

"within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States."

[7] "Any employee of the Immigration and Naturalization Service authorized so to do under regulations prescribed by the Commissioner of Immigration and Naturalization with the approval of the Attorney General, shall have power without warrant . . . to board and search for aliens any vessel within the territorial waters of the United States, railway car, aircraft, conveyance, or vehicle, within a reasonable distance from any external boundary of the United States."

[8] *United States* v. *Thompson*, 475 F. 2d 1359 (CA5 1973); *Kelly* v. *United States*, 197 F. 2d 162 (CA5 1952); *Roa-Rodriquez* v. *United States*, 410 F. 2d 1206 (CA10 1969); *United States* v. *Miranda*, 426 F. 2d 283 (CA9 1970); *United States* v. *Almeida-Sanchez*, 452 F. 2d 459 (CA9 1971), rev'd, 413 U. S. 266 (1973). In support of these holdings, the Courts of Appeals have relied upon cases sustaining searches and seizures at fixed checkpoints main-

other Fifth,[9] Ninth,[10] and Tenth Circuit[11] decisions strongly suggested that the statute and the Border Patrol policy were acceptable means for policing the immigration laws. As MR. JUSTICE POWELL observed in his concurring opinion in *Almeida-Sanchez:*

> "Roving automobile searches in border regions for aliens . . . have been consistently approved by the judiciary. While the question is one of first impression in this Court, such searches uniformly have been sustained by the courts of appeals whose jurisdictions include those areas of the border between Mexico and the United States where the problem has been most severe." 413 U. S., at 278.

It was in reliance upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval, that Border Patrol agents stopped and searched respondent's automobile. Since the parties acknowledge that *Almeida-Sanchez* was the first roving Border Patrol case to be decided by this

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tained within 100 air miles of the border. See nn. 9, 10, and 11, *infra.* Whether fixed-checkpoint searches and seizures are constitutional notwithstanding our decision in *Almeida-Sanchez* is before us in *United States* v. *Ortiz,* No. 73-2050, cert. granted, 419 U. S. 824 (1974); *United States* v. *Bowen,* 500 F. 2d 960 (CA9), cert. granted, 419 U. S. 824 (1974).

[9] *Haerr* v. *United States,* 240 F. 2d 533 (1957); *Ramirez* v. *United States,* 263 F. 2d 385 (1959); *United States* v. *De Leon,* 462 F. 2d 170 (1972), cert. denied, 414 U. S. 853 (1973).

[10] *Fernandez* v. *United States,* 321 F. 2d 283 (1963); *Barba-Reyes* v. *United States,* 387 F. 2d 91 (1967); *United States* v. *Avey,* 428 F. 2d 1159, cert. denied, 400 U. S. 903 (1970); *Fumagalli* v. *United States,* 429 F. 2d 1011 (1970); *Mienke* v. *United States,* 452 F. 2d 1076 (1971); *United States* v. *Foerster,* 455 F. 2d 981 (1972), vacated and remanded, 413 U. S. 915 (1973).

[11] *United States* v. *McCormick,* 468 F. 2d 68 (1972), cert. denied, 410 U. S. 927 (1973); *United States* v. *Anderson,* 468 F. 2d 1280 (1972).

Court, unless we are to hold that parties may not reasonably rely upon any legal pronouncement emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm.[12] Cf. *Chevron Oil Co.* v. *Huson,* 404 U. S. 97 (1971); *Lemon* v. *Kurtzman,* 411 U. S. 192 (1973). If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. Admittedly this uniform treatment of roving border patrol searches by the federal judiciary was overturned by this Court's decision in *Almeida-Sanchez.* But in light of this history and of what we perceive to be the purpose of the exclusionary rule, we conclude that nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that respondent's Fourth Amendment rights were violated by the search of his car.[13]

The judgment of the Court of Appeals is therefore

Reversed.

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[12] MR. JUSTICE BRENNAN's dissent also suggests that we were wrong to reverse the judgment affirming Almeida-Sanchez' conviction if we uphold the judgment of conviction against Peltier. But where it has been determined, as in a case such as *Linkletter,* that an earlier holding such as *Mapp* is not to be applied retroactively, it has not been questioned that Mapp was entitled to the benefit of the rule enunciated in her case. See *Stovall* v. *Denno,* 388 U. S., at 300–301. Nor did the Government in *Almeida-Sanchez* urge upon us any considerations of exclusionary rule policy independent of the merits of the Fourth Amendment question which we decided adversely to the Government.

[13] In its haste to extrapolate today's decision, that dissent argues

MR. JUSTICE STEWART dissents from the opinion and judgment of the Court for the reasons set out in Part I of the dissenting opinion of MR. JUSTICE BRENNAN, *post*, at 544–549.

MR. JUSTICE DOUGLAS, dissenting.

I agree with my Brother BRENNAN that *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973), reaffirmed traditional Fourth Amendment principles and that the purposes of the exclusionary rule compel exclusion of the unconstitutionally seized evidence in this case. I adhere to my view that a constitutional rule made retroactive in one case must be applied retroactively in all. See my dissent in *Daniel* v. *Louisiana,* 420 U. S. 31, 33 (1975), and cases cited. It is largely a matter of chance that we held the Border Patrol to the command of the Fourth Amendment in *Almeida-Sanchez* rather than in the case of this defendant. Equal justice does not permit a defendant's fate to depend upon such a fortuity. The judgment below should be affirmed.

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that this decision will *both* "stop dead in its tracks judicial development of Fourth Amendment rights" since "the first duty of a court will be to deny the accused's motion to suppress if he cannot cite a case invalidating a search or seizure on identical facts" and add "a new layer of factfinding in deciding motions to suppress in the already heavily burdened federal courts." *Post,* at 554, 560. Whether today's decision will reduce the responsibilities of district courts, as the dissent first suggests, or whether that burden will be increased, as the dissent also suggests, it surely will not fulfill *both* of these contradictory prophecies. A fact not open to doubt is that the district courts are presently required, in hearing motions to suppress evidence, to spend substantial time addressing issues that do not go to a criminal defendant's guilt or innocence. In this case, for example, the transcript of the suppression hearing takes almost three times as many pages in the Appendix as is taken by the transcript of respondent's trial. App. 5–36.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I

Until today the question of the prospective application of a decision of this Court was not deemed to be presented unless the decision "constitute[d] a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks." *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 499 (1968).[1] Measured by that test, our decision in *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973), presents no question of prospectivity, and the Court errs in even addressing the question. For both the Court's opinion and the concurring opinion of MR. JUSTICE POWELL in *Almeida-Sanchez* plainly applied familiar principles of constitutional adjudication announced 50 years ago in *Carroll* v. *United States,* 267 U. S. 132, 153–154 (1925), and merely construed 66 Stat. 233, 8 U. S. C. § 1357 (a)(3), so as to render it constitutionally consistent with that decision. 413 U. S., at 272; *id.,* at 275, and n. 1 (POWELL, J., concurring).

The Court states, however, that the Border Patrol agents searched Peltier "in reliance upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval . . . ." *Ante,*

[1] This requirement has been variously stated. See, *e. g., Desist* v. *United States,* 394 U. S. 244, 248 (1969) ("a clear break with the past"); *Milton* v. *Wainwright,* 407 U. S. 371, 381 n. 2 (1972) (STEWART, J., dissenting) ("a sharp break in the web of the law"); *Chevron Oil Co.* v. *Huson,* 404 U. S. 97, 106 (1971) ("the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . .").

at 541. With all respect, any such reliance would be misplaced. First, the Court repeats the error of my Brother WHITE in his dissent in *Almeida-Sanchez* in finding express congressional and administrative approval for random roving patrol searches. 413 U. S., at 291, 292–293, 296. The statute, 8 U. S. C. § 1357 (a), only authorizes searches of vehicles "without warrant . . . within a reasonable distance from any external boundary"; nothing in the statute expressly dispenses with the necessity for showing probable cause. The regulation, 8 CFR § 287.1 (a)(2) (1973), merely defined "a reasonable distance" as "within 100 air miles"; it, too, does not purport to exempt the Border Patrol from observing the probable-cause requirement.[2]

Second, the Court states that "[b]etween 1952 and *Almeida-Sanchez,* roving Border Patrol searches under § 287 (a)(3) were upheld repeatedly against constitutional attack." *Ante,* at 540. But the first decision of the Court of Appeals for the Ninth Circuit squarely in point, *United States* v. *Miranda,* 426 F. 2d 283, was decided in 1970, and the second, *United States* v. *Almeida-*

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[2] Nor is there anything in the legislative history of § 1357 (a) which suggests that Congress intended to authorize the Border Patrol to stop *any* car in motion within 100 miles of a border. See H. R. Rep. No. 186, 79th Cong., 1st Sess., 2 (1945); S. Rep. No. 632, 79th Cong., 1st Sess., 2 (1945). See also *United States* v. *Almeida-Sanchez,* 452 F. 2d 459, 465 (CA9 1971) (Browning, J., dissenting): "The more reasonable interpretation of a statute of this sort is not that it defines a constitutional standard of reasonableness for searches by the government agents to whom it applies, but rather that it delegates authority to be exercised by those agents in accordance with constitutional limitations. . . . The statute authorizes the officers to conduct such searches—and a search within the statute's terms is not illegal as beyond the officer's statutory authority. But a search within the literal language of the [statute] is nonetheless barred if it violates the Fourth Amendment. *See, e. g.,* Boyd v. United States, 116 U. S. 616 . . . (1886)."

Sanchez, 452 F. 2d 459, was decided over strong dissent in 1971 and was pending on certiorari in this Court when Peltier was searched. 406 U. S. 944 (1972). The first decision of the Court of Appeals for the Tenth Circuit approving alien searches by roving patrols without either probable cause or any suspicious conduct was in 1969. *Roa-Rodriquez* v. *United States,* 410 F. 2d 1206. And the Court of Appeals for the Fifth Circuit, unlike the Ninth and Tenth Circuits, always required at least a "reasonable suspicion" that a car might contain aliens as the basis of a valid search under 8 U. S. C. § 1357 (a)(3). *United States* v. *Wright,* 476 F. 2d 1027, 1030, and n. 2 (1973), and cases cited.

In addition, the rule of *Miranda, supra,* was a patent anomaly in the Courts of Appeals which sanctioned roving patrol searches without a showing even of suspicious circumstances. The Court of Appeals for the Ninth Circuit, for example, held consistently that probable cause must be shown to validate a search for contraband except in a border search or its functional equivalent, see, *e. g., Cervantes* v. *United States,* 263 F. 2d 800, 803 (1959); *Fumagalli* v. *United States,* 429 F. 2d 1011 (1970),[3] and this despite a statutory authorization to search for contraband at least as broad as § 1357 (a)

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[3] In *Cervantes,* the court said: "The government . . . appears to accept appellant's proposition that the reasonableness of a search made of an automobile on the highway and its driver depends upon a showing of probable cause. . . . That this is the proper test of the reasonableness of such a search, see Carroll v. United States, supra, 267 U. S., at pages 155-156 . . . ." 263 F. 2d, at 803, and n. 4. Despite this general language, *Cervantes* was later summarily distinguished as applying only to searches for contraband, and not to searches for aliens. *Fumagalli* v. *United States,* 429 F. 2d, at 1013. No attempt was ever made to explain how a search for aliens could be distinguished under *Carroll* from a search for contraband. See *United States* v. *Almeida-Sanchez,* 452 F. 2d, at 464 (Browning, J., dissenting).

(3). See 14 Stat. 178, 19 U. S. C. § 482.[4] Moreover, the Courts of Appeals require some measure of cause to suspect violation of law in interrogations and arrests authorized by other subsections of 8 U. S. C. § 1357 (a). See *Au Yi Lau* v. *INS,* 144 U. S. App. D. C. 147, 445 F. 2d 217 (1971); *Yam Sang Kwai* v. *INS,* 133 U. S. App. D. C. 369, 411 F. 2d 683 (1969).

Given this history, it becomes quite clear why the Court has found it necessary to discard the "sharp break" test to reach the prospectivity question in this case. For the approval by Courts of Appeals of this law enforcement practice was short-lived, less than unanimous, irreconcilable with other rulings of the same courts, and contrary to the explicit doctrine of this Court in *Carroll, supra,* as reaffirmed in *Brinegar* v. *United States,* 338 U. S. 160, 164 (1949), and other cases. If a case in this Court merely reaffirming longstanding precedent can ever constitute the "avulsive change [in] the current of the law" required before we even address the issue of prospectivity, *Hanover Shoe,* 392 U. S., at 499, surely *Almeida-Sanchez* was not such a case.[5]

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[4] Title 19 U. S. C. § 482 provides in pertinent part: "Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, . . . or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law . . . ."

"In order to avoid conflict between this statute and the Fourth Amendment, the statutory language has been restricted by the courts to 'border searches.'" *United States* v. *Weil,* 432 F. 2d 1320, 1323 (CA9 1970).

[5] Most cases where the Court has ordained prospective application of a new rule of criminal procedure have involved decisions which explicitly overruled a previous decision of this Court. See *Linkletter* v. *Walker,* 381 U. S. 618 (1965), involving the retroactivity of *Mapp* v. *Ohio,* 367 U. S. 643 (1961), which had overruled *Wolf* v.

This case is a good illustration of the dangers of addressing prospectivity where the "sharp break" standard is not met. As this Court has recognized, applying a decision only prospectively,[6] can entail inequity to others whose cases are here on direct review but are held pending decision of the case selected for decision. *Stovall* v. *Denno,* 388 U. S. 293, 301 (1967). Although I continue to believe that denial of the benefits of the decision in such cases is a tolerable anomaly in cases in which defendants

Colorado, 338 U. S. 25 (1949); *Williams* v. *United States,* 401 U. S. 646 (1971), involving the retroactivity of *Chimel* v. *California,* 395 U. S. 752 (1969), which overruled *United States* v. *Rabinowitz,* 339 U. S. 56 (1950), and *Harris* v. *United States,* 331 U. S. 145 (1947); *Fuller* v. *Alaska,* 393 U. S. 80 (1968) (*per curiam*), involving the retroactivity of *Lee* v. *Florida,* 392 U. S. 378 (1968), which overruled *Schwartz* v. *Texas,* 344 U. S. 199 (1952); *Desist* v. *United States,* 394 U. S. 244 (1969), involving the retroactivity of *Katz* v. *United States,* 389 U. S. 347 (1967), which specifically rejected *Goldman* v. *United States,* 316 U. S. 129 (1942), and *Olmstead* v. *United States,* 277 U. S. 438 (1928); *Tehan* v. *United States ex rel. Shott,* 382 U. S. 406 (1966), involving the retroactivity of *Griffin* v. *California,* 380 U. S. 609 (1965), which overruled *Twining* v. *New Jersey,* 211 U. S. 78 (1908); *Daniel* v. *Louisiana,* 420 U. S. 31 (1975), involving the retroactivity of *Taylor* v. *Louisiana,* 419 U. S. 522 (1975), which specifically disapproved *Hoyt* v. *Florida,* 368 U. S. 57 (1961).

In other instances, the practice recently disapproved had, at least arguably, been sanctioned previously by this Court. See *Johnson* v. *New Jersey,* 384 U. S. 719, 731 (1966); *Gosa* v. *Mayden,* 413 U. S. 665, 673 (1973) (opinion of BLACKMUN, J.); *Adams* v. *Illinois,* 405 U. S. 278 (1972).

Finally, in another group of cases, the rule applied prospectively was merely a prophylactic one, designed by this Court to protect underlying rights already announced and applicable retroactively. See *Halliday* v. *United States,* 394 U. S. 831 (1969) (*per curiam*); *Stovall* v. *Denno,* 388 U. S. 293 (1967); *Michigan* v. *Payne,* 412 U. S. 47 (1973).

[6] Of course, we have always given the benefit of a criminal procedure decision to the defendant in whose case the principle was announced. See *Stovall* v. *Denno, supra,* at 301.

were accorded all constitutional rights then announced by this Court, it becomes intolerable, and a travesty of justice, when the Court does no more than reaffirm and apply long-established constitutional principles to correct an aberration created by the courts of appeals.

More fundamentally, applying a decision of this Court prospectively when the decision is not a "sharp break in the web of the law," *Milton* v. *Wainwright,* 407 U. S. 371, 381 n. 2 (1972) (STEWART, J., dissenting), encourages in those responsible for law enforcement a parsimonious approach to enforcement of constitutional rights. "One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year . . . ." *Desist* v. *United States,* 394 U. S. 244, 263 (1969) (Harlan, J., dissenting). To apply our opinions prospectively except in "sharp break" cases "add[s] this Court's approval to those who honor the Constitution's mandate only where acceptable to them or compelled by the precise and inescapable specifics of a decision of this Court. . . . History does not embrace the years needed for us to hold, millimeter by millimeter, that such and such a penetration of individual rights is an infringement of the Constitution's guarantees. The vitality of our Constitution depends upon conceptual faithfulness and not merely decisional obedience. Certainly, this Court should not encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach." *Id.,* at 277 (Fortas, J., dissenting).[7]

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[7] I continue to believe that Mr. Justice Harlan and Mr. Justice Fortas were in error in *Desist* itself, because *Katz* v. *United States, supra,* did overrule clear past precedent of this Court. But I think that the prophecy of horrors by the dissenters in *Desist* has, with the Court's opinion today, come true.

II

Nevertheless, the Court substitutes, at least as respects the availability of the exclusionary rule in cases involving searches invalid under the Fourth Amendment, a presumption against the availability of decisions of this Court except prospectively. The substitution discards not only the "sharp break" determinant but also the equally established principle that prospectivity "is not automatically determined by the provision of the Constitution on which the dictate is based. . . . [W]e must determine retroactivity 'in each case' by looking to the peculiar traits of the specific 'rule in question.'" *Johnson* v. *New Jersey,* 384 U. S. 719, 728 (1966).[8] *Linkletter* v. *Walker,* 381 U. S. 618 (1965), the seminal prospectivity decision, held only that "the Court *may* in the interest of justice make [a] rule prospective . . . where *the exigencies of the situation* require such an application." *Id.,* at 628 (emphasis added). Today the Court stands the *Linkletter* holding on its head by creating a class of cases in which nonretroactivity is the rule and not, as heretofore, the exception.

The Court's stated reason for this remarkable departure from settled principles is "the policies underlying the [exclusionary] rule." *Ante,* at 534–535. But the policies identified by the Court as underlying that rule in Fourth Amendment cases are distorted out of all resemblance to the understanding of purposes that has heretofore prevailed. I said in my dissent in *United States* v. *Calandra,* 414 U. S. 338 (1974), that that decision left

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[8] See also *Michigan* v. *Tucker,* 417 U. S. 433, 453 n. 26 (1974): "Under the framework of the analysis established in *Linkletter, supra,* and in subsequent cases, it would seem indispensable to understand the basis for a constitutional holding of the Court in order to later determine whether that holding should be retroactive."

me "with the uneasy feeling that . . . a majority of my colleagues have positioned themselves to . . . abandon altogether the exclusionary rule in search-and-seizure cases." *Id.*, at 365. My uneasiness approaches conviction after today's treatment of the rule.

III

The Court's opinion depends upon an entirely new understanding of the exclusionary rule in Fourth Amendment cases, one which, if the vague contours outlined today are filled in as I fear they will be, forecasts the complete demise of the exclusionary rule as fashioned by this Court in over 61 years of Fourth Amendment jurisprudence. See *Weeks* v. *United States*, 232 U. S. 383 (1914).[9] An analysis of the Court's unsuccessfully veiled reformulation demonstrates that its apparent rush to discard 61 years of constitutional development has produced a formula difficult to comprehend and, on any understanding of its meaning, impossible to justify.

The Court signals its new approach in these words: "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Ante*, at 542. True, the Court does not state in so many words that this formulation of the exclusionary rule is to be applied beyond the present retroactivity context. But the proposition is stated generally and, particularly in view of

[9] The exclusionary rule in federal cases has roots that antedate even *Weeks*. Twenty-eight years before that decision, in *Boyd* v. *United States*, 116 U. S. 616 (1886), the Court held that the admission into evidence of papers acquired by the Government in violation of the Fourth Amendment was unconstitutional. *Id.*, at 638.

the concomitant expansion of prospectivity announced today, Part I, *supra,* I have no confidence that the new formulation is to be confined to putative retroactivity cases. Rather, I suspect that when a suitable opportunity arises, today's revision of the exclusionary rule will be pronounced applicable to all search-and-seizure cases. I therefore register my strong disagreement now.

The new formulation obviously removes the very foundation of the exclusionary rule as it has been expressed in countless decisions. Until now the rule in federal criminal cases decided on direct review[10] has been that suppression is necessarily the sanction to be applied when it is determined that the evidence was in fact illegally acquired.[11] The revision unveiled today

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[10] I emphasize that this is a *federal* criminal case, and that the exclusionary rule issue comes to us on *direct* review. Thus, neither *Mapp* v. *Ohio,* 367 U. S. 643 (1961), applying the Fourth Amendment exclusionary rule to the States, nor *Kaufman* v. *United States,* 394 U. S. 217 (1969), permitting Fourth Amendment exclusionary rule issues to be raised for the first time in collateral proceedings, is here involved. While abandonment of both *Mapp* and *Kaufman* has at times been advocated, no Justice has intimated that *Weeks* should also be overruled, at least in the absence of suitable and efficacious substitute remedies. See, on *Mapp, Coolidge* v. *New Hampshire,* 403 U. S. 443, 490 (1971) (Harlan, J., concurring); *id.,* at 492 (BURGER, C. J., dissenting in part and concurring in part); *id.,* at 493 (Black, J., concurring and dissenting); *id.,* at 510 (statement of BLACKMUN, J.); on *Kaufman,* see *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 250 (1973) (POWELL, J., joined by BURGER, C. J., and REHNQUIST, J., concurring); see also, *id.,* at 249 (BLACKMUN, J., concurring). But see, on *Weeks, Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U. S. 388, 420–421 (1971) (BURGER, C. J., dissenting); *Schneckloth, supra,* at 267–268, n. 25 (POWELL, J., concurring).

[11] *Wolf* v. *Colorado,* 338 U. S. 25, 28 (1949), summarized *Weeks* as follows: "In *Weeks* v. *United States, supra,* this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an *illegal* search and seizure." (Emphasis

suggests that instead of that single inquiry, district judges may also have to probe the subjective knowledge of the official who orders the search, and the inferences from existing law that official should have drawn.[12] The decision whether or not to order suppression would then turn upon whether, based on that expanded inquiry, suppression would comport with either the deterrence rationale of the exclusionary rule or "the imperative of judicial integrity." [13]

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added.) *Elkins* v. *United States,* 364 U. S. 206, 212–213 (1960), again confirmed the *Weeks* rule, "[e]vidence which had been seized by federal officers *in violation of the Fourth Amendment* [can]not be used in a federal criminal prosecution" (emphasis added), and expanded it to cover "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's *immunity from unreasonable searches and seizures under the Fourth Amendment,*" *id.,* at 223 (emphasis added); see also *id.,* at 222. Similarly, *Ker* v. *California,* 374 U. S. 23, 30 (1963), stated that the exclusionary rule "forbids the Federal Government to convict a man of crime by using testimony or papers obtained from him by *unreasonable* searches and seizures *as defined in the Fourth Amendment*" (emphasis supplied); see also *id.,* at 34. Thus, the test whether evidence should be suppressed in federal court has always been solely whether the Fourth Amendment prohibition against "unreasonable" searches and seizures was violated, nothing more and nothing less. See also, *e. g., Alderman* v. *United States,* 394 U. S. 165, 176 (1969); *United States* v. *Calandra,* 414 U. S. 338, 347 (1974).

[12] To be sure, the very vagueness of the intimated reformulation as articulated today leaves unclear exactly what showing demonstrates that a law enforcement officer "may properly be charged with knowledge, that the search was unconstitutional." In this case, for example, could the Border Patrol, a national organization, have been charged with knowledge of the unconstitutionality of an *Almeida-Sanchez* type search if the courts of appeals were in clear conflict on whether probable cause was required?

[13] It is gratifying that the Court at least verbally restores to exclusionary-rule analysis this consideration, which for me is the core value served by the exclusionary rule. See *Harris* v. *New*

On this reasoning, *Almeida-Sanchez* itself was wrongly decided. For if the Border Patrolmen who searched Peltier could not have known that they were acting unconstitutionally, and thus could not have been deterred from the search by the possibility of the exclusion of the evidence from the trial, obviously the Border Patrolmen who searched Almeida-Sanchez several years earlier had no reason to be any more percipient. If application of the exclusionary rule depends upon a showing that the particular officials who conducted or authorized a particular search knew or should have known that they were violating a specific, established constitutional right, the reversal of Almeida-Sanchez' conviction was plainly error.

Other defects of today's new formulation are also patent. First, this new doctrine could stop dead in its tracks judicial development of Fourth Amendment rights. For if evidence is to be admitted in criminal trials in the absence of clear precedent declaring the search in question unconstitutional, the first duty of a court will be to deny the accused's motion to suppress if he cannot cite a case invalidating a search or seizure on identical facts.[14] Yet, even its opponents concede

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York, 401 U. S. 222, 231–232 (1971) (BRENNAN, J., dissenting); *United States* v. *Calandra, supra,* at 355 (BRENNAN, J., dissenting). But the Court's treatment of this factor is wholly unsatisfactory. See *id.,* at 359–360 (BRENNAN, J., dissenting). I need discuss the question no further, however, since the Court merges the "imperative of judicial integrity" into its deterrence rationale, *ante,* at 538, and then ignores the imperative when it applies its new theory to the facts of this case, see Part II of the Court's opinion. Rather, I show in the text that, on the Court's own deterrence rationale alone, today's suggested reformulation would be a disaster.

[14] *Angelet* v. *Fay,* 381 U. S. 654 (1965), declined to decide whether *Mapp* v. *Ohio,* 367 U. S. 643 (1961), would bar federal agents from testifying in a state court concerning illegally obtained

that the great service of the exclusionary rule has been its usefulness in forcing judges to enlighten our understanding of Fourth Amendment guarantees. "It is . . . imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. Over the long term this may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies." Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 756 (1970) (hereafter Oaks). See also Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 429–430 (1974) (hereafter Amsterdam). While distinguished authority has suggested that an effective affirmative remedy could equally serve that function, see Oaks, *supra,* and *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U. S. 388, 420–423 (1971) (BURGER, C. J., dissenting), no equally effective alternative has yet been devised.

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evidence, because *Mapp* was held in *Linkletter* v. *Walker,* 381 U. S. 618 (1965), to be nonretroactive. Somewhat similarly, *Michigan* v. *Tucker,* 417 U. S. 433 (1974), refused to decide whether *Miranda* v. *Arizona,* 384 U. S. 436 (1966), applies to exclude the testimony of a witness discovered as a result of a statement given after incomplete *Miranda* warnings, because the interrogation in *Tucker* occurred before *Miranda.* See also *Michigan* v. *Payne,* 412 U. S., at 49–50, n. 3. Thus, there is clear precedent for avoiding decision of a constitutional issue raised by police behavior when in any event the evidence was admissible in the particular case at bar.

Second, contrary to the Court's assumption, the exclusionary rule does not depend in its deterrence rationale on the punishment of individual law enforcement officials.[15] Indeed, one general fallacy in the reasoning of critics of the exclusionary rule is the belief that the rule is meant to deter official wrongdoers by punishment or threat of punishment. It is also the fallacy of the Court's attempt today to outline a revision in the exclusionary rule.

Deterrence can operate in several ways. The simplest is special or specific deterrence—punishing an individual so that *he* will not repeat the same behavior. But "[t]he exclusionary rule is not aimed at special deterrence since it does not impose any direct punishment on a law enforcement official who has broken the rule. . . . The exclusionary rule is aimed at affecting the wider audience of all law enforcement officials and society at

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[15] Critics of the exclusionary rule emphasize that in actual operation law enforcement officials are rarely reprimanded, discharged, or otherwise disciplined when evidence is excluded at trial for search-and-seizure violations. While this fact, to the extent it is true, may limit the efficacy of the exclusionary rule, it does not, for the reasons stated in the text, prove it useless. Suggestions are emerging for tailoring the exclusionary rule to the adoption and enforcement of regulations and training procedures concerning searches and seizures by law enforcement agencies. Amsterdam 409 *et seq.;* Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1050 *et seq.* (1974). Today's approach, rather than advancing this goal, would diminish the incentive for law enforcement agencies to train and supervise subordinate officers. See *id.,* at 1044. At any rate, to the extent law enforcement agencies do visit upon individual employees consequences for conducting searches and seizures which are later held illegal, the agencies can be expected to take account of the degree of departure from existing norms as elucidated in court decisions. Thus, there is no need for the courts to adjust the exclusionary rule in order to assure fairness to individual officials or to promote decisiveness.

large. It is meant to discourage violations by individuals who have never experienced any sanction for them." Oaks 709–710.[16]

Thus, the exclusionary rule, focused upon general, not specific, deterrence, depends not upon threatening a sanction for lack of compliance but upon removing an *inducement* to violate Fourth Amendment rights. *Elkins* v. *United States,* 364 U. S. 206, 217 (1960), clearly explained that the exclusionary rule's "purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—*by removing the incentive to disregard it.*" (Emphasis added.) "A criminal court system functioning without an exclusionary rule . . . is the equivalent of a government purchasing agent paying premium prices for evidence branded with the stamp of unconstitutionality. . . . If [the Government] receives the products of [illegal] searches and seizures . . . and uses them as the means of convicting people whom the officer conceives it to be his job to get convicted, it is not merely tolerating but *inducing* unconstitutional

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[16] See also Amsterdam 431:

"The common focus on the concept of 'deterrence' in the debate over the exclusionary rule can be quite misleading. It suggests that the police have a God-given inclination to commit unconstitutional searches and seizures unless they are 'deterred' from that behavior. Once this assumption is indulged, it is easy enough to criticize the rule excluding unconstitutionally obtained evidence on the ground that it 'does not apply any direct sanction to the individual officer whose illegal conduct results in the exclusion,' and so cannot 'deter' him. But no one, to my knowledge, has ever urged that the exclusionary rule is supportable on this principle of 'deterrence.' It is not supposed to 'deter' in the fashion of the law of larceny, for example, by threatening punishment to him who steals a television set—a theory of deterrence, by the way, whose lack of empirical justification makes the exclusionary rule look as solid by comparison as the law of gravity."

searches and seizures." Amsterdam 431–432.[17] (Emphasis supplied.)

We therefore might consider, in this light, what may have influenced the officials who authorized roving searches without probable cause under the supposed authority of 8 U. S. C. § 1357 (a)(3) and 8 CFR § 287.1 (a)(2) (1973).[18] The statute is at best ambiguous as to

[17] See also Oaks 711:

"'The act is branded as reprehensible by authorized organs of society,' Andenaes states, 'and this official branding of the conduct may influence attitudes quite apart from the fear of sanctions.' The existence and imposition of a sanction reinforces the rule and underlines the importance of observing it. The principle is directly applicable to the exclusionary rule. The salient defect in the rule of *Wolf v. Colorado* was the difficulty of persuading anyone that the guarantees of the fourth amendment were seriously intended and important when there was no sanction whatever for their violation. As a visible expression of social disapproval for the violation of these guarantees, the exclusionary rule makes the guarantees of the fourth amendment credible. Its example teaches the importance attached to observing them."

[18] I assume that the Court's statement that "the purpose of the exclusionary rule is to deter unlawful police conduct," *ante,* at 542, does not imply that deterrence can work only at the level of the individual officers on the scene, nor suggest that under its approach only the knowledge, real or constructive, of the official conducting the search is relevant. Fourth Amendment violations become more, not less, reprehensible when they are the product of Government policy rather than an individual policeman's errors of judgment. See *Alderman* v. *United States,* 394 U. S., at 203 (Fortas, J., concurring in part and dissenting in part).

"[T]he Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction. This protection is equally extended to the action of the *Government* and officers of the law acting under it. . . ." *Weeks* v. *United States,* 232 U. S. 383, 394 (1914). (Emphasis supplied.)

Obviously, any rule intended to prevent Fourth Amendment violations must operate not only upon individual law enforcement officers

whether probable cause is required, though quite explicit that a warrant is not.[19] The officials could therefore read the statute in one of two ways. They could read it not to require probable cause, regard as irrelevant *Carroll* v. *United States,* 267 U. S. 132 (1925), requiring probable cause, though no warrant, before stopping and searching a moving automobile unless the search is at the border, and command their subordinates to stop at random any car within 100 miles of the border and search for illegal aliens. Or they could conclude that because the statute is silent about probable cause, and because *Carroll* seems to require it, they should instruct their subordinates to stop moving vehicles away from the border only if there is some good reason to believe that they contain illegal aliens. Obviously, today's decision is a wide-open invitation to pursue the former course, because if this Court later decides that the officers guessed wrong in a particular case, one conviction will perhaps be lost, but many will have been gained, see *supra,* at 549, 554. The concept of the exclusionary rule until today, however, was designed to discourage officials from *invariably* opting for the choice that compromises Fourth Amendment rights, even though that rule has not worked perfectly as it did not in this case. "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be *aided* by the sacrifice of those great principles established by years of endeavor and

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but also upon those who set policy for them and approve their actions. Otherwise, for example, evidence derived from any search under a warrant could be admissible, because the searching policeman, having had a warrant approved by the designated judicial officer, had every reason to believe the warrant valid. Certainly, the Court can intend no such result, and would have lower courts inquire into the frame of mind, actual and constructive, of *all* officials whose actions were relevant to the search.

[19] See *supra,* at 545, and n. 2.

suffering which have resulted in their embodiment in the fundamental law of the land." *Weeks,* 232 U. S., at 393 (emphasis supplied).

Aside from this most fundamental error, solid practical reasons militate forcefully in favor of rejection of today's suggested road to revision of the exclusionary rule. This Court has already rejected a case-by-case approach to the exclusionary rule. After *Wolf* v. *Colorado,* 338 U. S. 25 (1949), had held the Fourth Amendment applicable to the States without also requiring the States to follow the exclusionary rule of *Weeks, Irvine* v. *California,* 347 U. S. 128 (1954), presented the opportunity of compelling the States to apply *Weeks* in especially egregious situations such as Irvine's. The Court rejected the opportunity because "a distinction of the kind urged would leave the rule so indefinite that no state court could know what it should rule in order to keep its processes on solid constitutional ground." *Id.,* at 134 (opinion of Jackson, J.). See also *id.,* at 138 (Clark, J., concurring).

Today's formulation extended to all search-and-seizure cases would inevitably introduce the same uncertainty, by adding a new layer of factfinding in deciding motions to suppress in the already heavily burdened federal courts. The district courts would have to determine, and the appellate courts to review, subjective states of mind of numerous people, see n. 18, *supra,* and reasonable objective extrapolations of existing law, on each of the thousands of suppression motions presented each year.[20] Nice questions will have to be faced, such as whether to exclude evidence obtained in a search which officers be-

[20] In addition, adding "one more factfinding operation, and an especially difficult one to administer, to those already required of [the] lower judiciary" could add a factor of discretion to the operation of the exclusionary rule impossible for the appellate courts effectively to control. Kaplan, *supra,* n. 15, at 1045.

lieved to be unconstitutional but which in fact was not, and whether to exclude evidence obtained in a search in fact unconstitutional and believed to be unconstitutional, but which the ordinary, reasonable police officer might well have believed was constitutional. One criticism of the present formulation of the exclusionary rule is that it may deflect the inquiry in a criminal trial from the guilt of the defendant to the culpability of the police. The formulation suggested today would vastly exacerbate this possibility, heavily burden the lower courts, and worst of all, erode irretrievably the efficacy of the exclusion principle.[21] Indeed, "no [federal] court could know what it should rule in order to keep its processes on solid constitutional ground." Cf. 347 U. S., at 134. Because of the superficial and summary way that the Court treats the question the formulation will, I am certain, be unsatisfactory even to those convinced, as I am not, that the exclusionary rule must be drastically overhauled.[22]

If a majority of my colleagues are determined to discard the exclusionary rule in Fourth Amendment cases, they should forthrightly do so, and be done with it. This business of slow strangulation of the rule, with no

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[21] Indeed, Congress in recent years has declined to take steps somewhat similar to those now proposed. See Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 Ky. L. J. 681, 694–696 (1974).

[22] For example, the modification of the exclusionary rule most discussed recently has been that in the ALI Model Code of Pre-Arraignment Procedure § 290.2 (2) (Prop. Off. Draft No. 1, 1972). See *Bivens,* 403 U. S., at 424 (Appendix to opinion of BURGER, C. J., dissenting); Canon, *supra,* n. 21, at 694–696. While the ALI proposal raises many of the same questions I have outlined above, it differs substantially from the Court's proposed approach, since it takes into account many factors *besides* "(c) the extent to which the violation was willful."

opportunity afforded parties most concerned to be heard, would be indefensible in any circumstances. But to attempt covertly the erosion of an important principle over 61 years in the making as applied in federal courts clearly demeans the adjudicatory function, and the institutional integrity of this Court.

O'CONNOR *v.* DONALDSON

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

No. 74-8. Argued January 15, 1975—Decided June 26, 1975

Respondent, who was confined almost 15 years "for care, maintenance, and treatment" as a mental patient in a Florida state hospital, brought this action for damages under 42 U. S. C. § 1983 against petitioner. the hospital's superintendent, and other staff members, alleging that they had intentionally and maliciously deprived him of his constitutional right to liberty. The evidence showed that respondent, whose frequent requests for release had been rejected by petitioner notwithstanding undertakings by responsible persons to care for him if necessary, was dangerous neither to himself nor others, and, if mentally ill, had not received treatment. Petitioner's principal defense was that he had acted in good faith, since state law, which he believed valid, had authorized indefinite custodial confinement of the "sick," even if they were not treated and their release would not be harmful, and that petitioner was therefore immune from any liability for monetary damages. The jury found for respondent and awarded compensatory and punitive damages against petitioner and a codefendant. The Court of Appeals, on broad Fourteenth Amendment grounds, affirmed the District Court's ensuing judgment entered on the verdict. *Held:*

1. A State cannot constitutionally confine, without more, a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends, and since the jury found, upon ample evidence, that petitioner did so confine respondent, it properly concluded that petitioner had violated respondent's right to liberty. Pp. 573-576.

2. Since the Court of Appeals did not consider whether the trial judge erred in refusing to give an instruction requested by petitioner concerning his claimed reliance on state law as authorization for respondent's continued confinement, and since neither court below had the benefit of this Court's decision in *Wood* v. *Strickland*, 420 U. S. 308, on the scope of a state official's qualified immunity under 42 U. S. C. § 1983, the case is vacated and

remanded for consideration of petitioner's liability *vel non* for monetary damages for violating respondent's constitutional right. Pp. 576–577.

493 F. 2d 507, vacated and remanded.

STEWART, J., delivered the opinion for a unanimous Court. BURGER, C. J., filed a concurring opinion, *post,* p. 578.

Raymond W. Gearey, Assistant Attorney General of Florida, argued the cause for petitioner *pro hac vice.* With him on the briefs were *Robert L. Shevin,* Attorney General, and *Daniel S. Dearing,* Special Assistant Attorney General.

Bruce J. Ennis, Jr., argued the cause for respondent. With him on the brief was *Morton Birnbaum.**

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, Kenneth Donaldson, was civilly committed to confinement as a mental patient in the Florida State Hospital at Chattahoochee in January 1957. He was kept in custody there against his will for nearly 15 years. The petitioner, Dr. J. B. O'Connor, was the hospital's superintendent during most of this period.

**William F. Hyland,* Attorney General, *Stephen Skillman,* Assistant Attorney General, and *Joseph T. Maloney,* Deputy Attorney General, filed a brief for the State of New Jersey as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *E. Barrett Prettyman, Jr.,* for the American Psychiatric Assn.; by *Francis M. Shea, Ralph J. Moore, Jr., John Townsend Rich, James F. Fitzpatrick, Kurt W. Melchior, Harry J. Rubin, Sheridan L. Neimark,* and *A. L. Zwerdling* for the American Association on Mental Deficiency; and by *June Resnick German* and *Alfred Berman* for the Committee on Mental Hygiene of the New York State Bar Assn.

William J. Brown, Attorney General, and *Andrew J. Ruzicho* and *Barbara J. Rouse,* Assistant Attorneys General, filed a brief for the State of Ohio as *amicus curiae.*

Throughout his confinement Donaldson repeatedly, but unsuccessfully, demanded his release, claiming that he was dangerous to no one, that he was not mentally ill, and that, at any rate, the hospital was not providing treatment for his supposed illness. Finally, in February 1971, Donaldson brought this lawsuit under 42 U. S. C. § 1983, in the United States District Court for the Northern District of Florida, alleging that O'Connor, and other members of the hospital staff named as defendants, had intentionally and maliciously deprived him of his constitutional right to liberty.[1] After a four-day trial, the jury returned a verdict assessing both compensatory and punitive damages against O'Connor and a codefendant. The Court of Appeals for the Fifth Circuit affirmed the judgment, 493 F. 2d 507. We granted O'Connor's petition for certiorari, 419 U. S. 894, because of the important constitutional questions seemingly presented.

I

Donaldson's commitment was initiated by his father, who thought that his son was suffering from "delusions." After hearings before a county judge of Pinellas County, Fla., Donaldson was found to be suffering from "paranoid schizophrenia" and was committed for "care, main-

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[1] Donaldson's original complaint was filed as a class action on behalf of himself and all of his fellow patients in an entire department of the Florida State Hospital at Chattahoochee. In addition to a damages claim, Donaldson's complaint also asked for habeas corpus relief ordering his release, as well as the release of all members of the class. Donaldson further sought declaratory and injunctive relief requiring the hospital to provide adequate psychiatric treatment.

After Donaldson's release and after the District Court dismissed the action as a class suit, Donaldson filed an amended complaint, repeating his claim for compensatory and punitive damages. Although the amended complaint retained the prayer for declaratory and injunctive relief, that request was eliminated from the case prior to trial. See 493 F. 2d 507, 512-513.

tenance, and treatment" pursuant to Florida statutory provisions that have since been repealed.[2] The state law was less than clear in specifying the grounds necessary

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[2] The judicial commitment proceedings were pursuant to § 394.22 (11) of the State Public Health Code, which provided:

"Whenever any person who has been adjudged mentally incompetent requires confinement or restraint to prevent self-injury or violence to others, the said judge shall direct that such person be forthwith delivered to a superintendent of a Florida state hospital, for the mentally ill, after admission has been authorized under regulations approved by the board of commissioners of state institutions, for care, maintenance, and treatment, as provided in sections 394.09, 394.24, 394.25, 394.26 and 394.27, or make such other disposition of him as he may be permitted by law . . . ." Fla. Laws 1955–1956 Extra. Sess., c. 31403, § 1, p. 62.

Donaldson had been adjudged "incompetent" several days earlier under § 394.22 (1), which provided for such a finding as to any person who was

"incompetent by reason of mental illness, sickness, drunkenness, excessive use of drugs, insanity, or other mental or physical condition, so that he is incapable of caring for himself or managing his property, or is likely to dissipate or lose his property or become the victim of designing persons, or inflict harm on himself or others . . . ." Fla. Gen. Laws 1955, c. 29909, § 3, p. 831.

It would appear that § 394.22 (11)(a) contemplated that involuntary commitment would be imposed only on those "incompetent" persons who "require[d] confinement or restraint to prevent self-injury or violence to others." But this is not certain, for § 394.22 (11)(c) provided that the judge could adjudicate the person a "harmless incompetent" and release him to a guardian upon a finding that he did "not require confinement or restraint to prevent self-injury or violence to others *and* that treatment in the Florida State Hospital is unnecessary or would be without benefit to such person . . . ." Fla. Gen. Laws 1955, c. 29909, § 3, p. 835 (emphasis added). In this regard, it is noteworthy that Donaldson's "Order for Delivery of Mentally Incompetent" to the Florida State Hospital provided that he required "confinement or restraint to prevent self-injury or violence to others, *or* to insure proper treatment." (Emphasis added.) At any rate, the Florida commitment statute provided no judicial procedure whereby one still incompetent could

for commitment, and the record is scanty as to Donaldson's condition at the time of the judicial hearing. These matters are, however, irrelevant, for this case involves no challenge to the initial commitment, but is focused, instead, upon the nearly 15 years of confinement that followed.

The evidence at the trial showed that the hospital staff had the power to release a patient, not dangerous to himself or others, even if he remained mentally ill and had been lawfully committed.[3] Despite many requests, O'Connor refused to allow that power to be

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secure his release on the ground that he was no longer dangerous to himself or others.

Whether the Florida statute provided a "right to treatment" for involuntarily committed patients is also open to dispute. Under § 394.22 (11)(a), commitment "to prevent self-injury or violence to others" was "for care, maintenance, and treatment." Recently Florida has totally revamped its civil commitment law and now provides a statutory right to receive individual medical treatment. Fla. Stat. Ann. § 394.459 (1973).

[3] The sole *statutory* procedure for release required a judicial reinstatement of a patient's "mental competency." Public Health Code §§ 394.22 (15) and (16), Fla. Gen. Laws 1955, c. 29909, § 3, pp. 838–841. But this procedure could be initiated by the hospital staff. Indeed, it was at the staff's initiative that Donaldson was finally restored to competency, and liberty, almost immediately after O'Connor retired from the superintendency.

In addition, witnesses testified that the hospital had always had its own procedure for releasing patients—for "trial visits," "home visits," "furloughs," or "out of state discharges"—even though the patients had not been judicially restored to competency. Those conditional releases often became permanent, and the hospital merely closed its books on the patient. O'Connor did not deny at trial that he had the power to release patients; he conceded that it was his "duty" as superintendent of the hospital "to determine whether that patient having once reached the hospital was in such condition as to request that he be considered for release from the hospital."

exercised in Donaldson's case. At the trial, O'Connor indicated that he had believed that Donaldson would have been unable to make a "successful adjustment outside the institution," but could not recall the basis for that conclusion. O'Connor retired as superintendent shortly before this suit was filed. A few months thereafter, and before the trial, Donaldson secured his release and a judicial restoration of competency, with the support of the hospital staff.

The testimony at the trial demonstrated, without contradiction, that Donaldson had posed no danger to others during his long confinement, or indeed at any point in his life. O'Connor himself conceded that he had no personal or secondhand knowledge that Donaldson had ever committed a dangerous act. There was no evidence that Donaldson had ever been suicidal or been thought likely to inflict injury upon himself. One of O'Connor's codefendants acknowledged that Donaldson could have earned his own living outside the hospital. He had done so for some 14 years before his commitment, and immediately upon his release he secured a responsible job in hotel administration.

Furthermore, Donaldson's frequent requests for release had been supported by responsible persons willing to provide him any care he might need on release. In 1963, for example, a representative of Helping Hands, Inc., a halfway house for mental patients, wrote O'Connor asking him to release Donaldson to its care. The request was accompanied by a supporting letter from the Minneapolis Clinic of Psychiatry and Neurology, which a codefendant conceded was a "good clinic." O'Connor rejected the offer, replying that Donaldson could be released only to his parents. That rule was apparently of O'Connor's own making. At the time, Donaldson was 55 years old, and, as O'Connor knew, Donaldson's parents

were too elderly and infirm to take responsibility for him. Moreover, in his continuing correspondence with Donaldson's parents, O'Connor never informed them of the Helping Hands offer. In addition, on four separate occasions between 1964 and 1968, John Lembcke, a college classmate of Donaldson's and a longtime family friend, asked O'Connor to release Donaldson to his care. On each occasion O'Connor refused. The record shows that Lembcke was a serious and responsible person, who was willing and able to assume responsibility for Donaldson's welfare.

The evidence showed that Donaldson's confinement was a simple regime of enforced custodial care, not a program designed to alleviate or cure his supposed illness. Numerous witnesses, including one of O'Connor's codefendants, testified that Donaldson had received nothing but custodial care while at the hospital. O'Connor described Donaldson's treatment as "milieu therapy." But witnesses from the hospital staff conceded that, in the context of this case, "milieu therapy" was a euphemism for confinement in the "milieu" of a mental hospital.[4] For substantial periods, Donaldson was simply kept in a large room that housed 60 patients, many of whom were under criminal commitment. Donaldson's requests for ground privileges, occupational training, and an opportunity to discuss his case with O'Connor or other staff members were repeatedly denied.

At the trial, O'Connor's principal defense was that he had acted in good faith and was therefore immune from any liability for monetary damages. His position, in short, was that state law, which he had believed valid,

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[4] There was some evidence that Donaldson, who is a Christian Scientist, on occasion refused to take medication. The trial judge instructed the jury not to award damages for any period of confinement during which Donaldson had declined treatment.

had authorized indefinite custodial confinement of the "sick," even if they were not given treatment and their release could harm no one.[5]

The trial judge instructed the members of the jury that they should find that O'Connor had violated Donaldson's constitutional right to liberty if they found that he had

> "confined [Donaldson] against his will, knowing that he was not mentally ill or dangerous or knowing that if mentally ill he was not receiving treatment for his alleged mental illness.
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> . . . . .
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> "Now, the purpose of involuntary hospitalization is treatment and not mere custodial care or punishment if a patient is not a danger to himself or others. Without such treatment there is no justification from a constitutional stand-point for continued confinement unless you should also find that [Donaldson] was dangerous to either himself or others."[6]

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[5] At the close of Donaldson's case in chief, O'Connor moved for a directed verdict on the ground that state law at the time of Donaldson's confinement authorized institutionalization of the mentally ill even if they posed no danger to themselves or others. This motion was denied. At the close of all the evidence, O'Connor asked that the jury be instructed that "if defendants acted pursuant to a statute which was not declared unconstitutional at the time, they cannot be held accountable for such action." The District Court declined to give this requested instruction.

[6] The District Court defined treatment as follows:

"You are instructed that a person who is involuntarily civilly committed to a mental hospital does have a constitutional right to receive such treatment *as will give him a realistic opportunity to be cured or to improve his mental condition*." (Emphasis added.) O'Connor argues that this statement suggests that a mental patient has a right to treatment even if confined by reason of dangerousness to himself or others. But this is to take the above paragraph out of context, for it is bracketed by paragraphs making clear the trial

The trial judge further instructed the jury that O'Connor was immune from damages if he

"reasonably believed in good faith that detention of

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judge's theory that treatment is constitutionally required only if mental illness alone, rather than danger to self or others, is the reason for confinement. If O'Connor had thought the instructions ambiguous on this point, he could have objected to them and requested a clarification. He did not do so. We accordingly have no occasion here to decide whether persons committed on grounds of dangerousness enjoy a "right to treatment."

In pertinent part, the instructions read as follows:

"The Plaintiff claims in brief that throughout the period of his hospitalization he was not mentally ill or dangerous to himself or others, and claims further that if he was mentally ill, or if Defendants believed he was mentally ill, Defendants withheld from him the treatment necessary to improve his mental condition.

"The Defendants claim, in brief, that Plaintiff's detention was legal and proper, or if his detention was not legal and proper, it was the result of mistake, without malicious intent.

. . . . .

"In order to prove his claim under the Civil Rights Act, the burden is upon the Plaintiff in this case to establish by a preponderance of the evidence in this case the following facts:

"That the Defendants confined Plaintiff against his will, knowing that he was not mentally ill or dangerous or knowing that if mentally ill he was not receiving treatment for his alleged mental illness.

. . . . .

"[T]hat the Defendants' acts and conduct deprived the Plaintiff of his Federal Constitutional right not to be denied or deprived of his liberty without due process of law as that phrase is defined and explained in these instructions . . . .

. . . . .

"You are instructed that a person who is involuntarily civilly committed to a mental hospital does have a constitutional right to receive such treatment as will give him a realistic opportunity to be cured or to improve his mental condition.

"Now, the purpose of involuntary hospitalization is treatment and not mere custodial care or punishment if a patient is not a danger to himself or others. Without such treatment there is no justifica-

[Donaldson] was proper for the length of time he was so confined . . . .

"However, mere good intentions which do not give rise to a reasonable belief that detention is lawfully required cannot justify [Donaldson's] confinement in the Florida State Hospital."

The jury returned a verdict for Donaldson against O'Connor and a codefendant, and awarded damages of $38,500, including $10,000 in punitive damages.[7]

The Court of Appeals affirmed the judgment of the District Court in a broad opinion dealing with "the far-reaching question whether the Fourteenth Amendment guarantees a right to treatment to persons involuntarily civilly committed to state mental hospitals." 493 F. 2d, at 509. The appellate court held that when, as in Donaldson's case, the rationale for confinement is that the patient is in need of treatment, the Constitution requires that minimally adequate treatment in fact be provided. *Id.*, at 521. The court further expressed the view that, regardless of the grounds for involuntary civil commitment, a person confined against his will at a state mental institution has "a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition." *Id.*, at 520. Conversely, the court's opinion implied that it is constitutionally permissible for a State to confine a mentally ill person against his will in order to treat his illness, regardless of whether his illness ren-

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tion from a constitutional stand-point for continued confinement unless you should also find that the Plaintiff was dangerous either to himself or others."

[7] The trial judge had instructed that punitive damages should be awarded only if "the act or omission of the Defendant or Defendants which proximately caused injury to the Plaintiff was maliciously or wantonly or oppressively done."

ders him dangerous to himself or others. See *id.*, at 522–527.

II

We have concluded that the difficult issues of constitutional law dealt with by the Court of Appeals are not presented by this case in its present posture. Specifically, there is no reason now to decide whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the State, or whether the State may compulsorily confine a nondangerous, mentally ill individual for the purpose of treatment. As we view it, this case raises a single, relatively simple, but nonetheless important question concerning every man's constitutional right to liberty.

The jury found that Donaldson was neither dangerous to himself nor dangerous to others, and also found that, if mentally ill, Donaldson had not received treatment.[8] That verdict, based on abundant evidence, makes the issue before the Court a narrow one. We need not decide whether, when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure

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[8] Given the jury instructions, see n. 6 *supra,* it is possible that the jury went so far as to find that O'Connor knew not only that Donaldson was harmless to himself and others but also that he was not mentally ill at all. If it so found, the jury was permitted by the instructions to rule against O'Connor regardless of the nature of the "treatment" provided. If we were to construe the jury's verdict in that fashion, there would remain no substantial issue in this case: That a wholly sane and innocent person has a constitutional right not to be physically confined by the State when his freedom will pose a danger neither to himself nor to others cannot be seriously doubted.

his own survival or safety,[9] or to alleviate or cure his illness. See *Jackson* v. *Indiana,* 406 U. S. 715, 736–737; *Humphrey* v. *Cady,* 405 U. S. 504, 509. For the jury found that none of the above grounds for continued confinement was present in Donaldson's case.[10]

Given the jury's findings, what was left as justification for keeping Donaldson in continued confinement? The fact that state law may have authorized confinement of the harmless mentally ill does not itself establish a constitutionally adequate purpose for the confinement. See *Jackson* v. *Indiana, supra,* at 720–723; *McNeil* v. *Director, Patuxent Institution,* 407 U. S. 245, 248–250. Nor is it enough that Donaldson's original confinement was

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[9] The judge's instructions used the phrase "dangerous to himself." Of course, even if there is no foreseeable risk of self-injury or suicide, a person is literally "dangerous to himself" if for physical or other reasons he is helpless to avoid the hazards of freedom either through his own efforts or with the aid of willing family members or friends. While it might be argued that the judge's instructions could have been more detailed on this point, O'Connor raised no objection to them, presumably because the evidence clearly showed that Donaldson was not "dangerous to himself" however broadly that phrase might be defined.

[10] O'Connor argues that, despite the jury's verdict, the Court must assume that Donaldson was receiving treatment sufficient to justify his confinement, because the adequacy of treatment is a "nonjusticiable" question that must be left to the discretion of the psychiatric profession. That argument is unpersuasive. Where "treatment" is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present. See *Jackson* v. *Indiana,* 406 U. S. 715. Neither party objected to the jury instruction defining treatment. There is, accordingly, no occasion in this case to decide whether the provision of treatment, standing alone, can ever constitutionally justify involuntary confinement or, if it can, how much or what kind of treatment would suffice for that purpose. In its present posture this case involves not involuntary treatment but simply involuntary custodial confinement.

founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed. *Jackson* v. *Indiana, supra,* at 738; *McNeil* v. *Director, Patuxent Institution, supra.*

A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the "mentally ill" can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.

May the State confine the mentally ill merely to ensure them a living standard superior to that they enjoy in the private community? That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. Moreover, while the State may arguably confine a person to save him from harm, incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends. See *Shelton* v. *Tucker,* 364 U. S. 479, 488–490.

May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty. See, *e. g., Cohen* v. *California,* 403 U. S. 15, 24–26; *Coates* v. *City of*

Cincinnati, 402 U. S. 611, 615; *Street* v. *New York,* 394 U. S. 576, 592; cf. *U. S. Dept. of Agriculture* v. *Moreno,* 413 U. S. 528, 534.

In short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends. Since the jury found, upon ample evidence, that O'Connor, as an agent of the State, knowingly did so confine Donaldson, it properly concluded that O'Connor violated Donaldson's constitutional right to freedom.

III

O'Connor contends that in any event he should not be held personally liable for monetary damages because his decisions were made in "good faith." Specifically, O'Connor argues that he was acting pursuant to state law which, he believed, authorized confinement of the mentally ill even when their release would not compromise their safety or constitute a danger to others, and that he could not reasonably have been expected to know that the state law as he understood it was constitutionally invalid. A proposed instruction to this effect was rejected by the District Court.[11]

The District Court did instruct the jury, without objection, that monetary damages could not be assessed against O'Connor if he had believed reasonably and in good faith that Donaldson's continued confinement was

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[11] See n. 5, *supra.* During his years of confinement, Donaldson unsuccessfully petitioned the state and federal courts for release from the Florida State Hospital on a number of occasions. None of these claims was ever resolved on its merits, and no evidentiary hearings were ever held. O'Connor has not contended that he relied on these unsuccessful court actions as an independent intervening reason for continuing Donaldson's confinement, and no instructions on this score were requested.

"proper," and that punitive damages could be awarded only if O'Connor had acted "maliciously or wantonly or oppressively." The Court of Appeals approved those instructions. But that court did not consider whether it was error for the trial judge to refuse the additional instruction concerning O'Connor's claimed reliance on state law as authorization for Donaldson's continued confinement. Further, neither the District Court nor the Court of Appeals acted with the benefit of this Court's most recent decision on the scope of the qualified immunity possessed by state officials under 42 U. S. C. § 1983. *Wood* v. *Strickland,* 420 U. S. 308.

Under that decision, the relevant question for the jury is whether O'Connor "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [Donaldson], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [Donaldson]." *Id.,* at 322. See also *Scheuer* v. *Rhodes,* 416 U. S. 232, 247-248; *Wood* v. *Strickland, supra,* at 330 (opinion of POWELL, J.). For purposes of this question, an official has, of course, no duty to anticipate unforeseeable constitutional developments. *Wood* v. *Strickland, supra,* at 322.

Accordingly, we vacate the judgment of the Court of Appeals and remand the case to enable that court to consider, in light of *Wood* v. *Strickland,* whether the District Judge's failure to instruct with regard to the effect of O'Connor's claimed reliance on state law rendered inadequate the instructions as to O'Connor's liability for compensatory and punitive damages.[12]

It is so ordered.

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[12] Upon remand, the Court of Appeals is to consider only the question whether O'Connor is to be held liable for monetary damages for violating Donaldson's constitutional right to liberty. The

MR. CHIEF JUSTICE BURGER, concurring.

Although I join the Court's opinion and judgment in this case, it seems to me that several factors merit more emphasis than it gives them. I therefore add the following remarks.

I

With respect to the remand to the Court of Appeals on the issue of official immunity from liability for monetary damages,[1] it seems to me not entirely irrelevant that there was substantial evidence that Donaldson consistently refused treatment that was offered to him, claiming that he was not mentally ill and needed no treatment.[2]

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jury found, on substantial evidence and under adequate instructions, that O'Connor deprived Donaldson, who was dangerous neither to himself nor to others and was provided no treatment, of the constitutional right to liberty. Cf. n. 8, *supra*. That finding needs no further consideration. If the Court of Appeals holds that a remand to the District Court is necessary, the only issue to be determined in that court will be whether O'Connor is immune from liability for monetary damages.

Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case. See *United States* v. *Munsingwear*, 340 U. S. 36.

[1] I have difficulty understanding how the issue of immunity can be resolved on this record and hence it is very likely a new trial on this issue may be required; if that is the case I would hope these sensitive and important issues would have the benefit of more effective presentation and articulation on behalf of petitioner.

[2] The Court's reference to "milieu therapy," *ante*, at 569, may be construed as disparaging that concept. True, it is capable of being used simply to cloak official indifference, but the reality is that some mental abnormalities respond to no known treatment. Also, some mental patients respond, as do persons suffering from a variety of physiological ailments, to what is loosely called "milieu treatment," *i. e.*, keeping them comfortable, well nourished, and in a protected environment. It is not for us to say in the baffling field of psychiatry that "milieu therapy" is always a pretense.

The Court appropriately takes notice of the uncertainties of psychiatric diagnosis and therapy, and the reported cases are replete with evidence of the divergence of medical opinion in this vexing area. *E. g., Greenwood* v. *United States,* 350 U. S. 366, 375 (1956). See also *Drope* v. *Missouri,* 420 U. S. 162 (1975). Nonetheless, one of the few areas of agreement among behavioral specialists is that an uncooperative patient cannot benefit from therapy and that the first step in effective treatment is acknowledgment by the patient that he is suffering from an abnormal condition. See, *e. g.,* Katz, The Right to Treatment—An Enchanting Legal Fiction? 36 U. Chi. L. Rev. 755, 768–769 (1969). Donaldson's adamant refusal to do so should be taken into account in considering petitioner's good-faith defense.

Perhaps more important to the issue of immunity is a factor referred to only obliquely in the Court's opinion. On numerous occasions during the period of his confinement Donaldson unsuccessfully sought release in the Florida courts; indeed, the last of these proceedings was terminated only a few months prior to the bringing of this action. See 234 So. 2d 114 (1969), cert. denied, 400 U. S. 869 (1970). Whatever the reasons for the state courts' repeated denials of relief, and regardless of whether they correctly resolved the issue tendered to them, petitioner and the other members of the medical staff at Florida State Hospital would surely have been justified in considering each such judicial decision as an approval of continued confinement and an independent intervening reason for continuing Donaldson's custody. Thus, this fact is inescapably related to the issue of immunity and must be considered by the Court of Appeals on remand and, if a new trial on this issue is ordered, by the District Court.[3]

[3] That petitioner's counsel failed to raise this issue is not a reason

II

As the Court points out, *ante,* at 570 n. 6, the District Court instructed the jury in part that "a person who is involuntarily civilly committed to a mental hospital does have a *constitutional* right to receive such treatment *as will give him a realistic opportunity to be cured*" (emphasis added), and the Court of Appeals unequivocally approved this phrase, standing alone, as a correct statement of the law. 493 F. 2d 507, 520 (CA5 1974). The Court's opinion plainly gives no approval to that holding and makes clear that it binds neither the parties to this case nor the courts of the Fifth Circuit. See *ante,* at 577–578, n. 12. Moreover, in light of its importance for future litigation in this area, it should be emphasized that the Court of Appeals' analysis has no basis in the decisions of this Court.

A

There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law. *Specht* v. *Patterson,* 386 U. S. 605, 608 (1967). Cf. *In re Gault,* 387 U. S. 1, 12–13 (1967). Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. Equally important, confinement must cease when those reasons no longer exist. See *McNeil* v. *Director, Patuxent Institution,* 407 U. S. 245, 249–250 (1972); *Jackson* v. *Indiana,* 406 U. S. 715, 738 (1972).

The Court of Appeals purported to be applying these principles in developing the first of its theories support-

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why it should not be considered with respect to immunity in light of the Court's holding that the defense was preserved for appellate review.

ing a constitutional right to treatment. It first identified what it perceived to be the traditional bases for civil commitment—physical dangerousness to oneself or others, or a need for treatment—and stated:

> "[W]here, as in Donaldson's case, the rationale for confinement is the '*parens patriae*' rationale that the patient is in need of treatment, the due process clause requires that minimally adequate treatment be in fact provided. . . . 'To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.'" 493 F. 2d, at 521.

The Court of Appeals did not explain its conclusion that the rationale for respondent's commitment was that he needed treatment. The Florida statutes in effect during the period of his confinement did not require that a person who had been adjudicated incompetent and ordered committed either be provided with psychiatric treatment or released, and there was no such condition in respondent's order of commitment. Cf. *Rouse* v. *Cameron,* 125 U. S. App. D. C. 366, 373 F. 2d 451 (1967). More important, the instructions which the Court of Appeals read as establishing an absolute constitutional right to treatment did not require the jury to make any findings regarding the specific reasons for respondent's confinement or to focus upon any rights he may have had under state law. Thus, the premise of the Court of Appeals' first theory must have been that, at least with respect to persons who are not physically dangerous, a State has no power to confine the mentally ill except for the purpose of providing them with treatment.

That proposition is surely not descriptive of the power traditionally exercised by the States in this area.

Historically, and for a considerable period of time, subsidized custodial care in private foster homes or boarding houses was the most benign form of care provided incompetent or mentally ill persons for whom the States assumed responsibility. Until well into the 19th century the vast majority of such persons were simply restrained in poorhouses, almshouses, or jails. See A. Deutsch, The Mentally Ill in America 38–54, 114–131 (2d ed. 1949). The few States that established institutions for the mentally ill during this early period were concerned primarily with providing a more humane place of confinement and only secondarily with "curing" the persons sent there. See *id.*, at 98–113.

As the trend toward state care of the mentally ill expanded, eventually leading to the present statutory schemes for protecting such persons, the dual functions of institutionalization continued to be recognized. While one of the goals of this movement was to provide medical treatment to those who could benefit from it, it was acknowledged that this could not be done in all cases and that there was a large range of mental illness for which no known "cure" existed. In time, providing places for the custodial confinement of the so-called "dependent insane" again emerged as the major goal of the States' programs in this area and remained so well into this century. See *id.*, at 228–271; D. Rothman, The Discovery of the Asylum 264–295 (1971).

In short, the idea that States may not confine the mentally ill except for the purpose of providing them with treatment is of very recent origin,[4] and there is no historical basis for imposing such a limitation on state power. Analysis of the sources of the civil commitment power likewise lends no support to that notion. There can be little doubt that in the exercise of its police power

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[4] See Editorial, A New Right, 46 A. B. A. J. 516 (1960).

a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease. Cf. *Minnesota ex rel. Pearson* v. *Probate Court,* 309 U. S. 270 (1940); *Jacobson* v. *Massachusetts,* 197 U. S. 11, 25–29 (1905). Additionally, the States are vested with the historic *parens patriae* power, including the duty to protect "persons under legal disabilities to act for themselves." *Hawaii* v. *Standard Oil Co.,* 405 U. S. 251, 257 (1972). See also *Mormon Church* v. *United States,* 136 U. S. 1, 56–58 (1890). The classic example of this role is when a State undertakes to act as " 'the general guardian of all infants, idiots, and lunatics.' " *Hawaii* v. *Standard Oil Co., supra,* at 257, quoting 3 W. Blackstone, Commentaries *47.

Of course, an inevitable consequence of exercising the *parens patriae* power is that the ward's personal freedom will be substantially restrained, whether a guardian is appointed to control his property, he is placed in the custody of a private third party, or committed to an institution. Thus, however the power is implemented, due process requires that it not be invoked indiscriminately. At a minimum, a particular scheme for protection of the mentally ill must rest upon a legislative determination that it is compatible with the best interests of the affected class and that its members are unable to act for themselves. Cf. *Mormon Church* v. *United States, supra.* Moreover, the use of alternative forms of protection may be motivated by different considerations, and the justifications for one may not be invoked to rationalize another. Cf. *Jackson* v. *Indiana,* 406 U. S., at 737–738. See also American Bar Foundation, The Mentally Disabled and the Law 254–255 (S. Brakel & R. Rock ed. 1971).

However, the existence of some due process limitations on the *parens patriae* power does not justify the further conclusion that it may be exercised to confine a mentally

ill person only if the purpose of the confinement is treatment. Despite many recent advances in medical knowledge, it remains a stubborn fact that there are many forms of mental illness which are not understood, some which are untreatable in the sense that no effective therapy has yet been discovered for them, and that rates of "cure" are generally low. See Schwitzgebel, The Right to Effective Mental Treatment, 62 Calif. L. Rev. 936, 941–948 (1974). There can be little responsible debate regarding "the uncertainty of diagnosis in this field and the tentativeness of professional judgment." *Greenwood* v. *United States,* 350 U. S., at 375. See also Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif. L. Rev. 693, 697–719 (1974).[5] Similarly, as previously observed, it is universally recognized as fundamental to effective therapy that the patient acknowledge his illness and cooperate with those attempting to give treatment; yet the failure of a large proportion of mentally ill persons to do so is a common phenomenon. See Katz, *supra,* 36 U. Chi. L. Rev., at 768–769. It may be that some persons in either of these categories,[6] and there may be others, are unable to function in society and will suffer real harm to themselves unless provided with care in a sheltered environment. See, *e. g., Lake* v. *Cameron,* 124 U. S. App. D. C.

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[5] Indeed, there is considerable debate concerning the threshold questions of what constitutes "mental disease" and "treatment." See Szasz, The Right to Health, 57 Geo. L. J. 734 (1969).

[6] Indeed, respondent may have shared both of these characteristics. His illness, paranoid schizophrenia, is notoriously unsusceptible to treatment, see Livermore, Malmquist, & Meehl, On the Justifications for Civil Commitment, 117 U. Pa. L. Rev. 75, 93, and n. 52 (1968), and the reports of the Florida State Hospital staff which were introduced into evidence expressed the view that he was unwilling to acknowledge his illness and was generally uncooperative.

264, 270–271, 364 F. 2d 657, 663–664 (1966) (dissenting opinion). At the very least, I am not able to say that a state legislature is powerless to make that kind of judgment. See *Greenwood* v. *United States, supra.*

B

Alternatively, it has been argued that a Fourteenth Amendment right to treatment for involuntarily confined mental patients derives from the fact that many of the safeguards of the criminal process are not present in civil commitment. The Court of Appeals described this theory as follows:

> "[A] due process right to treatment is based on the principle that when the three central limitations on the government's power to detain—that detention be in retribution for a specific offense; that it be limited to a fixed term; and that it be permitted after a proceeding where the fundamental procedural safeguards are observed—are absent, there must be a *quid pro quo* extended by the government to justify confinement. And the *quid pro quo* most commonly recognized is the provision of rehabilitative treatment." 493 F. 2d, at 522.

To the extent that this theory may be read to permit a State to confine an individual simply because it is willing to provide treatment, regardless of the subject's ability to function in society, it raises the gravest of constitutional problems, and I have no doubt the Court of Appeals would agree on this score. As a justification for a constitutional right to such treatment, the *quid pro quo* theory suffers from equally serious defects.

It is too well established to require extended discussion that due process is not an inflexible concept. Rather, its requirements are determined in particular instances by identifying and accommodating the inter-

ests of the individual and society. See, *e. g., Morrissey* v. *Brewer,* 408 U. S. 471, 480–484 (1972); *McNeil* v. *Director, Patuxent Institution,* 407 U. S., at 249–250; *McKeiver* v. *Pennsylvania,* 403 U. S. 528, 545–555 (1971) (plurality opinion). Where claims that the State is acting in the best interests of an individual are said to justify reduced procedural and substantive safeguards, this Court's decisions require that they be "candidly appraised." *In re Gault,* 387 U. S., at 21, 27–29. However, in so doing judges are not free to read their private notions of public policy or public health into the Constitution. *Olsen* v. *Nebraska,* 313 U. S. 236, 246–247 (1941).

The *quid pro quo* theory is a sharp departure from, and cannot coexist with, due process principles. As an initial matter, the theory presupposes that essentially the same interests are involved in every situation where a State seeks to confine an individual; that assumption, however, is incorrect. It is elementary that the justification for the criminal process and the unique deprivation of liberty which it can impose requires that it be invoked only for commission of a specific offense prohibited by legislative enactment. See *Powell* v. *Texas,* 392 U. S. 514, 541–544 (1968) (opinion of Black, J.).[7] But it would be incongruous, for example, to apply the same limitation when quarantine is imposed by the State to protect the public from a highly communicable disease. See *Jacobson* v. *Massachusetts,* 197 U. S., at 29–30.

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[7] This is not to imply that I accept all of the Court of Appeals' conclusions regarding the limitations upon the States' power to detain persons who commit crimes. For example, the notion that confinement must be "for a fixed term" is difficult to square with the widespread practice of indeterminate sentencing, at least where the upper limit is a life sentence.

A more troublesome feature of the *quid pro quo* theory is that it would elevate a concern for essentially procedural safeguards into a new substantive constitutional right.[8] Rather than inquiring whether strict standards of proof or periodic redetermination of a patient's condition are required in civil confinement, the theory accepts the absence of such safeguards but insists that the State provide benefits which, in the view of a court, are adequate "compensation" for confinement. In light of the wide divergence of medical opinion regarding the diagnosis of and proper therapy for mental abnormalities, that prospect is especially troubling in this area and cannot be squared with the principle that "courts may not substitute for the judgments of legislators their own understanding of the public welfare, but must instead concern themselves with the validity under the Constitution of the methods which the legislature has selected." *In re Gault,* 387 U. S., at 71 (Harlan, J., concurring and dissenting). Of course, questions regarding the adequacy of procedure and the power of a State to continue particular confinements are ultimately for the courts, aided by expert opinion to the extent that is found helpful. But I am not persuaded that we should abandon the traditional limitations on the scope of judicial review.

C

In sum, I cannot accept the reasoning of the Court of Appeals and can discern no basis for equating an involuntarily committed mental patient's unquestioned constitutional right not to be confined without due proc-

[8] Even advocates of a right to treatment have criticized the *quid pro quo* theory on this ground. *E. g.,* Developments in the Law—Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1325 n. 39 (1974).

ess of law with a constitutional right to *treatment.*[9] Given the present state of medical knowledge regarding abnormal human behavior and its treatment, few things would be more fraught with peril than to irrevocably condition a State's power to protect the mentally ill upon the providing of "such treatment as will give [them] a

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[9] It should be pointed out that several issues which the Court has touched upon in other contexts are not involved here. As the Court's opinion makes plain, this is not a case of a person's seeking release because he has been confined "without ever obtaining a judicial determination that such confinement is warranted." *McNeil* v. *Director, Patuxent Institution,* 407 U. S. 245, 249 (1972). Although respondent's amended complaint alleged that his 1956 hearing before the Pinellas County Court was procedurally defective and ignored various factors relating to the necessity for commitment, the persons to whom those allegations applied were either not served with process or dismissed by the District Court prior to trial. Respondent has not sought review of the latter rulings, and this case does not involve the rights of a person in an initial competency or commitment proceeding. Cf. *Jackson* v. *Indiana,* 406 U. S. 715, 738 (1972); *Specht* v. *Patterson,* 386 U. S. 605 (1967); *Minnesota ex rel. Pearson* v. *Probate Court,* 309 U. S. 270 (1940).

Further, it was not alleged that respondent was singled out for discriminatory treatment by the staff of Florida State Hospital or that patients at that institution were denied privileges generally available to other persons under commitment in Florida. Thus, the question whether different bases for commitment justify differences in conditions of confinement is not involved in this litigation. Cf. *Jackson* v. *Indiana, supra,* at 723–730; *Baxstrom* v. *Herold,* 383 U. S. 107 (1966).

Finally, there was no evidence whatever that respondent was abused or mistreated at Florida State Hospital or that the failure to provide him with treatment aggravated his condition. There was testimony regarding the general quality of life at the hospital, but the jury was not asked to consider whether respondent's confinement was in effect "punishment" for being mentally ill. The record provides no basis for concluding, therefore, that respondent was denied rights secured by the Eighth and Fourteenth Amendments. Cf. *Robinson* v. *California,* 370 U. S. 660 (1962).

realistic opportunity to be cured." Nor can I accept the theory that a State may lawfully confine an individual thought to need treatment and justify that deprivation of liberty solely by providing some treatment. Our concepts of due process would not tolerate such a "trade-off." Because the Court of Appeals' analysis could be read as authorizing those results, it should not be followed.

BROWN *v.* ILLINOIS

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 73-6650. Argued March 18, 1975—Decided June 26, 1975

Petitioner, who had been arrested without probable cause and without a warrant, and under circumstances indicating that the arrest was investigatory, made two in-custody inculpatory statements after he had been given the warnings prescribed by *Miranda* v. *Arizona*, 384 U. S. 436. Thereafter indicted for murder, petitioner filed a pretrial motion to suppress the statements. The motion was overruled and the statements were used in the trial, which resulted in petitioner's conviction. The State Supreme Court, though recognizing the unlawfulness of petitioner's arrest, held that the statements were admissible on the ground that the giving of the *Miranda* warnings served to break the causal connection between the illegal arrest and the giving of the statements, and petitioner's act in making the statements was "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Wong Sun* v. *United States,* 371 U. S. 471, 486. *Held:*

1. The Illinois courts erred in adopting a *per se* rule that *Miranda* warnings in and of themselves broke the causal chain so that any subsequent statement, even one induced by the continuing effects of unconstitutional custody, was admissible so long as, in the traditional sense, it was voluntary and not coerced in violation of the Fifth and Fourteenth Amendments. When the exclusionary rule is used to effectuate the Fourth Amendment, it serves interests and policies that are distinct from those it serves under the Fifth, being directed at all unlawful searches and seizures, and not merely those that happen to produce incriminating material or testimony as fruits. Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. *Wong Sun* requires not merely that a statement meet the Fifth Amendment voluntariness standard but that it be "sufficiently an act of free will to purge the primary taint" in light of the distinct policies and interests of the Fourth Amendment. Pp. 600–603.

2. The question whether a confession is voluntary under *Wong Sun* must be answered on the facts of each case. Though the

Miranda warnings are an important factor in resolving the issue, other factors must be considered; and the burden of showing admissibility of in-custody statements of persons who have been illegally arrested rests on the prosecutor. Pp. 603–604.

3. The State failed to sustain its burden in this case of showing that petitioner's statements were admissible under *Wong Sun*. Pp. 604–605.

56 Ill. 2d 312, 307 N. E. 2d 356, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, and MARSHALL, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 606. POWELL, J., filed an opinion concurring in part, in which REHNQUIST, J., joined, *post*, p. 606.

Robert P. Isaacson argued the cause for petitioner *pro hac vice*. With him on the brief were *James J. Doherty* and *John T. Moran*.

Jayne A. Carr, Assistant Attorney General of Illinois, argued the cause for respondent. With her on the brief were *William J. Scott*, Attorney General, and *James B. Zagel*, Assistant Attorney General.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case lies at the crossroads of the Fourth and the Fifth Amendments. Petitioner was arrested without probable cause and without a warrant. He was given, in full, the warnings prescribed by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Thereafter, while in custody, he made two inculpatory statements. The issue is whether evidence of those statements was properly admitted, or should have been excluded, in petitioner's subsequent trial for murder in state court. Expressed another way, the issue is whether the statements were to be excluded

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**Solicitor General Bork* and *Acting Assistant Attorney General Keeney* filed a memorandum for the United States as *amicus curiae*.

as the fruit of the illegal arrest, or were admissible because the giving of the *Miranda* warnings sufficiently attenuated the taint of the arrest. See *Wong Sun* v. *United States,* 371 U. S. 471 (1963). The Fourth Amendment, of course, has been held to be applicable to the States through the Fourteenth Amendment. *Mapp* v. *Ohio,* 367 U. S. 643 (1961).

I

As petitioner Richard Brown was climbing the last of the stairs leading to the rear entrance of his Chicago apartment in the early evening of May 13, 1968, he happened to glance at the window near the door. He saw, pointed at him through the window, a revolver held by a stranger who was inside the apartment. The man said: "Don't move, you are under arrest." App. 42. Another man, also with a gun, came up behind Brown and repeated the statement that he was under arrest. It was about 7:45 p. m. The two men turned out to be Detectives William Nolan and William Lenz of the Chicago police force. It is not clear from the record exactly when they advised Brown of their identity, but it is not disputed that they broke into his apartment, searched it, and then arrested Brown, all without probable cause and without any warrant, when he arrived. They later testified that they made the arrest for the purpose of questioning Brown as part of their investigation of the murder of a man named Roger Corpus.

Corpus was murdered one week earlier, on May 6, with a .38-caliber revolver in his Chicago West Side second-floor apartment. Shortly thereafter, Detective Lenz obtained petitioner's name, among others, from Corpus' brother. Petitioner and the others were identified as acquaintances of the victim, not as suspects.[1]

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[1] The brother, however, when asked at the trial whether any of the victim's family suggested to the police that petitioner was

On the day of petitioner's arrest, Detectives Lenz and Nolan, armed with a photograph of Brown, and another officer arrived at petitioner's apartment about 5 p. m. App. 77, 78. While the third officer covered the front entrance downstairs, the two detectives broke into Brown's apartment and searched it. *Id.,* at 86. Lenz then positioned himself near the rear door and watched through the adjacent window which opened onto the back porch. Nolan sat near the front door. He described the situation at the later suppression hearing:

> "After we were there for a while, Detective Lenz told me that somebody was coming up the back stairs. I walked out the front door through the hall and around the corner, and I stayed there behind a door leading on to the back porch. At this time I heard Detective Lenz say, 'Don't move, you are under arrest.' I looked out. I saw Mr. Brown backing away from the window. I walked up behind him, I told him he is under arrest, come back inside the apartment with us." *Id.,* at 42.

As both officers held him at gunpoint, the three entered the apartment. Brown was ordered to stand against the wall and was searched. No weapon was found. *Id.,* at 93. He was asked his name. When he denied being Richard Brown, Detective Lenz showed him the photograph, informed him that he was under arrest for the murder of Roger Corpus, *id.,* at 16, handcuffed him, *id.,* at 93, and escorted him to the squad car.

The two detectives took petitioner to the Maxwell Street police station. During the 20-minute drive Nolan again asked Brown, who then was sitting with him in the back seat of the car, whether his name was Richard Brown and whether he owned a 1966 Oldsmobile. Brown

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possibly responsible for the victim's death, answered: "Nobody asked." App. 74.

alternately evaded these questions or answered them falsely. Tr. 74. Upon arrival at the station house Brown was placed in the second-floor central interrogation room. The room was bare, except for a table and four chairs. He was left alone, apparently without handcuffs, for some minutes while the officers obtained the file on the Corpus homicide. They returned with the file, sat down at the table, one across from Brown and the other to his left, and spread the file on the table in front of him. App. 19.

The officers warned Brown of his rights under *Miranda*.[2] *Ibid.* They then informed him that they knew of an incident that had occurred in a poolroom on May 5, when Brown, angry at having been cheated at dice, fired a shot from a revolver into the ceiling. Brown answered: "Oh, you know about that." *Id.*, at 20. Lenz informed him that a bullet had been obtained from the ceiling of the poolroom and had been taken to the crime laboratory to be compared with bullets taken from Corpus' body.[3] *Ibid.* Brown responded: "Oh, you know that, too." *Id.*, at 20–21. At this point—it was about 8:45 p. m.—Lenz asked Brown whether he wanted to talk about the Corpus homicide. Petitioner answered that he did. For the next 20 to 25 minutes Brown answered questions put to him by Nolan, as Lenz typed. *Id.*, at 21–23.

This questioning produced a two-page statement in which Brown acknowledged that he and a man named

[2] There is no assertion here that he did not understand those rights.

[3] It was stipulated at the trial that if expert testimony were taken, it would be to the effect that the bullet eventually was ascertained to be a "wiped bullet," that is, that its sides were "clean and therefore it was not ballistically comparable to any other bullets, specifically the bullets taken from the body of the deceased, Roger Corpus." Tr. 543.

Jimmy Claggett visited Corpus on the evening of May 5; that the three for some time sat drinking and smoking marihuana; that Claggett ordered him at gunpoint to bind Corpus' hands and feet with cord from the headphone of a stereo set; and that Claggett, using a .38-caliber revolver sold to him by Brown, shot Corpus three times through a pillow. The statement was signed by Brown. *Id.*, at 9, 38.

About 9:30 p. m. the two detectives and Brown left the station house to look for Claggett in an area of Chicago Brown knew him to frequent. They made a tour of that area but did not locate their quarry. They then went to police headquarters where they endeavored, without success, to obtain a photograph of Claggett. They resumed their search—it was now about 11 p. m.—and they finally observed Claggett crossing at an intersection. Lenz and Nolan arrested him. All four, the two detectives and the two arrested men, returned to the Maxwell Street station about 12:15 a. m. *Id.*, at 39.

Brown was again placed in the interrogation room. He was given coffee and was left alone, for the most part, until 2 a. m. when Assistant State's Attorney Crilly arrived.

Crilly, too, informed Brown of his *Miranda* rights. After a half hour's conversation, a court reporter appeared. Once again the *Miranda* warnings were given: "I read him the card." *Id.*, at 30. Crilly told him that he "was sure he would be charged with murder." *Id.*, at 32. Brown gave a second statement, providing a factual account of the murder substantially in accord with his first statement, but containing factual inaccuracies with respect to his personal background.[4] When the state-

[4] In response to questions from Mr. Crilly, Brown stated that he was employed at E. I. Guffman Company in Niles, Ill., and that he was a punch press operator, App. 97, whereas he later conceded

ment was completed, at about 3 a. m., Brown refused to sign it. *Id.*, at 57. An hour later he made a phone call to his mother. At 9:30 that morning, about 14 hours after his arrest, he was taken before a magistrate.

On June 20 Brown and Claggett were jointly indicted by a Cook County grand jury for Corpus' murder. Prior to trial, petitioner moved to suppress the two statements he had made. He alleged that his arrest and detention had been illegal and that the statements were taken from him in violation of his constitutional rights. After a hearing, the motion was denied. R. 46.

The case proceeded to trial. The State introduced evidence of both statements. Detective Nolan testified as to the contents of the first, App. 89–92, but the writing itself was not placed in evidence. The second statement was introduced and was read to the jury in full. Tr. 509–528. Brown was 23 at the time of the trial. *Id.*, at 543.

The jury found petitioner guilty of murder. R. 80. He was sentenced to imprisonment for not less than 15 years nor more than 30 years. *Id.*, at 83.

On appeal, the Supreme Court of Illinois affirmed the judgment of conviction. 56 Ill. 2d 312, 307 N. E. 2d 356 (1974). The court refused to accept the State's argument that Brown's arrest was lawful. "Upon review of the record, we conclude that the testimony fails to show that at the time of his apprehension there was probable cause for defendant's arrest, [and] that his arrest was, therefore, unlawful." *Id.*, at 315, 307 N. E.

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that he worked at Arnold Schwinn Bicycle Company and had never worked at any other place. *Id.*, at 63. He also remarked in the Crilly statement that he had completed three years of high school, *id.*, at 96, whereas later he conceded that he "never went to high school." *Id.*, at 58.

2d, at 357. But it went on to hold in two significant and unembellished sentences:

> "[W]e conclude that the giving of the *Miranda* warnings, in the first instance by the police officer and in the second by the assistant State's Attorney, served to break the causal connection between the illegal arrest and the giving of the statements, and that defendant's act in making the statements was 'sufficiently an act of free will to purge the primary taint of the unlawful invasion.' (*Wong Sun v. United States,* 371 U. S. 471, at 486.) We hold, therefore, that the circuit court did not err in admitting the statements into evidence." *Id.,* at 317, 307 N. E. 2d, at 358.

Aside from its reliance upon the presence of the *Miranda* warnings, no specific aspect of the record or of the circumstances was cited by the court in support of its conclusion. The court, in other words, appears to have held that the *Miranda* warnings in and of themselves broke the causal chain so that any subsequent statement, even one induced by the continuing effects of unconstitutional custody, was admissible so long as, in the traditional sense, it was voluntary and not coerced in violation of the Fifth and Fourteenth Amendments.

Because of our concern about the implication of our holding in *Wong Sun* v. *United States,* 371 U. S. 471 (1963), to the facts of Brown's case, we granted certiorari. 419 U. S. 894 (1974).

II

In *Wong Sun,* the Court pronounced the principles to be applied where the issue is whether statements and other evidence obtained after an illegal arrest or search should be excluded. In that case, federal agents elicited an oral statement from defendant Toy after forcing entry

at 6 a. m. into his laundry, at the back of which he had his living quarters. The agents had followed Toy down the hall to the bedroom and there had placed him under arrest. The Court of Appeals found that there was no probable cause for the arrest. This Court concluded that that finding was "amply justified by the facts clearly shown on this record." 371 U. S., at 479. Toy's statement, which bore upon his participation in the sale of narcotics, led the agents to question another person, Johnny Yee, who actually possessed narcotics. Yee stated that heroin had been brought to him earlier by Toy and another Chinese known to him only as "Sea Dog." Under questioning, Toy said that "Sea Dog" was Wong Sun. Toy led agents to a multifamily dwelling where, he said, Wong Sun lived. Gaining admittance to the building through a bell and buzzer, the agents climbed the stairs and entered the apartment. One went into the back room and brought Wong Sun out in handcuffs. After arraignment, Wong Sun was released on his own recognizance. Several days later, he returned voluntarily to give an unsigned confession.

This Court ruled that Toy's declarations and the contraband taken from Yee were the fruits of the agents' illegal action and should not have been admitted as evidence against Toy. *Id.*, at 484–488. It held that the statement did not result from " 'an intervening independent act of a free will,' " and that it was not "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Id.*, at 486. With respect to Wong Sun's confession, however, the Court held that in the light of his lawful arraignment and release on his own recognizance, and of his return voluntarily several days later to make the statement, the connection between his unlawful arrest and the statement "had 'become so attenuated as to dissipate the taint.' *Nardone* v. *United*

States, 308 U. S. 338, 341." *Id.,* at 491. The Court said:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)." *Id.,* at 487–488.

The exclusionary rule thus was applied in *Wong Sun primarily* to protect Fourth Amendment rights. Protection of the Fifth Amendment right against self-incrimination was not the Court's paramount concern there. To the extent that the question whether Toy's statement was voluntary was considered, it was only to judge whether it "was *sufficiently* an act of free will to purge the primary taint of the unlawful invasion." *Id.,* at 486 (emphasis added).

The Court in *Wong Sun,* as is customary, emphasized that application of the exclusionary rule on Toy's behalf protected Fourth Amendment guarantees in two respects: "in terms of deterring lawless conduct by federal officers," and by "closing the doors of the federal courts to any use of evidence unconstitutionally obtained." *Ibid.* These considerations of deterrence and of judicial integrity, by now, have become rather commonplace in the Court's cases. See, *e. g., United States* v. *Peltier, ante,* at 535–538; *United States* v. *Calandra,* 414 U. S. 338, 347 (1974); *Terry* v. *Ohio,* 392 U. S. 1, 12–13, 28–29 (1968). "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the

constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States,* 364 U. S. 206, 217 (1960). But "[d]espite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." *United States* v. *Calandra,* 414 U. S., at 348. See also *Michigan* v. *Tucker,* 417 U. S. 433, 446–447 (1974).[5]

III

The Illinois courts refrained from resolving the question, as apt here as it was in *Wong Sun,* whether Brown's statements were obtained by exploitation of the illegality of his arrest. They assumed that the *Miranda* warnings, by themselves, assured that the statements (verbal acts, as contrasted with physical evidence) were of sufficient free will as to purge the primary taint of the unlawful arrest. *Wong Sun,* of course, preceded *Miranda.*

This Court has described the *Miranda* warnings as a "prophylactic rule," *Michigan* v. *Payne,* 412 U. S. 47, 53 (1973), and as a "procedural safeguard," *Miranda* v. *Arizona,* 384 U. S., at 457, 478, employed to protect Fifth Amendment rights against "the compulsion inherent in custodial surroundings." *Id.,* at 458. The function of the warnings relates to the Fifth Amendment's guarantee against coerced self-incrimination, and the exclusion

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[5] Members of the Court on occasion have indicated disenchantment with the rule. See, *e. g., Coolidge* v. *New Hampshire,* 403 U. S. 443, 490 (1971) (Harlan, J., concurring); *id.,* at 492 (BURGER, C. J., dissenting in part and concurring in part); *id.,* at 493 (Black, J., concurring and dissenting); *id.,* at 510 (WHITE, J., concurring and dissenting); *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U. S. 388, 411 (1971) (BURGER, C. J., dissenting). Its efficacy has been subject to some dispute. *United States* v. *Calandra,* 414 U. S. 338, 348 n. 5 (1974). See *Elkins* v. *United States,* 364 U. S. 206, 218 (1960).

of a statement made in the absence of the warnings, it is said, serves to deter the taking of an incriminating statement without first informing the individual of his Fifth Amendment rights.

Although, almost 90 years ago, the Court observed that the Fifth Amendment is in "intimate relation" with the Fourth, *Boyd* v. *United States,* 116 U. S. 616, 633 (1886), the *Miranda* warnings thus far have not been regarded as a means either of remedying or deterring violations of Fourth Amendment rights. Frequently, as here, rights under the two Amendments may appear to coalesce since "the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment." *Ibid.;* see *Mapp* v. *Ohio,* 367 U. S., at 646 n. 5. The exclusionary rule, however, when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth. It is directed at all unlawful searches and seizures, and not merely those that happen to produce incriminating material or testimony as fruits. In short, exclusion of a confession made without *Miranda* warnings might be regarded as necessary to effectuate the Fifth Amendment, but it would not be sufficient fully to protect the Fourth. *Miranda* warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation.[6]

Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth

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[6] The *Miranda* warnings in no way inform a person of his Fourth Amendment rights, including his right to be released from unlawful custody following an arrest made without a warrant or without probable cause.

Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the primary taint." 371 U. S., at 486. *Wong Sun* thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment.

If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. See *Davis* v. *Mississippi,* 394 U. S. 721, 726–727 (1969). Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings.[7] Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all," and the constitutional guarantee against unlawful searches and seizures could

[7] A great majority of the commentators have taken the same position. See, *e. g.*, Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 603–604 (1968); Ruffin, Out on a Limb of the Poisonous Tree: The Tainted Witness, 15 U. C. L. A. L. Rev. 32, 70 (1967); Comment, 1 Fla. St. L. Rev. 533, 539–540 (1973); Note, Admissibility of Confessions Made Subsequent to an Illegal Arrest: Wong Sun v. United States Revisited, 61 J. Crim. L. 207, 212 n. 58 (1970); Comment, Scope of Taint Under the Exclusionary Rule of the Fifth Amendment Privilege Against Self-Incrimination, 114 U. Pa. L. Rev. 570, 574 (1966). But see Comment, Voluntary Incriminating Statements Made Subsequent to an Illegal Arrest—A Proposed Modification of the Exclusionary Rule, 71 Dick. L. Rev. 573, 582–583 (1967).

be said to be reduced to "a form of words." See *Mapp* v. *Ohio,* 367 U. S., at 648.

It is entirely possible, of course, as the State here argues, that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the *Miranda* warnings, *alone* and *per se,* cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited. See *Westover* v. *United States,* 384 U. S. 436, 496–497 (1966).

While we therefore reject the *per se* rule which the Illinois courts appear to have accepted, we also decline to adopt any alternative *per se* or "but for" rule. The petitioner himself professes not to demand so much. Tr. of Oral Arg. 12, 45, 47. The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession,[8] the presence of intervening circum-

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[8] See *United States* v. *Owen,* 492 F. 2d 1100, 1107 (CA5), cert. denied, 419 U. S. 965 (1974); *Hale* v. *Henderson,* 485 F. 2d 266, 267–269 (CA6 1973), cert. denied, 415 U. S. 930 (1974); *United States* v. *Fallon,* 457 F. 2d 15, 19–20 (CA10 1972); *Leonard* v. *United States,* 391 F. 2d 537, 538 (CA9 1968); *Pennsylvania ex rel. Craig* v. *Maroney,* 348 F. 2d 22, 29 (CA3 1965).

stances, see *Johnson* v. *Louisiana,* 406 U. S. 356, 365 (1972), and, particularly, the purpose and flagrancy of the official misconduct[9] are all relevant. See *Wong Sun* v. *United States,* 371 U. S., at 491. The voluntariness of the statement is a threshold requirement. Cf. 18 U. S. C. § 3501. And the burden of showing admissibility rests, of course, on the prosecution.[10]

IV

Although the Illinois courts failed to undertake the inquiry mandated by *Wong Sun* to evaluate the circumstances of this case in the light of the policy served by the exclusionary rule, the trial resulted in a record of amply sufficient detail and depth from which the determination may be made. We therefore decline the suggestion of the United States, as *amicus curiae,* see *Morales* v. *New York,* 396 U. S. 102 (1969), to remand the case for further factual findings. We conclude that the State failed to sustain the burden of showing that the evidence in question was admissible under *Wong Sun.*

Brown's first statement was separated from his illegal arrest by less than two hours, and there was no intervening event of significance whatsoever. In its essentials, his situation is remarkably like that of James Wah Toy in *Wong Sun.*[11] We could hold Brown's first state-

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[9] See *United States* v. *Edmons,* 432 F. 2d 577 (CA2 1970). See also *United States ex rel. Gockley* v. *Myers,* 450 F. 2d 232, 236 (CA3 1971), cert. denied, 404 U. S. 1063 (1972); *United States* v. *Kilgen,* 445 F. 2d 287, 289 (CA5 1971).

[10] Our approach relies heavily, but not excessively, on the "learning, good sense, fairness and courage of federal trial judges." *Nardone* v. *United States,* 308 U. S. 338, 342 (1939).

[11] The situation here is thus in dramatic contrast to that of Wong Sun himself. Wong Sun's confession, which the Court held admissible, came several days after the illegality, and was preceded

ment admissible only if we overrule *Wong Sun.* We decline to do so. And the second statement was clearly the result and the fruit of the first.[12]

The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning."[13] App. 35, 43, 78, 81, 83, 88, 89, 94. The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion.

We emphasize that our holding is a limited one. We decide only that the Illinois courts were in error in assuming that the *Miranda* warnings, by themselves, under *Wong Sun* always purge the taint of an illegal arrest.

The judgment of the Supreme Court of Illinois is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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by a lawful arraignment and a release from custody on his own recognizance. 371 U. S., at 491.

[12] The fact that Brown had made one statement, believed by him to be admissible, and his cooperation with the arresting and interrogating officers in the search for Claggett, with his anticipation of leniency, bolstered the pressures for him to give the second, or at least vitiated any incentive on his part to avoid self-incrimination. Cf. *Fahy* v. *Connecticut,* 375 U. S. 85 (1963).

[13] Detective Lenz had been a member of the Chicago police force for 14 years and a detective for 12 years. App. 6. Detective Nolan had been a detective on the force for 5½ years. *Id.,* at 87.

MR. JUSTICE WHITE, concurring in the judgment.

Insofar as the Court holds (1) that despite *Miranda* warnings the Fourth and Fourteenth Amendments require the exclusion from evidence of statements obtained as the fruit of an arrest which the arresting officers knew or should have known was without probable cause and unconstitutional, and (2) that the statements obtained in this case were in this category, I am in agreement and therefore concur in the judgment.

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, concurring in part.

I join the Court insofar as it holds that the *per se* rule adopted by the Illinois Supreme Court for determining the admissibility of petitioner's two statements inadequately accommodates the diverse interests underlying the Fourth Amendment exclusionary rule. I would, however, remand the case for reconsideration under the general standards articulated in the Court's opinion and elaborated herein.

A

The issue presented in this case turns on proper application of the policies underlying the Fourth Amendment exclusionary rule, not on the Fifth Amendment or the prophylaxis added to that guarantee by *Miranda* v. *Arizona,* 384 U. S. 436 (1966).[1] The Court recognized in *Wong Sun* v. *United States,* 371 U. S. 471 (1963), that the Fourth Amendment exclusionary rule applies to statements obtained following an illegal arrest just as it does to tangible evidence seized in a similar manner

[1] Each of these guarantees provides an independent ground for suppression of statements and thus may make it unnecessary in many cases to conduct the inquiry mandated by *Wong Sun* v. *United States,* 371 U. S. 471 (1963).

or obtained pursuant to an otherwise illegal search and seizure. *Wong Sun* squarely rejected, however, the suggestion that the admissibility of statements so obtained should be governed by a simple "but for" test that would render inadmissible all statements given subsequent to an illegal arrest. *Id.,* at 487–488. In a similar manner, the Court today refrains from according dispositive weight to the single factor of *Miranda* warnings. I agree with each holding. Neither of the rejected extremes adequately recognizes the competing considerations involved in a determination to exclude evidence after finding that official possession of that evidence was to some degree caused by a violation of the Fourth Amendment.

On this record, I cannot conclude as readily as the Court that admission of the statements here at issue would constitute an effective overruling of *Wong Sun.* See *ante,* at 604–605. Although *Wong Sun* establishes the boundaries within which this case must be decided, the incompleteness of the record leaves me uncertain that it compels the exclusion of petitioner's statements. The statements at issue in *Wong Sun* were on the temporal extremes in relation to the illegal arrest. Cf. *Collins* v. *Beto,* 348 F. 2d 823, 832, 834–836 (CA5 1965) (Friendly, J., concurring). Toy's statement was obtained immediately after his pursuit and arrest by six agents. It appears to have been a spontaneous response to a question put to him in the frenzy of that event, and there is no indication that the agents made any attempt to inform him of his right to remain silent. Wong Sun's statement, by contrast, was not given until after he was arraigned and released on his own recognizance. Wong Sun voluntarily returned to the station a few days after the arrest for questioning. His statement was preceded by an official warning of his right

to remain silent and to have counsel if he desired.[2] The Court rejected the Government's assertion that Toy's statement resulted from an independent act of free will sufficient to purge the consequences of the illegal arrest. Wong Sun's statement, however, was deemed admissible. Given the circumstances in which Wong Sun's statement was obtained, the Court concluded that "the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.'" 371 U. S., at 491.

Like most cases in which the admissibility of statements obtained subsequent to an illegal arrest is contested, this case concerns statements more removed than that of Toy from the time and circumstances of the illegal arrest. Petitioner made his first statement some two hours following his arrest, after he had been given *Miranda* warnings. The Court is correct in noting that no other significant intervening event altered the relationship established between petitioner and the officers by the illegal arrest. But the Court's conclusion that admission of this statement could be allowed only by overruling *Wong Sun* rests either on an overly restrictive interpretation of the attenuation doctrine, to which I cannot subscribe, or on its view that the arrest was made for investigatory purposes, a factual determination that I think more appropriately should have been left for decision in the first instance by the state courts.

B

The Court's rejection in *Wong Sun* of a "but for" test, reaffirmed today, *ante,* at 603–604, recognizes that in some

[2] Toy gave a second statement under circumstances similar to those in Wong Sun's case. The Court did not, however, rule as to the admissibility of this statement, finding instead that it lacked corroboration and was therefore insufficient to support Toy's conviction. *Wong Sun* v. *United States,* 371 U. S., at 488–491.

circumstances strict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. The notion of the "dissipation of the taint" attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost. Application of the *Wong Sun* doctrine will generate fact-specific cases bearing distinct differences as well as similarities, and the question of attenuation inevitably is largely a matter of degree. The Court today identifies the general factors that the trial court must consider in making this determination. I think it appropriate, however, to attempt to articulate the possible relationships of those factors in particular, broad categories of cases.

All Fourth Amendment violations are, by constitutional definition, "unreasonable." There are, however, significant practical differences that distinguish among violations, differences that measurably assist in identifying the kinds of cases in which disqualifying the evidence is likely to serve the deterrent purposes of the exclusionary rule. Cf. *United States* v. *Calandra,* 414 U. S. 338, 347–348 (1974); *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 250 (1973) (POWELL, J., concurring). In my view, the point at which the taint can be said to have dissipated should be related, in the absence of other controlling circumstances, to the nature of that taint.

That police have not succeeded in coercing the accused's confession through willful or negligent misuse of the power of arrest does not remove the fact that they may have tried. The impermissibility of the attempt, and the extent to which such attempts can be deterred by the use of the exclusionary rule, are of primary relevance in determining whether exclusion is an appropriate rem-

edy. The basic purpose of the rule, briefly stated, is to remove possible motivations for illegal arrests. Given this purpose the notion of voluntariness has practical value in deciding whether the rule should apply to statements removed from the immediate circumstances of the illegal arrest. If an illegal arrest merely provides the occasion of initial contact between the police and the accused, and because of time or other intervening factors the accused's eventual statement is the product of his own reflection and free will, application of the exclusionary rule can serve little purpose: the police normally will not make an illegal arrest in the hope of eventually obtaining such a truly volunteered statement. In a similar manner, the role of the *Miranda* warnings in the *Wong Sun* inquiry is indirect. To the extent that they dissipate the psychological pressures of custodial interrogation, *Miranda* warnings serve to assure that the accused's decision to make a statement has been relatively unaffected by the preceding illegal arrest. Correspondingly, to the extent that the police perceive *Miranda* warnings to have this equalizing potential, their motivation to abuse the power of arrest is diminished. Bearing these considerations in mind, and recognizing that the deterrent value of the Fourth Amendment exclusionary rule is limited to certain kinds of police conduct, the following general categories can be identified.

Those most readily identifiable are on the extremes: the flagrantly abusive violation of Fourth Amendment rights, on the one hand, and "technical" Fourth Amendment violations, on the other. In my view, these extremes call for significantly different judicial responses.

I would require the clearest indication of attenuation in cases in which official conduct was flagrantly abusive of Fourth Amendment rights. If, for example, the fac-

tors relied on by the police in determining to make the arrest were so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or if the evidence clearly suggested that the arrest was effectuated as a pretext for collateral objectives, cf. *United States* v. *Robinson,* 414 U. S. 218, 237, 238 n. 2 (1973) (POWELL, J., concurring), or the physical circumstances of the arrest unnecessarily intrusive on personal privacy, I would consider the equalizing potential of *Miranda* warnings rarely sufficient to dissipate the taint. In such cases the deterrent value of the exclusionary rule is most likely to be effective, and the corresponding mandate to preserve judicial integrity, see *United States* v. *Peltier, ante,* p. 531; *Michigan* v. *Tucker,* 417 U. S. 433, 450 n. 25 (1974), most clearly demands that the fruits of official misconduct be denied. I thus would require some demonstrably effective break in the chain of events leading from the illegal arrest to the statement, such as actual consultation with counsel or the accused's presentation before a magistrate for a determination of probable cause, before the taint can be deemed removed, see *Gerstein* v. *Pugh,* 420 U. S. 103 (1975); cf. *Johnson* v. *Louisiana,* 406 U. S. 356, 365 (1972); *Parker* v. *North Carolina,* 397 U. S. 790, 796 (1970).

At the opposite end of the spectrum lie "technical" violations of Fourth Amendment rights where, for example, officers in good faith arrest an individual in reliance on a warrant later invalidated [3] or pursuant to a statute that subsequently is declared unconstitutional, see *United States* v. *Kilgen,* 445 F. 2d 287 (CA5

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[3] I note that this resolution might have the added benefit of encouraging the police to seek a warrant whenever possible. Cf. *Gerstein* v. *Pugh,* 420 U. S. 103, 113 (1975), and sources cited therein.

1971). As we noted in *Michigan* v. *Tucker, supra,* at 447: "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." In cases in which this underlying premise is lacking, the deterrence rationale of the exclusionary rule does not obtain, and I can see no legitimate justification for depriving the prosecution of reliable and probative evidence. Thus, with the exception of statements given in the immediate circumstances of the illegal arrest—a constraint I think is imposed by existing exclusionary-rule law—I would not require more than proof that effective *Miranda* warnings were given and that the ensuing statement was voluntary in the Fifth Amendment sense. Absent aggravating circumstances, I would consider a statement given at the station house after one has been advised of *Miranda* rights to be sufficiently removed from the immediate circumstances of the illegal arrest to justify its admission at trial.

Between these extremes lies a wide range of situations that defy ready categorization, and I will not attempt to embellish on the factors set forth in the Court's opinion other than to emphasize that the *Wong Sun* inquiry always should be conducted with the deterrent purpose of the Fourth Amendment exclusionary rule sharply in focus. See ALI Model Code of Pre-Arraignment Procedure, Art. 150, p. 54 *et seq.* and Commentary thereon, p. 375 *et seq.* (Prop. Off. Draft 1975). And, in view of the inevitably fact-specific nature of the inquiry, we must place primary reliance on the "learning, good sense, fairness and courage" of judges who must make the determination in the first instance. *Nardone* v. *United States,* 308 U. S. 338, 342 (1939). See *ante,* at 604 n. 10.

C

On the facts of record as I view them, it is possible that the police may have believed reasonably that there was probable cause for petitioner's arrest. Although the trial court conducted hearings on petitioner's motion to suppress and received his testimony and that of the arresting officers, its inquiry focused on determining whether petitioner's statements were preceded by adequate *Miranda* warnings and were made voluntarily. The court did not inquire into the possible justification, actual or perceived, for the arrest. Indeed, numerous questions addressed to the circumstances of the arrest elicited the State's objection, which was sustained. App. 14–15. The Illinois Supreme Court's consideration of the factual basis for its ruling similarly failed to focus on these relevant issues or to rest in any meaningful sense on the factors set forth in the Court's opinion today. After determining that the officers lacked probable cause for petitioner's arrest, the Illinois court concluded simply that examination of the record persuaded it that "the giving of *Miranda* warnings . . . served to break the causal connection between the illegal arrest and the giving of the statements." 56 Ill. 2d 312, 317, 307 N. E. 2d 356, 358 (1974).

I am not able to conclude on this record that the officers arrested petitioner solely for the purpose of questioning, *ante,* at 605; see also *ante,* at 606 (WHITE, J., concurring in judgment). To be sure, there is evidence suggesting, as the Court notes, an investigatory arrest. The strongest evidence on that point is the inconclusive testimony by the arresting officers themselves. But the evidence is conflicting. Responding to questions as to what they told petitioner upon his arrest, the officers testified he was advised that the arrest was for investigation of murder. Responding to more pointed questions,

however, one of the arresting officers stated that he informed petitioner that he was being arrested for murder. See App. 16.[4]

Moreover, other evidence of record indicates that the police may well have believed that probable cause existed to think that petitioner committed the crime of which he ultimately was convicted. As the opinion of the Illinois Supreme Court reveals, petitioner had been identified as an acquaintance of the deceased, and the police had been told that petitioner was seen in the building where the deceased lived on the day of the murder. 56 Ill. 2d, at 315, 307 N. E. 2d, at 357. It is also plain that the investigation had begun to focus on petitioner. For example, the police had gone to the trouble of obtaining a bullet that petitioner had fired in an unrelated incident for the purpose of comparing it with the bullets that killed the victim. App. 20. The officers also obtained petitioner's photograph prior to seeking him out, and the circumstances of petitioner's arrest indicate that their suspicions of him were quite pronounced.

The trial court made no determination as to whether probable cause existed for petitioner's arrest.[5] The Illi-

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[4] The majority of the statements cited by the Court are the officers' responses to questions inquiring as to what the officers *told* petitioner upon arresting him and thus are only indirectly relevant to the issue whether the officers might reasonably have thought they then had sufficient evidence to support a probable-cause determination. Moreover, as noted above, that evidence is contradictory. In only two instances during the trial did the inquiry relate more directly to whether the officers arrested petitioner for questioning. App. 83, 94. The officers' responses to those questions tend to support the Court's conclusion. In view of the weight of the contrary evidence, however, I think that the matter should be considered in the first instance by the state courts.

[5] Petitioner's motion to suppress alleged that the police lacked reasonable grounds for believing that he committed a crime. But

nois Supreme Court resolved that issue, but did not consider whether the officers might reasonably, albeit erroneously, have thought that probable cause existed. Rather than decide those matters for the first time at this level, I think it preferable to allow the state courts to reconsider the case under the general guidelines expressed in today's opinions.[6] I therefore would remand for reconsideration [7] with directions to conduct such further fac-

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the testimony at the hearing focused primarily on the issue of the adequacy of the *Miranda* warnings and the voluntariness of petitioner's statements. At the close of the hearing the trial court ruled, without elaboration or findings of fact, that the statements were admissible. *Id.*, at 65. Conceivably the trial court thought that probable cause existed to support the arrest. The State argued this point unsuccessfully on appeal. Equally possible, the trial court might have determined that the probable-cause issue was a close one and that, viewing the totality of the circumstances with that fact in mind, the statement should be admitted.

[6] The Solicitor General has filed a memorandum as *amicus curiae* in which he urges the Court to remand the case for further factual hearings, cf. *Morales* v. *New York*, 396 U. S. 102 (1969). I concur in the Court's rejection of this suggestion, agreeing that the record is adequate to allow us to rule on the major issue—whether advice of *Miranda* rights constitutes a *per se* attenuation of the taint of an illegal arrest in all cases. I do not agree, however, that the record is adequate for the Court to rule, in addition, that there was insufficient attenuation of taint in this case.

[7] Petitioner's second statement, corroborative of the first, was given more than six hours after his arrest and some five hours after the initial statement. During this time petitioner—cooperating with the police—had made two trips away from the police headquarters in search of Claggett, whom he had identified as his confederate in the murder. This second statement was given to an assistant state's attorney who again had informed petitioner of his *Miranda* rights. The Court deems this statement to be the fruit of the first one and thus excludable along with it.

I also would leave the question of admissibility of this statement to the lower Illinois courts. Of course, if the first statement were ruled admissible under the general guidelines articulated in today's

tual inquiries as may be necessary to resolve the admissibility issue.

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opinion, it would follow that the second statement also would be admissible. In any event, the question whether there was sufficient attenuation between the first and second statements to render the second admissible in spite of the inadmissibility of the first presents a factual issue which, like the factual issue underlying the possible admissibility of the first statement, has not been passed on by the state courts.

IVAN ALLEN CO. v. UNITED STATES

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

No. 74-22. Argued April 14-15, 1975—Decided June 26, 1975

In determining the applicability of § 533 (a) of the Internal Revenue Code of 1954—which provides a rebuttable presumption that a corporation that has accumulated earnings "beyond the reasonable needs of the business" did so with "the purpose to avoid the income tax with respect to shareholders"—listed and readily marketable securities owned by the corporation and purchased out of its earnings and profits, are to be taken into account, not at their cost to the corporation, but at their net liquidation value. Pp. 624-635.

493 F. 2d 426, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and REHNQUIST, JJ., joined. POWELL, J., filed a dissenting opinion, in which DOUGLAS and STEWART, JJ., joined, *post,* p. 635.

Kirk McAlpin argued the cause for petitioner. With him on the briefs were *Herschel M. Bloom* and *Michael C. Russ.*

Assistant Attorney General Crampton argued the cause for the United States. With him on the brief were *Solicitor General Bork, Stuart A. Smith,* and *Elmer J. Kelsey.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Sections 531-537, inclusive, of the Internal Revenue Code of 1954, as amended, 26 U. S. C. §§ 531-537, con-

**Carolyn E. Agger, Walter J. Rockler,* and *John S. McDaniel, Jr.,* filed a brief for American Trading and Production Corp. as *amicus curiae.*

stitute Part I of subchapter G of the Income Tax Subtitle. These sections subject most corporations to an "accumulated earnings tax." Section 531 [1] imposes the tax upon the "accumulated taxable income" of every corporation that, as § 532 (a) states,[2] is "formed or availed of for the purpose of avoiding the income tax with respect to its shareholders . . . by permitting earnings and profits to accumulate instead of being divided or distributed." And § 533 (a) [3] provides that "the fact that the earnings and profits . . . are permitted to accumulate beyond the reasonable needs of the business shall be determinative of the purpose to avoid the income tax with respect to shareholders, unless the corporation

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[1] "§ 531. Imposition of accumulated earnings tax.

"In addition to other taxes imposed by this chapter, there is hereby imposed for each taxable year on the accumulated taxable income (as defined in section 535) of every corporation described in section 532, an accumulated earnings tax equal to the sum of—

"(1) 27½ percent of the accumulated taxable income not in excess of $100,000, plus

"(2) 38½ percent of the accumulated taxable income in excess of $100,000."

[2] "§ 532. Corporations subject to accumulated earnings tax.

"(a) General rule.

"The accumulated earnings tax imposed by section 531 shall apply to every corporation (other than those described in subsection (b)) formed or availed of for the purpose of avoiding the income tax with respect to its shareholders or the shareholders of any other corporation, by permitting earnings and profits to accumulate instead of being divided or distributed."

[3] "§ 533. Evidence of purpose to avoid income tax.

"(a) Unreasonable accumulation determinative of purpose.

"For purposes of section 532, the fact that the earnings and profits of a corporation are permitted to accumulate beyond the reasonable needs of the business shall be determinative of the purpose to avoid the income tax with respect to shareholders, unless the corporation by the preponderance of the evidence shall prove to the contrary."

by the preponderance of the evidence shall prove to the contrary."[4]

The issue here is whether, in determining the application of § 533 (a), listed and readily marketable securities owned by the corporation and purchased out of its earnings and profits, are to be taken into account at their cost to the corporation or at their net liquidation value, that is, fair market value less the expenses of, and taxes resulting from, their conversion into cash.

I

The pertinent facts are admitted by the pleadings or are stipulated:

The petitioner, Ivan Allen Company (the taxpayer), is a Georgia corporation incorporated in 1902 and actively engaged in the business of selling office furniture, equipment, and supplies in the metropolitan Atlanta area. It files its federal income tax returns on the accrual basis and for the fiscal year ended June 30.

For its fiscal years 1965 and 1966, the taxpayer paid in due course the federal corporation income taxes shown on its returns as filed. Taxable income so reported was $341,045.82 for 1965 and $629,512.19 for 1966. App. 59, 84. During fiscal 1965 the taxpayer paid dividends consisting of cash in the amount of $48,945.30 and 870 shares

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[4] In a proceeding before the United States Tax Court, § 534 allows the taxpayer to shift the burden of proof to the Commissioner of Internal Revenue. Section 535 defines "accumulated taxable income" to mean the corporation's taxable income adjusted as specified; a credit is given for "such part of the earnings and profits for the taxable year as are retained for the reasonable needs of the business," with a minimum "lifetime" credit of $100,000 ($150,000 for taxable years beginning after December 31, 1974, Pub. L. 94-12, § 304, 89 Stat. 45, 26 U. S. C. § 535 (c)(2) (1970 ed., Supp. IV). Finally, § 537 provides that the term "reasonable needs of the business" includes "the reasonably anticipated needs of the business."

of Xerox Corporation common that had been carried on its books at a cost of $6,564.34. During fiscal 1966 the taxpayer paid cash dividends of $50,267.49; it also declared a 10% stock dividend. *Id.,* at 56. The dividends paid were substantially less than taxable income less federal income taxes for those years.

Throughout fiscal 1965 and 1966, the taxpayer owned various listed and unlisted marketable securities. Prominent among these were listed shares of common stock and listed convertible debentures of Xerox Corporation that, in prior years, had been purchased out of earnings and profits. Specifically, on June 30, 1965, the corporation owned 11,140 shares of Xerox common, with a cost of $116,701 and a then fair market value of $1,573,525, and $30,600 Xerox convertible debentures, with a cost to it of $30,625 and a then fair market value of $48,424. On June 30, 1966, the corporation owned 10,090 shares of Xerox common, with a cost of $102,479 and a then fair market value of $2,479,617, and the same $30,600 convertible debentures, with their cost of $30,625 and a then fair market value of $69,768. *Id.,* at 55.

According to its returns as filed, the taxpayer's undistributed earnings as of June 30, 1965, and June 30, 1966, were $2,200,184.77 and $2,360,146.52, respectively. *Id.,* at 70, 91. The taxpayer points out that the marketable portfolio assets represented an investment, as measured by cost, of less than 7% of its undistributed earnings and of less than 5% of its total assets. Brief for Petitioner 4.

It is also apparent, however, that the Xerox debentures and common shares had proved to be an extraordinarily profitable investment, although, of course, because these securities continued to be retained, the gains thereon were unrealized for federal income tax purposes. The debentures had increased in fair market value more than 50% over cost by the end of June 1965,

and more than 100% over cost one year later; the common shares had increased in fair market value more than 13 times their cost by June 30, 1965, and more than 24 times their cost by June 30, 1966.

Throughout fiscal 1965 and 1966 the taxpayer's two major shareholders, Ivan Allen, Sr., and Ivan Allen, Jr., respectively owned 31.20% and 45.46% of the taxpayer's outstanding voting stock. App. 78, 104.

Following an examination of the taxpayer's federal income tax returns for fiscal 1965 and 1966, the Commissioner of Internal Revenue determined that the taxpayer had permitted its earnings and profits for each of those years to accumulate beyond the reasonable and reasonably anticipated needs of its business, and that one of the purposes of the accumulation for each year was to avoid income tax with respect to its shareholders. Based upon this determination, the Commissioner assessed against the corporation accumulated earnings taxes of $77,383.98 and $73,131.87 for 1965 and 1966, respectively.

The taxpayer paid these taxes and thereafter timely filed claims for refund. The claims were not allowed, and the taxpayer then instituted this refund suit in the United States District Court for the Northern District of Georgia.

It is agreed that the taxpayer had reasonable business needs for operating capital amounting to $1,198,309 and $1,455,222 at the close of fiscal 1965 and fiscal 1966, respectively. *Id.*, at 56. It is stipulated, in particular, that if the taxpayer's marketable securities are to be taken into account at *cost,* its net liquid assets (current assets less current liabilities), at the end of each of those taxable years, and fully available for use in its business, were then exactly equal to its reasonable business needs for operating capital, that is, the above-stated figures of $1,198,309 and $1,455,222. It would follow, accordingly,

that the earnings and profits of the two taxable years had *not* been permitted to accumulate beyond the taxpayer's reasonable and reasonably anticipated business needs, within the meaning of § 533 (a), App. 57, and no accumulated earnings taxes were incurred. It is still further stipulated, however, that if the taxpayer's marketable securities are to be taken into account at *fair market value* (less the cost of converting them into cash), as of the ends of those fiscal years,[5] the taxpayer's net liquid assets would then be $2,235,029 and $3,152,009, respectively. *Id.*, at 56. From this it would follow that the earnings and profits of the two taxable years *had* been permitted to accumulate beyond the taxpayer's reasonable and reasonably anticipated business needs. Then, if those accumulations had been for "the purpose of avoiding the income tax with respect to its shareholders," under § 532 (a), accumulated earnings taxes would be incurred.

The issue, therefore, is clear and precise: whether, for purposes of applying § 533 (a), the taxpayer's readily marketable securities should be taken into account at cost, as the taxpayer contends, or at net liquidation value, as the Government contends.

The District Court held that the taxpayer's readily marketable securities were to be taken into account at cost. Accordingly, it entered judgment for the petitioner-taxpayer. 349 F. Supp. 1075 (1972). The court observed:

"Corporate taxpayers should not be penalized for

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[5] It is stipulated that the cost of converting the taxpayer's marketable securities into cash would have been the sum of a maximum of 6% of the fair market value of the securities (payable as a brokerage commission) and a maximum of 25% of such amount of the fair market value as exceeds the sum of the brokerage commission and the cost of the securities (payable as capital gains taxes). App. 55.

wise investments; they should be allowed to maximize their capital gains tax advantages in accordance with internal business policies and stock market conditions rather than being forced to sell securities which may have a high value on an arbitrarily selected date merely because the unrealized fair market value of the securities on that date would trigger the accumulated earnings tax." *Id.*, at 1077. (Footnote omitted.)

The United States Court of Appeals for the Fifth Circuit reversed. 493 F. 2d 426 (1974). It observed:

> "[T]he securities involved in the case at bar are of such a highly liquid character as to be readily available for business needs that might arise. Thus the appreciated value of these securities should be taken into account when determining whether the corporation has accumulated profits in excess of reasonable business needs.
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> . . . . .
>
> "This decision does not force the corporation to liquidate these securities at any time when a sale would be financially unwise, but only compels the corporation to comply with the proscriptions of the Code and refrain from accumulating excessive earnings and profits." *Id.*, at 428.

The case was remanded, as the parties had agreed, App. 57–58, "for the additional factual determination [under § 532 (a)] of whether one purpose for the accumulation was to avoid income tax on behalf of the shareholders." 493 F. 2d, at 428.

Because this conclusion was claimed by the taxpayer to conflict in principle with *American Trading & Production Corp.* v. *United States*, 362 F. Supp. 801 (Md. 1972), aff'd without published opinion, 474 F. 2d 1341 (CA4

1973),[6] and because of the importance of the issue in the administration of the accumulated earnings tax, we granted certiorari. 419 U. S. 1067 (1974).

II

Under our system of income taxation, corporate earnings are subject to tax at two levels. First, there is the tax imposed upon the income of the corporation. Second, when the corporation, by way of a dividend, distributes its earnings to its shareholders, the distribution is subject to the tax imposed upon the income of the shareholders. Because of the disparity between the corporate tax rates and the higher gradations of the rates on individuals,[7] a corporation may be utilized to reduce significantly its shareholders' overall tax liability by accumulating earnings beyond the reasonable needs of the business. Without some method to force the distribution of unneeded corporate earnings, a controlling shareholder would be able to postpone the full impact of income taxes on his share of the corporation's earnings in excess of its needs. See B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders ¶ 8.01 (3d ed. 1971); B. Wolfman, Federal Income Taxation of Business Enterprise 864 (1971).

In order to foreclose this possibility of using the corporation as a means of avoiding the income tax on dividends to the shareholders, every Revenue Act since the adoption of the Sixteenth Amendment in 1913 has imposed a tax

[6] American Trading and Production Corporation, pursuant to our Rule 42, was granted permission to file a brief as *amicus curiae* in the present case. It asserts that no conflict exists between the decisions in this case and in its own case.

[7] The income tax rates for a corporation are 22% of the first $25,000 of taxable income and 48% of the excess over $25,000. § 11 of the 1954 Code, 26 U. S. C. § 11. The graduated rates for an individual taxpayer range from 14% to 70%. § 1, 26 U. S. C. § 1.

upon unnecessary accumulations of corporate earnings effected for the purpose of insulating shareholders.[8]

The Court has acknowledged the obvious purpose of the accumulation provisions of the successive Acts:

> "As the theory of the revenue acts has been to tax corporate profits to the corporation, and their receipt

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[8] The accumulated earnings tax originated in § II A, Subdivision 2, of the Tariff Act of October 3, 1913, 38 Stat. 166. This imposed a tax on the shareholders of a corporation "formed or fraudulently availed of for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed." Accumulations "beyond the reasonable needs of the business shall be prima facie evidence of a fraudulent purpose to escape such tax." *Id.*, at 167. The same provision appeared as § 3 of the Revenue Act of 1916, 39 Stat. 758, and again as § 220 of the Revenue Act of 1918, 40 Stat. 1072 (1919), except that in the 1918 Act the word "fraudulently" was deleted. This change was effected inasmuch as the Senate felt that the former phraseology "has proved to be of little value, because it was necessary to its application that intended fraud on the revenue be established in each case." S. Rep. No. 617, 65th Cong., 3d Sess., 5 (1918).

This pattern of tax on the shareholders was changed with the Revenue Act of 1921, § 220, 42 Stat. 247. The incidence of the tax was shifted from the shareholders to the corporation itself. Judge Learned Hand opined that the change was due to doubts "as to the validity of taxing income which the taxpayers had never received, and in 1921 it was thought safer to tax the company itself." *United Business Corp.* v. *Commissioner*, 62 F. 2d 754, 756 (CA2), cert. denied, 290 U. S. 635 (1933).

Although the statutory language has varied somewhat from time to time, the income tax law, since the change effected by the Revenue Act of 1921, consistently has imposed the tax on the corporation, rather than upon the shareholders. Revenue Act of 1924, § 220, 43 Stat. 277; Revenue Act of 1926, § 220, 44 Stat. 34; Revenue Act of 1928, § 104, 45 Stat. 814; Revenue Act of 1932, § 104, 47 Stat. 195; Revenue Act of 1934, § 102, 48 Stat. 702; Revenue Act of 1936, § 102, 49 Stat. 1676; Revenue Act of 1938, § 102, 52 Stat. 483; Internal Revenue Code of 1939, § 102.

> only when distributed to the stockholders, the purpose of the legislation is to compel the company to distribute any profits not needed for the conduct of its business so that, when so distributed, individual stockholders will become liable not only for normal but for surtax on the dividends received." *Helvering* v. *Chicago Stock Yards Co.*, 318 U. S. 693, 699 (1943).

This was reaffirmed in *United States* v. *Donruss Co.*, 393 U. S. 297, 303 (1969).

It is to be noted that the focus and impositions of the accumulated earnings tax are upon "accumulated taxable income," § 531. This is defined in § 535 (a) to mean the corporation's "taxable income," as adjusted. The adjustments consist of the various items described in § 535 (b), including federal income tax, the deduction for dividends paid, defined in § 561, and the accumulated earnings credit defined in § 535 (c). The adjustments prescribed by §§ 535 (a) and (b) are designed generally to assure that a corporation's "accumulated taxable income" reflects more accurately than "taxable income" the amount actually available to the corporation for business purposes. This explains the deductions for dividends paid and for federal income taxes; neither of these enters into the computation of taxable income. Obviously, dividends paid and federal income taxes deplete corporate resources and must be recognized if the corporation's economic condition is to be properly perceived. Conversely, § 535 (b) (3) disallows, for example, the deduction, available to a corporation for income tax purposes under § 243, on account of dividends received; dividends received are freely available for use in the corporation's business.

The purport of the accumulated earnings tax structure established by §§ 531–537, therefore, is to determine the

corporation's true economic condition before its liability for tax upon "accumulated taxable income" is determined. The tax, although a penalty and therefore to be strictly construed, *Commissioner* v. *Acker,* 361 U. S. 87, 91 (1959), is directed at economic reality.

It is important to emphasize that we are concerned here with a tax on "accumulated taxable income," § 531, and that the tax attaches only when a corporation has permitted "earnings and profits to accumulate instead of being divided or distributed," § 532 (a). What is essential is that there be "income" and "earnings and profits." This at once eliminates, from the measure of the tax itself, any unrealized appreciation in the value of the taxpayer's portfolio securities over cost, for any such unrealized appreciation does not enter into the computation of the corporation's "income" and "earnings and profits."

The corporation's readily marketable portfolio securities and their unrealized appreciation, nonetheless, are of profound importance in making the entirely discrete determination whether the corporation has permitted what, concededly, are earnings and profits to accumulate beyond its reasonable business needs. If the securities, as here, are readily available as liquid assets, then the recognized earnings and profits that have been accumulated may well have been unnecessarily accumulated, so far as the reasonable needs of the business are concerned. On the other hand, if those portfolio securities are not liquid and are not readily available for the needs of the business, the accumulation of earnings and profits may be viewed in a different light. Upon this analysis, not only is such accumulation as has taken place important, but the liquidity otherwise available to the corporation is highly significant. In any event—and we repeat—the tax is directed at the accumulated taxable income and

at earnings and profits. The tax itself is not directed at the unrealized appreciation of the liquid assets in the securities portfolio. The latter becomes important only in measuring reasonableness of accumulation of the earnings and profits that otherwise independently exist. What we look at, then, in order to determine its reasonableness or unreasonableness, in the light of the needs of the business, is any failure on the part of the corporation to distribute the earnings and profits it has.

Accumulation beyond the reasonable needs of the business, by the language of § 533 (a), is "determinative of the purpose" to avoid tax with respect to shareholders unless the corporation proves the contrary by a preponderance of the evidence. The burden of proof, thus, is on the taxpayer. A rebuttable presumption is statutorily imposed. To be sure, we deal here, in a sense, with a state of mind. But it has been said that the statute, without the support of the presumption, would "be practically unenforceable . . . ." *United Business Corp.* v. *Commissioner,* 62 F. 2d 754, 755 (CA2), cert. denied, 290 U. S. 635 (1933). What is required, then, is a comparison of accumulated earnings and profits with "the reasonable needs of the business." Business *needs* are critical. And need, plainly, to use mathematical terminology, is a function of a corporation's liquidity, that is, the amount of idle current assets at its disposal. The question, therefore, is not how much capital of all sorts, but how much in the way of quick or liquid assets, it is reasonable to keep on hand for the business. *United Block Co.* v. *Helvering,* 123 F. 2d 704, 705 (CA2 1941), cert. denied, 315 U. S. 812 (1942); *Smoot Sand & Gravel Corp.* v. *Commissioner,* 274 F. 2d 495, 501 (CA4), cert. denied, 362 U. S. 976 (1960) (liquid assets provide "a strong indication" of the purpose of the accumulation); *Electric Regulator*

Corp. v. *Commissioner,* 336 F. 2d 339, 344 (CA2 1964); *Novelart Mfg. Co.* v. *Commissioner,* 52 T. C. 794, 806 (1969), aff'd, 434 F. 2d 1011 (CA6 1970), cert. denied, 403 U. S. 918 (1971); *John P. Scripps Newspapers* v. *Commissioner,* 44 T. C. 453, 467 (1965).[9]

The taxpayer itself recognizes, and accepts, the liquidity concept as a basic factor, for it "has agreed that the full amount of its realized earnings invested in its liquid assets—their cost—should be taken into account in determining the applicability of Section 533 (a)." Brief for Petitioner 15. It concedes that if this were not so, "the tax could be avoided by any form of investment of earnings and profits." Reply Brief for Petitioner 5. But the taxpayer would stop at the point of cost and, when it does so, is compelled to compare earnings and profits—not the amount of readily available liquid assets, net—with reasonable business needs.

We disagree with the taxpayer and conclude that cost is not the stopping point; that the application of the accumulated earnings tax, in a given case, may well depend on whether the corporation has available readily marketable portfolio securities; and that the proper measure of those securities, for purposes of the tax, is their net realizable value. Cost of the marketable securities on the assets side of the corporation's balance sheet would appear to be largely an irrelevant gauge of the taxpayer's true financial condition.[10] Certainly, a

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[9] In this case we are concerned only with readily marketable securities. We express no view with respect to items of a different kind, such as inventory or accounts receivable.

[10] "The tax should be administered with its purpose in mind at all times, *i. e.*, to prevent accumulations of income by the corporation for the purpose of avoiding the income tax ordinarily incident to the shareholders. It is not intended to serve as an obstacle to sound profit-oriented corporate management. The ultimate goal

lender would not evaluate a potential borrower's marketable securities at cost. Realistic financial condition is the focus of the lender's inquiry. It also must be the focus of the Commissioner's inquiry in determining the applicability of the accumulated earnings tax.[11]

This taxpayer's securities, being liquid and readily marketable, clearly were available for the business needs of the corporation, and their fair market value, net, was such that, according to the stipulation, the taxpayer's undistributed earnings and profits for the two fiscal years in question were permitted to accumulate beyond the reasonable and reasonably anticipated needs of the business.

III

Bearing directly upon the issue before us is *Helvering* v. *National Grocery Co.,* 304 U. S. 282 (1938). There the fact situation was the reverse of the present case inasmuch as that taxpayer corporation had unrealized *losses* in the value of marketable securities it was continuing to hold. After the Court upheld the accumulated earnings tax against constitutional attack, *id.,* at

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must be to administer the tax fairly, in light of the *total* economic reality of the corporation. Valuing liquid assets at cost invariably produces a poor and inaccurate picture of the corporate financial position. Adjusted fair market value may have shortcomings of its own, but it does, undeniably, come much closer to furthering the intent of the accumulated earnings tax." Note, Accumulated Earnings Tax: Should Marketable Securities be Valued at Cost or at Fair Market Value in Determining the Reasonableness of Further Accumulations of Income?, 40 Brooklyn L. Rev. 192, 209–210 (1973).

[11] We see little force in any observation that our emphasis on liquid assets means that a corporate taxpayer may avoid the accumulated earnings tax by merely investing in nonliquid assets. If such a step, in a given case, amounted to willful evasion of the accumulated earnings tax, it would be subject to criminal penalties. See, *e. g.,* § 7201 of the 1954 Code, 26 U. S. C. § 7201.

286–290, it observed: "Depreciation in any of the assets is evidence to be considered by the Commissioner and the Board [of Tax Appeals] in determining the issue of fact whether the accumulation of profits was in excess of the reasonable needs of the business." *Id.*, at 291. It went on to hold, however, that such depreciation "does not, as matter of law, preclude a finding that the accumulation of the year's profits was in excess of the reasonable needs of the business." *Ibid.* Indeed, the Court held that the evidence supported the Board's finding that the accumulation of surplus by the taxpayer was to enable its sole shareholder to escape surtaxes. It focused on bonds and stocks held by the corporation, described them as in no way related to the business, and concluded that "there was no need of accumulating any part of the year's earnings for the purpose of financing the business." *Id.*, at 291–292. That language forecloses the present taxpayer's case.

The precedent of *National Grocery* has been applied in accumulated earnings tax cases, with courts taking into account the fair market value of liquid, appreciated securities. *Battelstein Investment Co.* v. *United States,* 442 F. 2d 87, 89 (CA5 1971); *Cheyenne Newspapers, Inc.* v. *Commissioner,* 494 F. 2d 429, 434–435 (CA10 1974); *Henry Van Hummell, Inc.* v. *Commissioner,* 23 T. C. M. 1765, 1779 (1964), aff'd, 364 F. 2d 746 (CA10 1966), cert. denied, 386 U. S. 956 (1967); *Golconda Mining Corp.* v. *Commissioner,* 58 T. C. 139, supplemental opinion, 58 T. C. 736, 737–739 (1972), rev'd on other grounds, 507 F. 2d 594 (CA9 1974); *Ready Paving & Constr. Co.* v. *Commissioner,* 61 T. C. 826, 840–841 (1974). But see *Harry A. Koch Co.* v. *Vinal,* 228 F. Supp. 782, 784 (Neb. 1964).

American Trading & Production Corp. v. *United States,* 362 F. Supp. 801 (Md. 1972), aff'd without pub-

lished opinion, 474 F. 2d 1341 (CA4 1973), which the taxpayer continues to assert is in conflict with the present case, deserves mention. The taxpayer there had accumulated earnings and profits of something less than $10 million. Its anticipated business needs were about $12 million. But it owned stocks, primarily oil shares, having a total cost of $5,593,319 and an aggregate current market value in excess of $100 million. The District Court excluded these stocks in making its determination whether earnings had accumulated in excess of reasonable business needs. It did so on several grounds: that the shares constituted "original capital," a term the court used in the sense that the stocks "were properly held and retained as an integral part of [the taxpayer's] business and were utilized . . . as a base for borrowings for the needs of other parts of its business," 362 F. Supp., at 810; that the statute was not intended to require the conversion of assets of that kind into cash in order to meet business needs, even though that capital "has explosively increased in value," *id.*, at 808; and that "there was substantial evidence" that the stocks "were not readily saleable," *id.*, at 809.

Whatever may be the merit or demerit of the other grounds asserted by the District Court in *American Trading*—and we express no view thereon—we are satisfied that the court's determination as to the absence of ready salability, under all the circumstances, provides a sufficient point of distinction of that case from this one, so that it provides meager, if any, contrary precedent of substance to our conclusion here.

IV

The arguments advanced by the taxpayer do not persuade us:

1. The taxpayer, of course, quite correctly insists that

unrealized appreciation of portfolio securities does not enter into the determination of "earnings and profits," within the meaning of § 533 (a). As noted above, we agree. The Government does not contend otherwise. It does not follow, however, that unrealized appreciation is never to be taken into account for purposes of the accumulated earnings tax.

As has been pointed out, the tax is imposed only upon accumulated taxable income, and this is defined to mean taxable income as adjusted by factors that have been described. The question is not whether unrealized appreciation enters into the determination of earnings and profits, which it does not, but whether the accumulated taxable income, in the determination of which earnings and profits have entered, justifiably may be retained rather than distributed as dividends. The tax focuses, therefore, on current income and its retention or distribution. If the corporation has freely available liquid assets in excess of its reasonable business needs, then accumulation of taxable income may be unreasonable and the tax may attach. Utilizable availability of the portfolio assets is measured realistically only at net realizable value. The fact that this value is not included in earnings and profits does not foreclose its being considered in determining whether the corporation is subject to the accumulated earnings tax.

2. We see nothing in the "realization of income" concept of *Eisner* v. *Macomber,* 252 U. S. 189 (1920), that has significance for the issue presently under consideration. There the Court held that a dividend of common shares issued by a corporation having only common outstanding was not includable in the shareholder's gross income for income tax purposes. The decision may have prompted the shift, noted above and effected by the Revenue Act of 1921, of the incidence of the accumulated

earnings tax from the shareholders to the corporation. The case also emphasizes the realization of income with respect to a tax on the shareholder. We note again, however, that the accumulated earnings tax is not on unrealized appreciation of the portfolio securities. It rests upon, and only upon, the corporation's current taxable income adjusted to constitute "accumulated taxable income."

3. The taxpayer also argues that the effect of the Court of Appeals decision is to force the taxpayer to convert its appreciated assets in order to meet its business needs. It suggests that management should be entitled to finance business needs without resorting to unrealized appreciation. The argument, plainly, goes too far. On the taxpayer's own theory that marketable securities may be taken into account at their cost, a situation easily may be imagined where some conversion into cash becomes necessary, if the corporation is to avoid the accumulated earnings tax.

That our decision does not interfere with corporate management's exercise of sound business judgment, and that it does not amount to a dictation to management as to when appreciated assets are to be liquidated, was aptly answered by the Court of Appeals:

> "This decision does not force the corporation to liquidate these securities at any time when a sale would be financially unwise, but only compels the corporation to comply with the proscriptions of the Code and refrain from accumulating excessive earnings and profits. That taxpayer, as a consequence of its own sound judgment in making profitable investments, must sell, exchange or distribute to the shareholders assets in order to avoid an excessive accumulation of earnings and thus comply with the Code's

requirements is no justification for precluding its application." 493 F. 2d, at 428.

We might add that the existence of the Code's provisions for the accumulated earnings tax, of course, will affect management's decision. So, too, does the very existence of the corporate income tax itself. In this respect, the one is no more offensive than the other. Astute management in these tax-conscious days is not that helpless, and shrinkage, upon liquidation, of one-fourth of the appreciation hardly equates with loss. Such business decision as is necessitated was expressly intended by the Congress. All that is required is the disgorging, at the most, of the taxable year's "accumulated taxable income."

4. It is no answer to suggest that our decision here may conflict with standard accounting practice. The Court has not hesitated to apply congressional policy underlying a revenue statute even when it does conflict with an established accounting practice. See, *e. g., Schlude* v. *Commissioner,* 372 U. S. 128 (1963); *American Automobile Assn.* v. *United States,* 367 U. S. 687, 692–694 (1961). It is of some interest that the taxpayer itself, for the tax years under consideration, reflected the market value as well as the cost of its marketable securities on its balance sheets. App. 112, 118. This appears to be in line with presently accepted practice. See R. Kester, Advanced Accounting 117–118, 122–124 (4th ed. 1946).

The judgment of the Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE POWELL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART join, dissenting.

The Court's decision departs significantly from the relevant statutory language, creates a rule of additional

tax liability that places business management in a perilous position, and vests in the Internal Revenue Service an inappropriate degree of discretion in administering a punitive statute. I therefore dissent.

I

Petitioner, a corporation with 34 stockholders, is engaged in selling office supplies and equipment. In the late 1950's, because petitioner was a retail outlet for equipment of the Xerox Corp., it invested $147,000 of its earnings and profits in securities of Xerox. The market value of that investment increased substantially over the years, and by the end of petitioner's 1965 and 1966 tax years the unrealized market appreciation[1] of those securities approximated $1,475,000 and $2,416,000 respectively.[2] For the purpose of determining the applicability of the additional penalty tax liability under 26 U. S. C. § 531, the Commissioner valued these securities at their year-end market price. He thereupon assessed the tax here at issue.

The question is one of statutory construction: In determining whether a corporation has accumulated earnings and profits in excess of reasonable business needs within the meaning of 26 U. S. C. § 533 (a), are assets purchased with earnings and profits to be valued at the amount invested in them—their cost—or at their market

[1] Unrealized appreciation is the difference between the cost basis of a retained asset and its market or appraised value, where the latter exceeds cost.

[2] The cost basis for petitioner's Xerox securities for the 1966 tax year was some $14,000 less than for 1965, apparently reflecting the payment as a dividend of 870 shares of Xerox stock in 1965. The "appreciation" figures used herein come from Petitioner's Brief and vary somewhat from the figures used by the Government, but the differences are insignificant in the context of this case. Rounded figures are used throughout this opinion.

price,[3] which reflects both cost and unrealized appreciation? The question has not heretofore been decided by this Court and has been considered infrequently by other federal courts.

II

I address first the statutory language, which in my view is controlling. Section 531 imposes a tax "[i]n addition to other taxes imposed by this chapter . . . on the accumulated taxable income . . . of every corporation" identified by § 532. Section 532 makes the § 531 tax applicable to every corporation "formed or availed of for the purpose of avoiding the income tax with respect to its shareholders . . . by permitting earnings and profits to accumulate instead of being divided or distributed." If "the earnings and profits of a corporation are permitted to accumulate" beyond its reasonable needs, § 533 establishes a rebuttable presumption that the corporation is one "formed or availed of for the purpose of avoiding the income tax" and that it is therefore liable for the § 531 tax.

The central element of this statutory scheme is the unreasonable accumulation of earnings and profits beyond the corporation's reasonable needs. It is stipulated in this case that there is no unreasonable accumulation and no additional tax unless the unrealized appreciation of the Xerox securities is *added* to petitioner's actual accumulated earnings and profits (*i. e.*, to its earned sur-

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[3] The Court refers to net liquidation value, which reflects the asset's current market price less the costs and expenses attendant to its liquidation. The Court thus seeks to identify the sum that would be made available by a hypothetical sale of the asset in question, although nothing in the statute requires such a liquidation. For the purpose of discussion, I will refer simply to market value or market price.

plus account).[4] Under normal concepts of tax law and accounting the Government's position is therefore untenable on its face. Unrealized appreciation of assets is not considered in computing ordinary corporate or individual taxable income. Indeed, sound accounting practice requires that assets be recorded and carried at cost,[5] and this requirement is enforced with respect to filings with the Securities and Exchange Commission (SEC). Similarly, if assets of a corporation are distributed to shareholders "in kind," the company is credited for a dividend payment only on the basis of the cost of those assets, not their appreciated value.

In view of this unanimity of law and practice, what theory is devised by the Government and the Court today as justification for a different rule for this penalty tax? I look to the Court's opinion for the answer. It is conceded that "unrealized appreciation does not enter into the computation of the corporation's . . . [accumulated] 'earnings and profits.'" *Ante,* at 627. Neverthe-

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[4] There may be some ambiguity in the critical language stating the Court's theory of the case, *ante,* at 626, as to whether it intends the term "accumulated" to refer only to earnings and profits accumulated in the tax year in question or to all accumulated and undistributed earnings as shown by the corporation's earned surplus account. I assume the Court refers to the latter, as the statutory language and purpose contemplate consideration of the total accumulation in determining whether the retention of earnings and profits of a given year has been in excess of the amount justified by reasonable business needs.

[5] It is not unusual, of course, for a corporation also to show parenthetically on its balance sheet, or in a footnote thereto, the market price of assets when that figure can be ascertained readily. But unrealized appreciated value, whether based on market price or an appraisal of the asset, is normally not included in the sum of a corporation's assets or in its surplus account on the liability side of its balance sheet.

less, the Court holds that such appreciation "becomes important" and must be taken into account "in measuring [the] reasonableness" of such accumulation. *Ante,* at 628. In short, the Court construes the statute to mean that although unrealized appreciation is not includable in computing earnings and profits, it is includable in determining whether earnings and profits have been accumulated unreasonably.

The statute provides no basis whatever for this distinction. According to its own terms, selected with full knowledge of accepted tax and accounting principles, the penalty tax applies only if there is an unreasonable accumulation of *earnings and profits;* the statute contains no reference to the addition of unrealized appreciation to the accumulated earnings and profits which constitute the only basis for imposing the tax. Nor does the history or purpose of the statute support the "add on" of an unrealized increment of value conceded by the Court to be neither earnings nor profits. By authorizing this "add on," the Court's decision effectively converts the tax on excessive accumulation of earnings and profits to a tax on the retention of certain assets that appreciate in value. Although current accumulated taxable income remains the measure of the tax, its application in many cases will be controlled simply by the existence of unrealized appreciation in the value of these assets.

The purpose of the statute, as the Court states, is "to force the distribution of unneeded corporate earnings." *Ante,* at 624. Such a distribution is accomplished by the payment of dividends, which normally are declared and paid only out of current earnings or earned surplus, determined in accordance with sound accounting practice. Absent authorization in a statute or corporate charter, corporate directors who pay dividends from unrealized

appreciation risk personal liability at the suit of stockholders or injured creditors.[6]

III

The plain language of the Code resolves this case for me. But even if the statute could be thought ambigu-

[6] See 11 W. Fletcher, Cyclopedia of the Law of Private Corporations §§ 5329, 5329.1, 5335, 5335.1 (1971). Some States have statutes expressly prohibiting recognition of unrealized appreciation as a source upon which a corporation can rely in determining the amount of a dividend that legally can be paid. *E. g.*, Cal. Corp. Code §§ 1502, 1505 (1955); Ind. Ann. Stat. § 23-1-2-15 (a) (1972). Other States have statutes allowing limited recognition of unrealized appreciation. *E. g.*, Minn. Stat. § 301.22 (1) (1974) (a corporation may take into account appreciation of "securities having a readily ascertainable market value"; otherwise, unrealized appreciation may not be counted in computing earnings available for dividends); Ohio Rev. Code Ann. § 1701.33 (A) (Supp. 1974) (allows only share dividends to be paid from unrealized appreciation). The decisional law of States lacking precise statutory guidance generally prohibits reliance on unrealized appreciation. 11 W. Fletcher, *supra*, § 5335.1; H. Henn, Handbook of the Law of Corporations and Other Business Enterprises § 320, pp. 652-653 (1970).

Georgia's law follows the Model Business Corporation Act, allowing payment of cash or property dividends only out of earned surplus or current earnings. Ga. Code Ann. § 22-511 (a) (1) (1970); Model Bus. Corp. Act § 45 (a). Share dividends may be paid out of capital surplus on certain conditions, Ga. Code Ann. § 22-511 (a) (4); Model Bus. Corp. Act § 45 (d), and stricter conditions govern the declaration of cash or property dividends out of capital surplus. Ga. Code Ann. § 22-512; Model Bus. Corp. Act § 46. Commentators have suggested that under the Model Act a corporation could revalue its assets, creating capital surplus out of the unrealized appreciation, and then pay dividends out of the capital surplus, but that course of action is considered quite risky for the directors. Bugge, Unrealized Appreciation as a Source of Shareholder Distributions Under the Wisconsin Business Corporation Law, 1964 Wis. L. Rev. 292, 300-304, 312-313; Hackney, The Financial Provisions of the Model Business Corporation Act, 70 Harv. L. Rev.

ous on the point, the tax is, as the Court concedes, a "penalty and therefore [must] be strictly construed . . . ." *Ante,* at 627. See *Commissioner* v. *Acker,* 361 U. S. 87, 91 (1959). This means, at a minimum, that doubts and ambiguities must be resolved in favor of a fair and equitable construction that is as free from the hazards of uncertainty as the statutory language and purpose will allow. It seems to me that the Court's opinion ignores the meaning of this canon of construction. Rather than construe the statute narrowly, today's decision extends the presumptive reach of this tax beyond the language of the Code and creates a number of perplexing uncertainties.

Businesses normally are conducted, and management decisions made, on the basis of financial information that is maintained in accordance with sound accounting practice. The most elementary principle of accounting practice is that assets are recorded at cost. This is true with respect to the computation of earnings and profits, payment of ordinary corporate taxes, determination of dividend policy, and reporting to stockholders, the SEC, and other regulatory agencies. Corporate books and records are audited only on that basis. Whatever may be said for the Court's view of the "unreality" of adhering to the principles of sound accounting practice, *ante,* at 629–630, those principles are the best system yet devised for guiding management, informing shareholders, and determining tax liability. They have the not inconsiderable virtues of consistency, regularity, and certainty—virtues that also assure fairness and reasonable

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1357, 1377–1381 (1957). Under Georgia law, Ga. Code Ann. § 22–715 (c), as under the Model Act § 48, a director is not liable for an illegal dividend distribution if in computing the amount available for dividends he considers the corporate assets at their "book value."

predictability in the Commissioner's administration of this penalty tax.

The Court today abandons accounting principles confirmed by the wisdom of business experience and announces a new rule with far-reaching consequences. In my view, this rule will create uncertainty and open wide possibilities for unfairness.

A

Both taxpayers and the Government know what is meant by "cost basis," and a corporation's earned surplus account, which reflects accumulated earnings and profits from which dividends normally are paid, is an established accounting fact. There is no comparable certainty or dependability in the rule devised by the Court:

> "Cost of the marketable securities on the assets side of the corporation's balance sheet would appear to be largely an irrelevant gauge of the taxpayer's *true financial condition*. . . . *Realistic financial condition* is the focus . . . of the Commissioner's inquiry in determining the applicability of the accumulated earnings tax." *Ante*, at 629–630 (emphasis added).

In this case, involving marketable securities, the computation of the true value for purposes of the tax appears at first blush to present no serious problem of uncertainty. The Court simply equates market price at the end of the tax year with true value, and adds the resulting excess over cost to the book value of the securities. Apart from the questionable assumption that market quotations represent the true value of a retained common stock, the Court's new formulation poses perplexing definitional questions for management.

An initial uncertainty results from the Court's ambiguous use of the term "securities." As defined in the

Securities Act of 1933 and the Securities Exchange Act of 1934, the term is quite comprehensive.[7] Even so, its meaning is not always self-evident, as can be seen by examining some of the extensive litigation on this question. See, *e. g., 1050 Tenants Corp.* v. *Jakobson,* 503 F. 2d 1375 (CA2 1974); *SEC* v. *Glenn W. Turner Enterprises, Inc.,* 474 F. 2d 476 (CA9), cert. denied, 414 U. S. 821 (1973); *Lehigh Valley Trust Co.* v. *Central National Bank of Jacksonville,* 409 F. 2d 989 (CA5 1969).

In addition, uncertainties will arise in ascertaining whether the asset is sufficiently "readily marketable" to satisfy the Court's test. The Court attaches significance to whether the security is "listed" on a stock exchange. It is indeed true that the great majority of common stocks listed on the New York Stock Exchange are readily marketable, unless the number of shares to be sold is too large for the market to absorb. The same cannot be said, however, of all bonds listed on that Exchange. Moreover, there are other exchanges on which securities are listed and traded: the American Stock Exchange, over the counter, and scores of local exchanges. While many securities traded on these exchanges may be "readily marketable," perhaps the majority could not fairly be so characterized. In countless situations corporate management will be unable to determine, short of attempting to sell the security, whether it is "readily marketable" or not.

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[7] Among other things, the term "security" includes stocks, bonds, debentures, certificates of interest or participation in profit-sharing agreements, collateral trust certificates, investment contracts, voting-trust certificates, fractional undivided interests in oil, gas, or other mineral rights, or "in general, any interest or instrument commonly known as a 'security . . . .' " 48 Stat. 74, as amended, 15 U. S. C. § 77b (1); 48 Stat. 882, as amended, 15 U. S. C. § 78c (10). See *United Housing Foundation, Inc.* v. *Forman,* 421 U. S. 837 (1975).

B

The uncertainty engendered by today's opinion will not be limited to its undifferentiated treatment of marketable securities. A more fundamental question arising from the rationale of the Court's decision is whether the test of "true" or "realistic" financial condition will be applied to other assets. Nothing in the relevant statutory provisions suggests a distinction between securities and other assets, or even between assets with varying degrees of marketability. The Court nevertheless appears to read into the statutes a distinction based on "liquidity," at various points referring interchangeably to "readily marketable securities," "current assets," and "quick or liquid assets." *Ante,* at 622, 628. Although the Court's holding is limited in this case to readily marketable securities, see *ante,* at 629 n. 9, its rationale is not so easily contained.

The Court states categorically that the "focus" of the Commissioner's inquiry, in determining the application of this tax, must be on what it calls true or realistic financial condition. *Ante,* at 629–630. In view of this postulation, and the absence of any distinction in the statute among types of assets, is the Commissioner now free to include in his computation the unrealized appreciation of all corporate assets? Once cost basis is abandoned, and "realistic" value becomes the standard, the uncertainties confronting prudent management in many cases will be profoundly disquieting. To be sure, read narrowly, the Court's decision applies only to readily marketable securities, with emphasis on "liquidity." But this is another relative term, depending on the nature of the asset and the uncertainties of market conditions at the time.

The potential sweep of the Court's decision is forecast by the response of Government counsel to questions

about unrealized appreciation on real estate. At one point counsel stated that real estate would not be sufficiently liquid to be includable at market value in the tax calculation, Tr. of Oral Arg. 36, but he later qualified this statement by suggesting that land might be includable if it could be established that it was readily marketable, *id.*, at 42.[8]

The types of assets in which corporations lawfully may invest earnings and profits embrace the total range of property interests. They include, to name only a few examples, unimproved real estate within the anticipated growth pattern of a major urban area, improved real estate, unlisted securities of growth corporations that have not "gone public," undivided interests in oil or mining ventures, and even objects of art. At various times and depending upon conditions, any of these assets may be viewed as—and in fact may be—readily marketable and therefore "liquid." The unrealized appreciation of such assets may well bear upon the realistic financial condition of a corporation, however it is defined. In light of these economic facts, the sweep of today's decision presents problems both for corporate taxpayers and the Government.[9]

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[8] The following hypothetical example suggests the difficulty of application of today's decision. If petitioner had invested the same $147,000 of earnings in southern pine timberlands, and if by the end of the tax years in question the unrealized appreciation in value of these lands was precisely the same $1,475,000 and $2,416,000, respectively, as was the appreciation of the Xerox stock here at issue, would the Commissioner have been entitled to take the unrealized appreciation into account? In many instances, well-situated timberlands have appreciated in value as much as or more than most marketable securities. Such lands are not carried on corporate balance sheets as current assets, and yet experience indicates that growing timber and timberlands are often highly marketable.

[9] I hardly think that the Court's brandishment of the threat of criminal liability for willful tax evasion through investment in a

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I further think that the Court's decision to attach significant tax consequences to the market price of a volatile stock at a particular point in time will lead to unfairness in the application of the accumulated earnings tax. The Court's net liquidation formulation seems to assume, and nothing in the opinion dispels this assumption, that readily marketable assets are to be valued as of the end of the tax year in question. Moreover, the Court apparently would treat all marketable securities the same for the purpose of this valuation. No distinction is drawn or even suggested among the wide variety of securities that are held as corporate assets.

The market price of a short-term Treasury note, at most only fractionally different from its cost basis, would represent its value under any test. But few financial analysts or economists would say that the market quotation of a common stock at any particular time necessarily

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particular type of asset, see *ante*, at 630 n. 11, will suffice to deter future investment decisions made with the intention of avoiding the pitfalls of this decision. I cannot agree with the Court's suggestion that this motivation would convert an otherwise legitimate investment choice into a criminal offense. Corporate management considers the potential tax implications of countless business decisions and might reasonably be expected to assess the possible impact of a choice between investing in nonliquid or liquid assets on its potential future liability for the accumulated earnings tax.

"The fact that the incidences of income taxation may have been taken into account by arranging matters one way rather than another so long as the way chosen was the way the law allows, does not make a transaction something else than it truly is . . . ." *Commissioner* v. *Wodehouse,* 337 U. S. 369, 410 (1949) (Frankfurter, J., dissenting).

This is especially true where questions of criminal liability are involved.

reflects its "true" or "realistic" value *unless* the stock is sold at that price.[10] Over a sufficiently long term, the market price of a common stock will reflect, and vary with, the fundamental strength of the issuing corporation's balance sheet, its earnings record, and its future earnings prospects. But a variety of other factors also affect market price, producing wide swings that do not necessarily correspond to those economic facts. These factors include current conditions of supply and demand in the stock market, immediate confidence in the market in general and in the overall state of the economy, international stability or instability, notions of what is fashionable to buy at a particular time, and a variety of other intangibles. The extent to which the market prices of common stocks fluctuate, often without regard to any concept of "real" value, is illustrated by the tables in the Appendices to this opinion.

Bearing in mind the actual variations in the price of

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[10] The following swings in the value of Xerox stock illustrate the point: on May 16, 1975, the high was 87 and the low 78½. If petitioner continued to own 10,000 shares, its potentially available source of funds would have shrunk by $85,000 in a single day. In the month of August 1974, Xerox varied in market price from 98 to a low of 74¼, a 24.2% swing. Again, assuming a holding of 10,000 shares, the owner would have suffered paper "losses" in that one month of approximately $237,500, or about one-fourth of market value. Considering the entire calendar year of 1965, Xerox sold as high as 71 and as low as 31, a variation on the down side of 55.9% and on the up side of 120%. In dollars, a person who bought 10,000 shares of Xerox in 1965 at its lowest and sold at the highest price would have enjoyed a pretax profit of $400,000. But in 1974, in which the high was 127 and the low 49, a taxpayer whose Xerox stock was assessed on the day of the market's peak, and who continued to own it, would find himself at the later date having "lost" 61% of what this Court deems the "realistic" or "true" value of the investment. See Appendix A–1, *infra*.

Xerox stock, can it be said that its market price at any given time fairly represents its true or realistic value for the purpose of determining whether earnings and profits have been accumulated unreasonably? The negative answer to this question is indicated, at least for me, by the following hypothetical example. In 1965, one of the tax years at issue in this case, the highest price at which Xerox sold was $71 and the lowest was $31. If two competing corporations each owned 10,000 shares of Xerox stock purchased prior to 1965 at the identical price of $31 per share, and Corporation A's tax year ended on the day that Xerox hit $71, while Corporation B's tax year ended on the day it hit $31, Corporation A would have had an unrealized appreciation of $400,000, whereas Corporation B would have had none.

By departing from the cost-basis standard of sound accounting practice, and compelling reliance on an isolated market price of a retained common stock, the Court itself departs from its avowed goal of "economic reality." *Ante*, at 627. An average price range at which the stock might have been sold over a relatively long period might produce a more equitable result in some cases. It would not, however, alleviate the basic problem inherent in the Court's formulation. The taxpayer still could be penalized for having failed to consider, in planning future business needs, the highly ephemeral "value" of unrealized appreciation on common stock. The effect of today's decision is to hold business management accountable for unrealized appreciation as if it were cash in hand, probably forcing corporate management in many cases to liquidate securities that otherwise it would have elected to retain.[11]

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[11] The wide gyrations in value of some of the equity securities listed in the Appendices to this opinion illustrate the point. For example, on May 16, 1975, the common stock of the Falstaff Corp. fell 20.6% in a single day. The Court's opinion assumes

Management decisions during the course of a year, including decisions whether and when to pay dividends and in what amounts, cannot be made intelligently on the basis of an asset so volatile that it may depreciate in market value as much as 8% in a single day and 61% in a year. Uncertainty of this magnitude could only be avoided by liquidation of assets that have appreciated in value. I find nothing in the language or purpose of this tax that justifies such detrimental interference with sound corporate management.

IV

The Court places major reliance on *Helvering* v. *National Grocery Co.,* 304 U. S. 282 (1938), finding that that opinion "forecloses the present taxpayer's case." *Ante,* at 631. I respectfully suggest that the Court's interpretation of *National Grocery* will not withstand close scrutiny of the facts or its actual holding.[12]

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that corporate management should plan to satisfy future business needs from the unrealized appreciation in value of such securities at a given point in time. The instability of market prices of common stocks suggests that this assumption is unsound.

[12] The basic facts of *National Grocery* are not fully revealed in this Court's opinion, but must be obtained from the opinions of the Board of Tax Appeals, 35 B. T. A. 163 (1936), the Court of Appeals for the Third Circuit, 92 F. 2d 931 (1937), and the briefs filed in this Court by the parties. In addition to those set forth above, the following are relevant: the decline in market value of the taxpayer's listed securities in the fiscal year aggregated $943,500; the $2,000,000 shrinkage figure mentioned by this Court included, in addition, the taxpayer's attempted elimination of $1,068,000 cost value of bank stocks claimed to be wholly unmarketable. Brief for Respondent in No. 723, O. T. 1937, pp. 34–35. In addition, as appears from the opinion of the Court of Appeals, National Grocery also claimed "that [its] merchandise shrank in value well on to a quarter million dollars, and the real estate declined in value $125,000." 92 F. 2d, at 933. All of this alleged depreciation and shrinkage was

National Grocery, its stock owned by a sole shareholder, was organized in 1908 with an authorized capital of $5,000; its business prospered over the years, so that by January 31, 1931 (the taxable year there at issue), its earned surplus was $7,939,000. These earnings notwithstanding, National Grocery's "only dividends . . . ever paid . . . up to January 31, 1931, were a dividend of $25,000 in 1917, and a dividend of a like amount in 1918." *National Grocery Co.* v. *Commissioner,* 35 B. T. A. 163, 164 (1936). The corporation's net profits for the four fiscal years preceding fiscal year 1931, all of which were retained rather than distributed, averaged in excess of $800,000 annually. National Grocery earned some $864,000 during the tax year in question, none of which was distributed as a dividend. Addressing the taxpayer's attempt to offset the depreciation of some of its assets, the Court noted:

> "Depreciation in any of the assets is evidence to be considered by the Commissioner and the Board in determining the issue of fact whether the accumulation of profits was in excess of the reasonable needs of the business. But obviously depreciation in the market value of securities which the corporation continues to hold does not, as matter of law, preclude a finding that the accumulation of the year's profits was in excess of the reasonable needs of the business." 304 U. S., at 291.

When *National Grocery* is read in light of the facts and issues there presented—as it must be in order to understand the Court's passing statement—it is readily apparent that the holding in that case does not govern the issue here. The central issue there was the

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claimed to have occurred in the taxable year, and was sought to be offset against net earnings for that year.

definition of "gains and profits": specifically, whether "gains," a term replaced in the present statute by "earnings," qualified the meaning of "profits." The Court apparently felt justified in devoting little attention to the issue, for it was plain in light of the huge accumulation of earnings over time that the taxpayer would be liable even if it were allowed to offset the asserted depreciation. Finally, it is significant that National Grocery's "accumulation of earnings" was computed on the basis of book value or cost. Indeed, all of the relevant figures were so computed, including the $7,393,000 surplus that had been accumulated over time.

I therefore find no justification for the view that *National Grocery* forecloses consideration of the question here presented. Moreover, even if I could agree with the Court's interpretation of that case, I would refuse to follow a rationale so plainly at odds with the statutory language and so conducive to uncertainty and unfairness.

V

The uncertainties the Court has now read into this penal statute correspondingly vest in the Internal Revenue Service an inappropriate latitude in its administration. In light of today's decision, the Commissioner will have wide and virtually uncontrolled discretion in deciding which corporations will be subject to additional taxation, or at least in deciding which will be required to rebut the presumption that earnings were accumulated to evade shareholder tax liability. Until today's decision, management, in trying to anticipate what a Commissioner would deem an unreasonable accumulation, at least could rely on the corporation's earned surplus account as establishing its accumulated earnings and profits. Now this dependable benchmark has become an "irrelevant gauge" of a corporation's "true financial con-

dition," and in many cases management can only speculate about the Commissioner's future determination of values nowhere reflected in the corporation's books. As commentators have noted, see B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders ¶ 8.01, p. 8-4 (3d ed. 1971), the decision to impose the accumulated earnings tax inevitably involves "a hindsight verdict on management's business judgment." The Court's decision does not impose identifiable standards on the Commissioner's exercise of this extraordinary "hindsight" authority, but leaves it open-ended. It is unlikely, to say the least, that Congress intended to leave small and medium-sized businesses—those most often the target of this tax—exposed to this degree of administrative discretion in the imposition of a potentially heavy penalty tax.

[Appendices start on page 653.]

APPENDIX A-1 TO OPINION OF POWELL, J., DISSENTING

The volatility and transient character of market prices of a common stock are illustrated by the following tables:*

TABLE I

XEROX CORP. COMMON STOCK†

	High	Low	% Change High to Low
Fluctuations in a single day:			
June 14, 1965	48.25	45	− 6.7
May 16, 1975	87	78.50	− 9.8
Fluctuations in a single month:			
November 1965	66.50	57.50	−13.6
August 1974	98	74.25	−24.2
Fluctuations in a single year:			
1965	71	31	−56.3
1974	127	49	−61.4

*Except as noted, all data in this Appendix were taken from published New York Stock Exchange quotations. The information presented here is selective and presented for illustrative purposes.

†All Xerox quotations take into account the 1965 three-for-one split.

APPENDIX A-2 TO OPINION OF POWELL, J., DISSENTING

TABLE II

SELECTED STOCK RANGES DURING 1965*

Name of Company	High	Low	Close	Change Open to Close	Percent Change High to Low	Percent Change Open to Close
Chrysler Corp.	62¼	41⅝	53⅜	− 7⅝	−33.1%	− 12.5%
Fairchild Camera	165¼	27¼	150½	+123	−83.5%	+447.3%
Financial Federation	37¼	19⅝	23⅞	− 13⅛	−47.3%	− 35.5%
General Dynamics	68¼	35	56¾	+ 21¾	−48.7%	+ 62.1%
W. T. Grant	62¼	35⅞	62¼	+ 25¾	−42.4%	+ 70.5%
Grolier, Inc.	60½	37	55¾	—	−38.8%	—
Gulf & Western Ind.	102	31⅛	92⅞	+ 61⅛	−69.5%	+192.5%
KLM Airlines	81⅞	19¾	79	+ 59	−75.9%	+295.0%
Ling Tempco Vaught	58	17¼	48¼	+ 30¾	−70.3%	+175.7%
Pan American Airways	55⅝	25¼	51⅛	+ 22⅝	−54.6%	+ 79.4%
Pennsylvania Railroad	65	35⅛	64⅜	+ 25¾	−46.0%	+ 66.7%
Polaroid Corp.	130	44¼	116⅝	+ 70¾	−66.0%	+154.2%
RCA Corp.	50½	31	47¼	+ 13⅜	−38.6%	+ 39.5%
United Airlines	118⅝	58⅝	104¾	+ 45½	−50.6%	+ 76.8%
White Consolidated Ind.	49½	17⅜	48¾	+ 30¾	−64.9%	+170.8%
Xerox Corp.	215	94⅞	202	+103⅜	−55.9%	+104.8%

RANGE IN AVERAGES

	12/31/64	High		Low	12/31/65
Dow Jones Industrial Average	874.13	969.26		840.59	969.26
Percent Change High to Low			−13.3%		
Standard & Poor's 500 Index	84.75	92.63		81.60	92.43
Percent Change High to Low			−11.9%		

SOME PRICES AS OF MAY 12, 1975, OF SELECTED COMPANIES LISTED ABOVE†

Chrysler Corp.	12¼	
W. T. Grant	9½	(Adjusted for 2 for 1 Split—1966)
Grolier, Inc.	6	(Adjusted for 2 for 1 Split—1966)
Pan American Airways	9¾	(Adjusted for 2 for 1 Split—1967)
Pennsylvania Central	1⅝	
Polaroid Corp.	63¼	(Adjusted for 2 for 1 Split—1968)
RCA Corp.	17¾	
UAL, Inc. (United Airlines)	42	(Adjusted for 2 for 1 Split—1966)
Xerox Corp.	258¾	(Adjusted for 3 for 1 Split—1969)

*Source—New York Times—Monday, January 17, 1966—for stock ranges only.

†Prices have been adjusted for additional shares received as a result of stock splits.

APPENDIX A-3 TO OPINION OF POWELL, J., DISSENTING

TABLE III

SELECTED STOCK RANGES DURING 1974*

Name of Company	High	Low	Close	Change Open to Close	Percent Change High to Low	Percent Change Open to Close
ACF Industries	61¼	28¾	33	−24⅞	−53.0%	− 43.0%
Addressograph-Multigraph	11¾	3	3⅜	− 6½	−74.5%	− 65.8%
Citizens & Southern Realty	31¾	2	2⅝	−26¾	−93.7%	− 91.1%
Chrysler Corp	20⅛	7	7¼	− 8⅜	−65.2%	− 53.6%
Coca Cola Co	127¾	44⅝	53	−73½	−65.1%	− 58.1%
Combustion Engineering	106¼	21⅝	26¼	−78¾	−79.6%	− 75.0%
Consolidated Edison	21½	6	7½	−11¼	−72.1%	− 60.0%
Continental Illinois Corp	59¼	23¼	26⅝	−25¼	−60.8%	− 48.7%
Cousins Mortgage	23¾	1⅛	1⅜	−18⅞	−95.3%	− 93.2%
E. I. duPont	179	84½	92¼	−66¾	−52.8%	− 42.0%
Eastman Kodak	117½	57⅝	62⅞	−53⅛	−51.0%	− 45.8%
Fidelity Mtge. Invest	10¼	9/16	15/16	− 5 15/16	−94.5%	− 86.4%
Foster Wheeler	64½	13	15⅛	−45	−79.8%	− 74.8%
Holly Sugar	39	12⅛	26¼	+13¾	−68.9%	+110.0%
Honeywell, Inc	86¼	17½	21	−49⅛	−79.7%	− 70.1%

Name of Company	High	Low	Close	Change Open to Close	Percent Change High to Low	Percent Change Open to Close
Moore McCormack Resources	34¼	12⅜	28½	+15¾	−63.9%	+123.5%
RCA Corp.	21½	9¼	10¾	− 7¾	−57.0%	− 41.9%
Stone & Webster	89⅞	31½	33⅜	−56	−65.0%	− 62.7%
Tri South Mtge. Investors	27¼	2	2¾	−21⅛	−92.7%	− 88.5%
Union Camp Corp.	63	37¼	38⅞	−20⅜	−40.9%	− 34.4%
Union Carbide	46	31¾	41⅜	+ 7¼	−31.0%	+ 21.3%
Xerox Corp.	127⅛	49	51½	−71¼	−61.5%	− 58.0%
Great Western United	31¼	3⅛	24¼	+20¾	−90.0%	+592.9%
Great American Mortgages	32	1	1⅛	−28⅞	−98.8%	− 96.3%

RANGE IN AVERAGES

	12/31/73	High		Low	12/31/74
Dow Jones Industrial Average	850.86	891.66		577.60	616.24
Percent Change High to Low			−35.2%		
Standard & Poor's 500 Index	97.55	99.80		62.28	68.24
Percent Change High to Low			−37.6%		

*Source—Richmond Times-Dispatch, Sunday, Jan. 5, 1975, pp. E-6, E-7—for stock ranges only.

APPENDIX A-4 TO OPINION OF POWELL, J., DISSENTING

TABLE IV

WALL STREET JOURNAL

Friday, May 16, 1975, p. 33

Daily Percentage Leaders On N. Y. Stock Exchange

NEW YORK—The following list shows the stocks that have gone up the most and down the most based on percent of change on the New York Stock Exchange regardless of volume for Thursday.

Net and percentage changes are the difference between the previous closing price and yesterday's last price.

UPS

	Name	Sales (hds)	High	Low	Last	Net	Pct.
1	Welbilt Cp......	56	1¼	1	1¼	+ ¼ Up	25.0
2	Int T&T pfF....	1	68	68	68	+ 8 Up	13.3
3	IDS Rlty Tr....	293	5⅜	4⅞	5⅜	+ ⅝ Up	13.2
4	Centrn Data....	811	19½	17⅜	18⅝	+ 1¾ Up	10.4
5	Texfi Ind......	13	5⅜	5¼	5⅜	+ ½ Up	10.3
6	Heler Int pf....	2	121¼	121¼	121¼	+11¼ Up	10.2
7	CCI Corp......	9	1½	1½	1½	+ ⅛ Up	9.1
8	Royal Ind......	150	4⅞	4½	4⅝	+ ⅜ Up	8.8
9	Readg Co.......	58	3¼	3⅛	3⅛	+ ¼ Up	8.7
10	Rockower	50	9⅝	8¾	9½	+ ¾ Up	8.6

DOWNS

	Name	Sales (hds)	High	Low	Last	Net	Pct.
1	Falstaff	178	4	3⅜	3⅜	− ⅞ Off	20.6
2	SeabCst Lin.....	2825	24⅜	22⅝	23¾	− 4⅝ Off	16.3
3	Emp 4.75pf.....	z100	4¼	4¼	4¼	− ⅝ Off	12.8
4	Bulova Wat.....	77	8½	7½	7½	− 1 Off	11.8
5	LehVallnd	32	1¼	1⅛	1⅛	− ⅛ Off	10.0
6	Adams Drg.....	116	3⅞	3½	3½	− ⅜ Off	9.7
7	Benguet B......	226	2¾	2½	2½	− ¼ Off	9.1
8	ChaseMTr	325	4⅛	3¾	3¾	− ⅜ Off	9.1
9	Plan Resrch.....	212	4⅜	3⅞	3⅞	− ⅜ Off	8.8
10	Xerox Cp.......	3350	87	78½	78⅝	− 7⅝ Off	8.8

Syllabus

GORDON *v.* NEW YORK STOCK EXCHANGE, INC., ET AL.

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

No. 74-304. Argued March 25-26, 1975—Decided June 26, 1975

Petitioner, individually and on behalf of an asserted class of small investors, filed suit against respondents—the New York Stock Exchange, the American Stock Exchange, and two member firms of the Exchanges—claiming that the system of fixed commission rates utilized by the Exchanges at that time for transactions of less than $500,000 violated §§ 1 and 2 of the Sherman Act. The District Court and the Court of Appeals both concluded that the fixed commission rates were immunized from antitrust attack because of the authority of the Securities and Exchange Commission (SEC) under § 19 (b) (9) of the Securities Exchange Act of 1934 to approve or disapprove exchange commission rates and its exercise of that power. *Held:* The system of fixed commission rates, which is under the active supervision of the SEC, is beyond the reach of the antitrust laws. Pp. 663-691.

(a) The statutory provision authorizing regulation of rates, § 19 (b) (9), the SEC's long regulatory practice in reviewing proposed rate changes and in making detailed studies of rates, culminating in the adoption of a rule requiring a transition to competitive rates, and continued congressional approval of the SEC's authority over rates, all show that Congress intended the Securities Exchange Act to leave the supervision of the fixing of reasonable rates to the SEC. Pp. 663-682.

(b) To interpose antitrust laws, which would bar fixed commission rates as *per se* violations of the Sherman Act, in the face of positive SEC action, would unduly interfere with the intended operation of the Securities Exchange Act. Hence, implied repeal of the antitrust laws is necessary to make that Act work as intended, since failure to imply repeal would render § 19 (b) (9) nugatory. *Silver* v. *New York Stock Exchange,* 373 U. S. 341; *Ricci* v. *Chicago Mercantile Exchange,* 409 U. S. 289, distinguished. Pp. 682-691.

498 F. 2d 1303, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court. DOUGLAS, J., filed a concurring opinion, *post,* p. 691. STEWART,

J., filed a concurring opinion, in which Brennan, J., joined, *post*, p. 692.

I. Walton Bader argued the cause for petitioner. With him on the brief was *Maximilian Bader*.

William Eldred Jackson argued the cause for respondents. With him on the brief were *Isaac Shapiro, Mark L. Davidson, John J. Loflin, Jr.*, and *James Brendan May*.

Howard E. Shapiro argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Bork* and *Assistant Attorney General Kauper*.

Lawrence E. Nerheim argued the cause for the Securities and Exchange Commission as *amicus curiae* urging affirmance. With him on the brief were *Walter P. North* and *Frederic T. Spindel*.

Mr. Justice Blackmun delivered the opinion of the Court.

This case presents the problem of reconciliation of the antitrust laws with a federal regulatory scheme in the particular context of the practice of the securities exchanges and their members of using fixed rates of commission. The United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit concluded that fixed commission rates were immunized from antitrust attack because of the Securities and Exchange Commission's authority to approve or disapprove exchange commission rates and its exercise of that power.

I

In early 1971 petitioner Richard A. Gordon, individually and on behalf of an asserted class of small investors, filed this suit against the New York Stock

Exchange, Inc. (NYSE), the American Stock Exchange, Inc. (Amex), and two member firms of the Exchanges.[1] The complaint challenged a variety of exchange rules and practices and, in particular, claimed that the system of fixed commission rates, utilized by the Exchanges at that time for transactions less than $500,000, violated §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1 and 2. Other challenges in the complaint focused on (1) the volume discount on trades of over 1,000 shares, and the presence of negotiated rather than fixed rates for transactions in excess of $500,000;[2] (2) the rules limiting the number of exchange memberships; and (3) the rules denying discounted commission rates to nonmembers using exchange facilities.[3]

Respondents moved for summary judgment on the ground that the challenged actions were subject to the overriding supervision of the Securities and Exchange Commission (SEC) under § 19 (b) of the Securities Exchange Act of 1934, 48 Stat. 898, as amended, 15 U. S. C. § 78s (b), and, therefore, were not subject to the strictures of the antitrust laws. The District Court granted respondents' motion as to all claims. 366 F. Supp. 1261 (1973). Dismissing the exchange membership limitation and the Robinson-Patman Act conten-

[1] The member firms are Merrill Lynch, Pierce, Fenner & Smith, Inc., and Bache & Company, Inc.

[2] Petitioner urged that these practices were in violation of the Robinson-Patman Price Discrimination Act, 49 Stat. 1528, 15 U. S. C. § 13a.

[3] The relief requested included an injunction prohibiting the implementation of certain negotiated commission rates that were to be placed in effect on April 5, 1971, or, alternatively, requiring that negotiated rates be available for transactions of any size. Petitioner also requested treble damages amounting to $1.5 billion and an award of attorneys' fees of $10 million plus interest and costs.

tions as without merit,[4] the court focused on the relationship between the fixed commission rates and the Sherman Act mandates. It utilized the framework for analysis of antitrust immunity in the regulated securities area that was established a decade ago in *Silver* v. *New York Stock Exchange,* 373 U. S. 341 (1963). Since § 19 (b)(9) of the Exchange Act authorized the SEC to supervise the Exchanges "in respect of such matters as . . . the fixing of reasonable rates of commission," the court held applicable the antitrust immunity reserved in *Silver* for those cases where "review of exchange self-regulation [is] provided through a vehicle other than the antitrust laws." 373 U. S., at 360. It further noted that the practice of fixed commission rates had continued without substantial challenge after the enactment of the 1934 Act, and that the SEC had been engaged in detailed study of the rate structure for a decade, culminating in the requirement for abolition of fixed rates as of May 1, 1975.

On appeal, the Second Circuit affirmed. 498 F. 2d 1303 (1974). Characterizing petitioner's other challenges as frivolous, the appellate court devoted its opinion to the problem of antitrust immunity. It, too, used *Silver* as a basis for its analysis. Because the SEC, by § 19 (b)(9), was given specific review power over the fixing of commission rates, because of the language, legislative history, and policy of the Exchange Act, and because of the SEC's actual exercise of its supervisory

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[4] In short, the District Court concluded that (1) since petitioner had never applied for exchange membership, he was not in a position to complain that he was arbitrarily precluded from membership; (2) the Exchange Act's § 3 (a)(3), 15 U. S. C. § 78c (a)(3), by its definition of "member," specifically limited access of nonmembers to the Exchanges; and (3) the Robinson-Patman Act did not apply to services or intangibles, but only to commodities or goods, and the latter were not involved in this litigation.

power, the Court of Appeals determined that this case differed from *Silver,* and that antitrust immunity was proper.

By his petition for certiorari, petitioner sought review only of the determination that fixed commission rates are beyond the reach of the antitrust laws. Because of the vital importance of the question, and at the urging of all the parties, we granted certiorari. 419 U. S. 1018 (1974).

II

Resolution of the issue of antitrust immunity for fixed commission rates may be made adequately only upon a thorough investigation of the practice in the light of statutory restrictions and decided cases. We begin with a brief review of the history of commission rates in the securities industry.

Commission rates for transactions on the stock exchanges have been set by agreement since the establishment of the first exchange in this country. The New York Stock Exchange was formed with the Buttonwood Tree Agreement of 1792, and from the beginning minimum fees were set and observed by the members. That Agreement itself stated:

> " 'We the Subscribers, Brokers for the Purchase and Sale of Public Stock, do hereby solemnly promise and pledge ourselves to each other, that we will not buy or sell from this day for any person whatsoever, any kind of Public Stock at a less rate than one-quarter per cent. Commission on the Specie value, and that we will give a preference to each other in our Negotiations.' " F. Eames, The New York Stock Exchange 14 (1968 ed).

See generally, R. Doede, The Monopoly Power of the New York Stock Exchange, reprinted in Hearings on S. 3169 before the Subcommittee on Securities of the Sen-

ate Committee on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess., 405, 412–427 (1972). Successive constitutions of the NYSE have carried forward this basic provision. Similarly, when Amex emerged in 1908–1910, a pattern of fixed commission rates was adopted there.

These fixed rate policies were not unnoticed by responsible congressional bodies. For example, the House Committee on Banking and Currency, in a general review of the stock exchanges undertaken in 1913, reported that the fixed commission rate rules were "rigidly enforced" in order "to prevent competition amongst the members." H. R. Rep. No. 1593, 62d Cong., 3d Sess., 39 (1913).[5] The report, known as the Pujo Report, did not recommend any change in this policy, for the Committee believed

> "the present rates to be reasonable, except as to stocks, say, of $25 or less in value, and that the

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[5] See, for example, the comments of the report in reviewing evidence on fixed commissions:

"As stated by Mr. Sturgis, a former president of the exchange, since 1876 a governor, and now the chairman of the law committee . . . :

" 'The violation of the commission law we regard as one of the most infamous crimes that a man can commit against his fellow members in the exchange, and as a gross breach of good faith and wrongdoing of the most serious nature, and we consider it a crime that we should punish as severely as, in the judgment of the governing committee, the constitution permits.

. . . . .

" 'Q. . . . But the breach of that rule (referring to the rule for uniform commissions) by a broker you consider the most heinous crime he can commit?

" 'A. It is absolute bad faith to his fellow men.'

"The rule is rigidly enforced by suspension from one to five years for a first violation and expulsion for a second. . . . The acknowledged object is to prevent competition amongst the members." H. R. Rep. No. 1593, 62d Cong., 3d Sess., 39 (1913).

> exchange should be protected in this respect by the law under which it shall be incorporated against a kind of competition between members that would lower the service and threaten the responsibility of members. A very low or competitive commission rate would also promote speculation and destroy the value of membership." *Id.*, at 115–116.

Despite the monopoly power of the few exchanges, exhibited not only in the area of commission rates but in a wide variety of other aspects, the exchanges remained essentially self-regulating and without significant supervision until the adoption of the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U. S. C. § 78a *et seq.* At the lengthy hearings before adoption of that Act, some attention was given to the fixed commission rate practice and to its anticompetitive features. See Hearings on S. Res. 84 (72d Cong.) and S. Res. 56 and 97 (73d Cong.) before the Senate Committee on Banking and Currency, 73d Cong., 1st and 2d Sess., pts. 13, 15, and 16, pp. 6075, 6080, 6868, and 7705 (1934) (hereafter Senate Hearings). See also Hearings on S. Res. 84 before the Senate Committee on Banking and Currency, 72d Cong., 1st Sess., pt. 1, p. 85 (1932); Hearings on H. R. 7852 and H. R. 8720 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 320–321, 423 (1934).

Perhaps the most pertinent testimony in the hearings preparatory to enactment of the Exchange Act was proffered by Samuel Untermyer, formerly chief counsel to the committee that drafted the Pujo Report. In commenting on proposed S. 2693, Mr. Untermyer noted that although the bill would provide the federal supervisory commission with

> "the right to prescribe uniform rates of commission, it does not otherwise authorize the Commission to

fix rates, which it seems to me it should do and would do by striking out the word 'uniform.' That would permit the Commission to fix rates.

"The volume of the business transacted on the exchange has increased manyfold. Great fortunes have been made by brokers through this monopoly. The public has no access to the exchange by way of membership except by buying a seat and paying a very large sum for it. Therefore it is a monopoly. Probably it has to be something of a monopoly. But after all it is essentially a public institution. It is the greatest financial agency in the world, and should be not only controlled by the public but it seems to me its membership and the commissions charged should either be fixed by some governmental authority or be supervised by such authority. As matters now stand, the exchange can charge all that the traffic will bear, and that is a burden upon commerce." Senate Hearings 7705.

As finally enacted, the Exchange Act apparently reflected the Untermyer suggestion, for it gave the SEC the power to fix and insure "reasonable" rates. Section 19 (b) provided:

"(b) *The Commission is further authorized, if* after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, *the Commission determines* that such exchange has not made the changes so requested, and that *such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in* upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order *to*

alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) *in respect of such matters as . . .* (9) *the fixing of reasonable rates of commission,* interest, listing, and other charges." (Emphasis added.)

This provision conformed to the Act's general policy of self-regulation by the exchanges coupled with oversight by the SEC. It is to be noted that the ninth category is one of 12 specifically enumerated. In *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware,* 414 U. S. 117, 127–128 (1973), we observed:

"Two types of regulation are reflected in the Act. Some provisions impose direct requirements and prohibitions. Among these are mandatory exchange registration, restrictions on broker and dealer borrowing, and the prohibition of manipulative or deceptive practices. Other provisions are flexible and rely on the technique of self-regulation to achieve their objectives. . . . Supervised self-regulation, although consonant with the traditional private governance of exchanges, allows the Government to monitor exchange business in the public interest."

The congressional reports confirm that while the development of rules for the governing of exchanges, as enumerated in § 19 (b), was left to the exchanges themselves in the first instance, the SEC could compel adoption of those changes it felt were necessary to insure fair dealing and protection of the public. See H. R. Rep. No. 1383, 73d Cong., 2d Sess., 15 (1934); S. Rep. No. 792, 73d Cong., 2d Sess., 13 (1934). The latter report, *id.,* at 15, noted that registered exchanges were required to provide the SEC with "complete information" regarding its rules.

III

With this legislative history in mind, we turn to the actual post-1934 experience of commission rates on the NYSE and Amex. After these two Exchanges had registered in 1934 under § 6 of the Exchange Act, 15 U. S. C. § 78f, both proceeded to prescribe minimum commission rates just as they had prior to the Act. App. A42, A216. These rates were changed periodically by the Exchanges,[6] after their submission to the SEC pursuant to § 6 (a)(4), 15 U. S. C. § 78f (a)(4), and SEC Rule 17a–8, 17 CFR § 240.17a–8. Although several rate changes appear to have been effectuated without comment by the SEC, in other instances the SEC thoroughly exercised its supervisory powers. Thus, for example, as early as 1958 a study of the NYSE commission rates to determine whether the rates were "reasonable and in accordance with the standards contemplated by applicable provisions of the Securities Exchange Act of 1934," was announced by the SEC. SEC Exchange Act Release No. 5678, Apr. 14, 1958, App. A240. This study resulted in an agreement by the NYSE to reduce commission rates in certain transactions, to engage in further study of the rate structure by the NYSE in collaboration with the SEC, and to provide the SEC with greater advance notice of proposed rate changes. SEC Exchange Act Release No. 5889, Feb. 20, 1959, App. A247. The SEC specifically stated that it had undertaken the study "in view of the responsibilities and duties imposed upon the Commission by Section 19 (b) . . . with respect to the rules of na-

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[6] Since 1947, rates generally have been based on the value of stock in a round lot, SEC Report of Special Study of Securities Markets, H. R. Doc. No. 95, 88th Cong., 1st Sess., pt. 5, p. 103 (1963). There was no volume discount at the time of this SEC report.

tional securities exchanges, including rules relating to the fixing of commission rates." *Ibid.*

Under subsection (d) of § 19 of the Act (which subsection was added in 1961, 75 Stat. 465), the SEC was directed to investigate the adequacy of exchange rules for the protection of investors. Accordingly, the SEC began a detailed study of exchange rules in that year. In 1963 it released its conclusions in a six-volume study. SEC Report of Special Study of Securities Markets, H. R. Doc. No. 95, 88th Cong., 1st Sess. The study, among other things, focused on problems of the structure of commission rates and procedures, and standards for setting and reviewing rate levels. *Id.*, pt. 5, p. 102. The SEC found that the rigid commission rate structure based on value of the round lot was causing a variety of "questionable consequences," such as "give-ups" and the providing of special services for certain large, usually institutional, customers. These attempts indirectly to achieve rate alterations made more difficult the administration of the rate structure and clouded the cost data used as the basis for determination of rates. These effects were believed by the SEC to necessitate a complete study of the structure. Moreover, the SEC concluded that methods for determining the reasonableness of rates were in need of overhaul. Not only was there a need for more complete information about the economics of the securities business and commission rates in particular, but also for a determination and articulation of the criteria important in arriving at a reasonable rate structure. Hence, while the study did not produce any major immediate changes in commission rate structure or levels, it did constitute a careful articulation of the problems in the structure and of the need for further studies that would be essential as a basis for future changes.

Meanwhile, the NYSE began an investigation of its own into the particular aspect of volume discounts from the fixed commission rates. App. A219–A220. This study determined that a volume discount and various other changes were needed, and so recommended to the SEC. The Commission responded in basic agreement. Letter dated Dec. 22, 1965, from SEC Chairman Cohen to NYSE President Funston, App. A249. The NYSE study continued over the next few years and final conclusions were presented to the SEC in early 1968. *Id.*, at A253.[7]

In 1968, the SEC, while continuing the study started earlier in the decade, began to submit a series of specific proposals for change and to require their implementation by the exchanges. Through its Exchange Act Release No. 8324, May 28, 1968, App. A286, the SEC requested the NYSE to revise its commission rate schedule, including a reduction of rates for orders for round lots in excess of 400 shares or, alternatively, the elimination of minimum rate requirements for orders in excess of $50,000. These changes were viewed by the SEC as interim measures, pending further consideration "in the context of the Commission's responsibilities to consider the national policies embodied both in the securities laws and in the antitrust laws." Letter dated May 28, 1968, from SEC Chairman Cohen to NYSE President Haack, App. A285. In response to these communications, the NYSE (and Amex) eventually adopted a volume discount for orders exceeding 1,000 shares, as well as other alterations in rates, all approved by the SEC. See,

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[7] The basic NYSE proposal included some volume discounts, continuation of limited give-ups if directed by the customers, termination of "rebative" reciprocal practices, discounts for certain nonmembers, and limitation of membership and discounts to "bona fide broker-dealers." App. A255.

e. g., letter dated Aug. 30, 1968, from Chairman Cohen to President Haack, App. A310; memorandum dated Sept. 20, 1968, Amex Subcommittee on Commission Structure, App. A104.

Members of the securities exchanges faced substantial declines in profits in the late 1960's and early 1970. These were attributed by the NYSE to be due, at least in part, to the fact that general commission rates had not been increased since 1958. Statement of Feb. 13, 1970, by President Haack to the SEC, App. A313. The NYSE determined that a service charge of at least the lesser of $15 or 50% of the required minimum commission on orders of fewer than 1,000 shares should be imposed as an interim measure to restore financial health by bringing rates in line with costs. NYSE Proposed Rule 383, App. A331. See also letter dated Mar. 19, 1970, from President Haack to members of the NYSE, App. A327. This proposal, submitted to the SEC pursuant to its Rule 17a–8, was permitted by the SEC to be placed into operation on a 90-day interim basis. Letter dated Apr. 2, 1970, from SEC Chairman Budge to President Haack, App. A333. Continuation of the interim measure was thereafter permitted pending further rate structure hearings undertaken by the SEC. SEC Exchange Act Release No. 8923, July 2, 1970, App. A336. The interim rates remained in effect until the rate structure change in March 1972.

In 1971 the SEC concluded its hearings begun in 1968. Finding that "minimum commissions on institutional size orders are neither necessary nor appropriate," the SEC announced that it would not object to competitive rates on portions of orders above a stated level. Letter dated Feb. 3, 1971, from SEC Commissioner Smith to President Haack, App. A353. See also SEC Exchange Act Release No. 9007, Oct. 22, 1970, App. A348.

Although at first supporting a $100,000 order as the cutoff below which fixed rates would be allowed, *ibid.*, the SEC later decided to permit use of $500,000 as the breakpoint. After a year's use of this figure, the SEC required the exchanges to reduce the cutoff point to $300,000 in April 1972. Statement of the SEC on the Future Structure of the Securities Markets, Feb. 2, 1972, App. A369, A387, A388 (Policy Study).

The 1972 Policy Study emphasized the problems of the securities markets, and attributed as a major cause of those problems the prevailing commission rate structure. The Policy Study noted:

> "Our concern with the fixed minimum commission . . . is not only with the level of the rate structure but with its side effects as well. Of these, perhaps the most important are the following:
>
> "(a) Dispersion of trading in listed securities.
>
> "(b) Reciprocal practices of various kinds.
>
> "(c) Increasing pressure for exchange membership by institutions." *Id.*, at A385.

Since commission rates had been fixed for a long period of time, however, and since it was possible that revenue would decline if hasty changes were made, the SEC believed that there should be no rush to impose competitive rates. Rather, the effect of switching to competition should be gauged on a step-by-step basis, and changes should be made "at a measured, deliberate pace." *Id.*, at A387. The result of the introduction of competitive rates for orders exceeding $500,000 was found to be a substantial reduction in commissions, with the rate depending on the size of the order. In view of this result, the SEC determined to institute competition in the $300,000–$500,000 range as well.

Further reduction followed relatively quickly. By March 29, 1973, the SEC was considering requiring the re-

duction of the breakpoint on competitive rates to orders in excess of $100,000. SEC Policy Statement on the Structure of a Central Market System 3. In June, the SEC began hearings on the rate schedules, stimulated in part by a request by the NYSE to permit an increase of 15% of the current rate on all orders from $5,000 to $300,000, and to permit a minimum commission on small orders (below $5,000) as well. SEC Exchange Act Release No. 10206, June 6, 1973, Documentary Appendix to Brief for SEC as *Amicus Curiae* 24 (Doc. App.). Three months later, after completion of the hearings, the SEC determined that it would allow the increases. SEC Exchange Act Release No. 10383, Sept. 11, 1973,[8] Doc. App. 27. The SEC also announced, however, that "[i]t will act promptly to terminate the fixing of commission rates by stock exchanges after April 30, 1975, if the stock exchanges do not adopt rule changes achieving that result." *Id.*, at 28.

Elaboration of the SEC's rationale for this phasing out of fixed commission rates was soon forthcoming. In December 1973, SEC Chairman Garrett noted that the temporary increase in fixed rates (through April 1975) was permitted because of the inflation in the cost of operating the exchanges, the decline in the volume of transactions on the exchanges, and the consequently severe financial losses for the members. SEC Exchange Act Release No. 10560, Dec. 14, 1973, Doc. App. 29. Indeed, without the rate increase, "the continued deterioration in the capital positions of many member firms was foreseeable, with significant capital impairment and indirect, but consequential, harm to investors the likely

[8] The increases were permitted through March 31, 1974, without restriction. Such increases could continue from April 1, 1974, through April 30, 1975, if the NYSE permitted its members to charge in excess of the old rate and also permitted reductions in brokerage services in return for discounts from the rate.

result." *Id.,* at 36. The rate increase also would forestall the possibility that the industry would be impaired during transition to competitive rates and other requirements. This view conformed to the suggestion of Senator Williams, Chairman of the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs. See statement dated July 27, 1973, of Senator Williams submitted to the SEC, cited in Exchange Act Release No. 10560 n. 12, Doc. App. 37. Although not purporting to elucidate fully its reasons for abolishing fixed rates, the SEC did suggest several considerations basic to its decision: the heterogeneous nature of the brokerage industry; the desirability of insuring trading on, rather than off, the exchanges; doubt that small investors are subsidized by large institutional investors under the fixed rate system; and doubt that small firms would be forced out of business if competitive rates were required.

In response to a request by the NYSE, the SEC permitted amendment to allow competitive rates on nonmember orders below $2,000. SEC Exchange Act Release No. 10670, Mar. 7, 1974, Doc. App. 42. Hearings on intramember commission rates were announced in April 1974. SEC Exchange Act Release No. 10751, Apr. 23, 1974, Doc. App. 45. The SEC concluded that intramember rates should not be fixed beyond April 30, 1975. SEC Exchange Act Release No. 11019, Sept. 19, 1974, Doc. App. 60. At this time the SEC stated:

> "[I]t presently appears to the Commission that it is necessary and appropriate (1) for the protection of investors, (2) to insure fair dealing in securities traded in upon national securities exchanges, and (3) to insure the fair administration of such exchanges, that the rules and practices of such exchanges that require, or have the effect of requir-

ing, exchange members to charge any person fixed minimum rates of commission, should be eliminated." *Id.*, at 63.

The SEC formally requested the exchanges to make the appropriate changes in their rules. When negative responses were received from the NYSE and others, the SEC released for public comment proposed Securities Exchange Act Rules 19b-3 and 10b-22. Proposed Rule 19b-3, applicable to intramember and nonmember rates effective May 1, 1975, would prohibit the exchanges from using or compelling their members to use fixed rates of commission. It also would require the exchanges to provide explicitly in their rules that nothing therein require or permit arrangements or agreements to fix rates. Proposed Rule 10b-22 would prohibit agreements with respect to the fixing of commission rates by brokers, dealers, or members of the exchanges. See SEC Exchange Act Release No. 11073, Oct. 24, 1974, Doc. App. 65.

Upon the conclusion of hearings on the proposed rules, the SEC determined to adopt Rule 19b-3, but not Rule 10b-22. SEC Exchange Act Release No. 11203, Jan. 23, 1975, Doc. App. 109. Effective May 1, 1975, competitive rates were to be utilized by exchange members in transactions of all sizes for persons other than members of the exchanges. Effective May 1, 1976, competitive rates were to be mandatory in transactions for members as well, *i. e.*, floor brokerage rates. Competition in floor brokerage rates was so deferred until 1976 in order to permit an orderly transition.[9] The required

[9] It was also believed that members of the exchanges had not expected that floor brokerage rates would be included among those required to be made competitive, and that extra time for planning and adjustment would be needed. The SEC noted, additionally, that the impact of floor brokerage rates on public investors was significantly less than the impact of public rates, *i. e.*, the rates on

transition to competitive rates was based on the SEC's conclusion that competition, rather than fixed rates, would be in the best interests of the securities industry and markets, as well as in the best interests of the investing public and the national economy. *Ibid.* This determination was not based on a simplistic notion in favor of competition, but rather on demonstrated deficiencies of the fixed commission rate structure. Specifically mentioned by the SEC were factors such as the rigidity and delay inherent in the fixed rate system, the potential for distortion, evasion, and conflicts of interest, and fragmentation of markets caused by the fixed rate system. Acknowledging that the fixed rate system perhaps was not all bad in all periods of its use, the SEC explicitly declined to commit itself to permanent abolition of fixed rates in all cases: in the future circumstances might arise that would indicate that reinstitution of fixed rates in certain areas would be appropriate.

The SEC dismissed the arguments against competitive rates that had been raised by various proponents of the status quo. First, the SEC deemed the possibility of destructive competition to be slim, because of the nature of the cost curve in the industry.[10] Second, there was substantial doubt whether maintenance of fixed rates, in fact, provided various subsidies that would be beneficial to the operation of the securities markets. For example, it was unlikely that small investors reaped a subsidy from higher rates charged larger investors, because of

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transactions for nonmembers. SEC Exchange Act Release No. 11203, Jan. 23, 1975, Doc. App. 109, 110.

[10] In order for destructive competition to occur on a large scale, fixed costs must be a high percentage of total costs, and there must be economies of scale in a wide range of production. Neither of these factors was found to be present in the brokerage industry. *Id.*, at 138–139.

separation of the business between large and small investors. Nor did the SEC believe that regional brokers were substantially benefited by maintenance of fixed rates. Third, the possibility of an exodus from membership on the exchanges was unlikely, and should be dealt with only as it occurred. In any event, inasmuch as the SEC anticipated that there would be detailed studies of the operation of the competitive rates effectuated by its orders, any problems that arose could be effectively resolved upon further consideration.

During this period of concentrated study and action by the SEC, lasting more than a decade, various congressional committees undertook their own consideration of the matter of commission rates. Early in 1972, the Senate Subcommittee on Securities concluded that fixed commission rates must be eliminated on institution-size transactions, and that lower fees should be permitted for small transactions with "unbundled" services than for those having the full range of brokerage services. Senate Committee on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess., Securities Industry Study (For the Period Ended Feb. 4, 1972), 4 (1972) (containing a report of the Subcommittee on Securities). The Subcommittee objected particularly to the failure of the fixed rate system to produce "fair and economic" rates, *id.*, at 59, and to distortion in the rate structure in favor of the institutionally oriented firms.

The Subcommittee was perturbed at the SEC's actions regarding fixed commission rates for several reasons. First, the Subcommittee noted that in litigation the SEC had taken the position that it had not approved NYSE rate changes in 1971, but had merely failed to object to the introduction of the new rates, *id.*, at 58, referring to the SEC position in *Independent Investor Protective League* v. *SEC* (SDNY No. 71–1924), dismissed without

opinion (CA2 1971). This posture precluded review of the SEC action in the Court of Appeals.[11] Second, the Subcommittee was displeased with the length of time the SEC took in arriving at its decisions regarding commission rate structure and level. Third, the Subcommittee feared that statements of the SEC lacked clarity and perpetuated uncertainty as to the status of fixed rates on transactions exceeding $100,000. Therefore, the Subcommittee report stressed:

> "[I]t is essential that fixed commission rates be phased out in an orderly and systematic manner, and that a date certain be set promptly for elimination of fixed commissions on institutional-size transactions, which have resulted in the most serious distortions. Based on the SEC's conclusions and on testimony submitted to the SEC and to this Subcommittee, this could best be achieved by eliminating fixed rates on orders in excess of $100,000." Securities Industry Study, *supra,* at 60.

The House Committee on Interstate and Foreign Commerce, in a report issued only six months after the Senate Report, *supra,* concluded that fixed rates of commission were not in the public interest and should be replaced by competitively determined rates for transactions of all sizes. Such action should occur "without excessive delay." H. R. Rep. No. 92-1519, pp. xiv, 141, 144-145, 146 (1972). Although prodding the SEC to take quick measures to introduce competitive rates for transactions of all sizes, the House Committee deter-

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[11] This view has been rejected by the United States Court of Appeals for the District of Columbia Circuit. *Independent Broker-Dealers' Trade Assn.* v. *SEC,* 142 U. S. App. D. C. 384, 442 F. 2d 132, cert. denied, 404 U. S. 828 (1971). The SEC appears no longer to take this position. See Brief for SEC as *Amicus Curiae* 38-39, n. 45.

mined to defer enacting legislation so long as reasonable progress was being made. These conclusions resulted from a detailed study, by the Subcommittee, of asserted costs and benefits of competitive versus fixed rates, and reflected information gained through lengthy hearings. *Id.*, at 131–146, and related Study of the Securities Industry, Hearings before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 92d Cong., 1st and 2d Sess., serials 92–37 to 92–37h (1971–1972). Similarly, after lengthy analysis, the Senate Subcommittee on Securities concluded both that competitive rates must be introduced at all transaction levels, and that legislation was not required at that time in view of the progress made by the SEC. Securities Industry Study Report of the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, S. Doc. No. 93–13, pp. 5–7, 43–63 (1973), and Hearings on S. 3169 before the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess. (1972).

In 1975 both Houses of Congress did in fact enact legislation dealing directly with commission rates. Although the bills initially passed by each chamber differed somewhat, the Conference Committee compromised the differences. Compare H. R. 4111, § 6 (p), as discussed in H. R. Rep. No. 94–123, pp. 51–53, 67–68 (1975), with S. 249, § 6 (e), as discussed in S. Rep. No. 94–75, pp. 71–72, 98 (1975). The measure, as so compromised, was signed by the President on June 4, 1975, 89 Stat. 97.

The new legislation amends § 19 (b) of the Securities Exchange Act to substitute for the heretofore existing provision a scheme for SEC review of proposed rules and rule changes of the various self-regulatory organizations.

Reference to commission rates is now found in the newly amended § 6 (e), generally providing that after the date of enactment "no national securities exchange may impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members." 89 Stat. 107. An exception is made for floor brokerage rates which may be fixed by the exchanges until May 1, 1976. Further exceptions from the ban against fixed commissions are provided if approved by the SEC after certain findings: prior to and including November 1, 1976, the Commission may allow the exchanges to fix commissions if it finds this to be "in the public interest," § 6 (e)(1)(A); after November 1, 1976, the exchanges may be permitted by the SEC to fix rates of commission if the SEC finds (1) the rates are reasonable in relation to costs of service (to be determined pursuant to standards of reasonableness published by the SEC), and (2) if the rates "do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title, taking into consideration the competitive effects of permitting such schedule or fixed rates weighed against the competitive effects of other lawful actions which the Commission is authorized to take under this title." § 6 (e)(1)(B)(ii). The statute specifically provides that even if the SEC does permit the fixing of rates pursuant to one of these exceptions, the SEC by rule may abrogate such practice if it finds that the fixed rates "are no longer reasonable, in the public interest, or necessary to accomplish the purposes of this title." § 6 (e)(2).

The new section also provides a detailed procedure which the SEC must follow in arriving at its decision to permit fixed commission rates. § 6 (e)(4). This procedure was described in the Conference Report as "comparable to that provided for in Section 18 of the Federal

Trade Commission Act, 15 U. S. C. [§] 58, which is more formal than normal notice and comment rulemaking under Section 553 of title 5 U. S. C. but less formal than 'on the record' procedure under Section[s] 556 and 557 of title 5 U. S. C." H. R. Conf. Rep. No. 94–229, p. 108 (1975). Finally, the amendments require the SEC to file regularly until December 31, 1976, with both branches of Congress, reports concerning the effect of competitive rates on the public interest, investors, and the securities markets. § 6 (e) (3).[12]

As of May 1, 1975, pursuant to order of the SEC, fixed commission rates were eliminated and competitive rates effectuated. Although it is still too soon to determine the total effect of this alteration, there have been no reports of disastrous effects for the public, investors, the industry, or the markets.

This lengthy history can be summarized briefly: In enacting the Securities Exchange Act of 1934, the Congress gave clear authority to the SEC to supervise exchange self-regulation with respect to the "fixing of reasonable rates of commission." Upon SEC determination that exchange rules or practices regarding commission rates required change in order to protect investors or to insure fair dealing, the SEC was authorized to

[12] One further change in the 1975 amendments should be noted. The 1934 Act defined the term "member" of an exchange as any person who, among other things, is permitted "to make use of the facilities of an exchange for transactions thereon . . . with the payment of a commission or fee which is less than that charged the general public." § 3 (a) (3), 48 Stat. 883. This implied a likelihood of fixed rates for the general public, for otherwise it would have been difficult to determine that a member, in fact, was given lower rates. This definition was deleted in the 1975 amendments and has been replaced with a general definition of a member of an exchange. § 3 (a) (3) (A), 89 Stat. 97.

require adoption of such changes as were deemed necessary or appropriate. This legislative permission for the fixing of commission rates under the supervision of the SEC occurred seven years *after* this Court's decision in *United States* v. *Trenton Potteries Co.,* 273 U. S. 392 (1927), to the effect that price fixing was a *per se* violation of the Sherman Act. Since the Exchange Act's adoption, and primarily in the last 15 years, the SEC has been engaged in thorough review of exchange commission rate practices. The committees of the Congress, while recently expressing some dissatisfaction with the progress of the SEC in implementing competitive rates, have generally been content to allow the SEC to proceed without new legislation. As of May 1, 1975, the SEC, by order, has abolished fixed rates. And new legislation, enacted into law June 5, 1975, codifies this result, although still permitting the SEC some discretion to reimpose fixed rates if warranted.

IV

This Court has considered the issue of implied repeal of the antitrust laws in the context of a variety of regulatory schemes and procedures. Certain axioms of construction are now clearly established. Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a "plain repugnancy between the antitrust and regulatory provisions" will repeal be implied. *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 350–351 (1963). See also *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware,* 414 U. S., at 126; *Hughes Tool Co.* v. *Trans World Airlines, Inc.,* 409 U. S. 363, 385–389 (1973); *Carnation Co.* v. *Pacific Conference,* 383 U. S. 213, 217–218 (1966); *Silver* v. *New York Stock Exchange,* 373 U. S.,

at 357–358; *United States* v. *Borden Co.,* 308 U. S. 188, 198–199 (1939). See *United States* v. *National Assn. of Securities Dealers, post,* at 719–720, 729–730.

The starting point for our consideration of the particular issue presented by this case, *viz.,* whether the antitrust laws are impliedly repealed or replaced as a result of the statutory provisions and administrative and congressional experience concerning fixed commission rates, of course, is our decision in *Silver.* There the Court considered the relationship between the antitrust laws and the Securities Exchange Act, and did so specifically with respect to the action of an exchange in ordering its members to remove private direct telephone connections with the offices of nonmembers. Such action, absent any immunity derived from the regulatory laws, would be a *per se* violation of § 1 of the Sherman Act. 373 U. S., at 347. Concluding that the proper approach to the problem was to reconcile the operation of the antitrust laws with a regulatory scheme, the Court established a "guiding principle" for the achievement of this reconciliation. Under this principle, "[r]epeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." *Id.,* at 357.

In *Silver,* the Court concluded that there was no implied repeal of the antitrust laws in that factual context because the Exchange Act did not provide for SEC jurisdiction or review of particular applications of rules enacted by the exchanges. It noted:

> "Although the Act gives to the Securities and Exchange Commission the power to request exchanges to make changes in their rules, § 19 (b), 15 U. S. C. § 78s (b), and impliedly, therefore, to disapprove any rules adopted by an exchange, see also

> § 6 (a)(4), 15 U. S. C. § 78f (a)(4), it does not give the Commission jurisdiction to review particular instances of enforcement of exchange rules." *Ibid.*

At the time *Silver* was decided, both the rules and constitution of the NYSE provided that the Exchange could require discontinuance of wire service between the office of a member and a nonmember at any time. There was no provision for notice or statement of reasons. While these rules were permissible under the general power of the exchanges to adopt rules regulating relationships between members and nonmembers, and the SEC could disapprove the rules, the SEC could not forbid or regulate any particular application of the rules. Hence, the regulatory agency could not prevent application of the rules that would have undesirable anticompetitive effects; there was no governmental oversight of the exchange's self-regulatory action, and no method of insuring that some attention at least was given to the public interest in competition.

The Court, therefore, concluded that the absence in *Silver* of regulatory supervision over the application of the exchange rules prevented any conflict arising between the regulatory scheme and the antitrust laws. See also *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 455–457 (1945), where the Court found no conflict because the regulatory agency (the Interstate Commerce Commission) had no jurisdiction over the rate-fixing combination involved. The Court in *Silver* cautioned, however, that "[s]hould review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented." 373 U. S., at 360. It amplified this statement in a footnote:

> "Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange

ruling . . . a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today." *Id.,* at 358 n. 12.

It is patent that the case presently at bar is, indeed, that "different case" to which the Court in *Silver* referred. In contrast to the circumstances of *Silver,* § 19 (b) gave the SEC direct regulatory power over exchange rules and practices with respect to "the fixing of reasonable rates of commission." Not only was the SEC authorized to disapprove rules and practices concerning commission rates, but the agency also was permitted to require alteration or supplementation of the rules and practices when "necessary or appropriate for the protection of investors or to insure fair dealings in securities traded in upon such exchange." Since 1934 all rate changes have been brought to the attention of the SEC, and it has taken an active role in review of proposed rate changes during the last 15 years. Thus, rather than presenting a case of SEC impotence to affect application of exchange rules in particular circumstances, this case involves explicit statutory authorization for SEC review of all exchange rules and practices dealing with rates of commission and resultant SEC continuing activity.

Having determined that this case is, in fact, the "different case," we must then make inquiry as to the proper reconciliation of the regulatory and antitrust statutes involved here, keeping in mind the principle that repeal of the antitrust laws will be "implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." 373 U. S., at 357. We hold that these requirements for implied repeal are clearly satisfied here. To permit operation of the antitrust laws with respect to commission rates, as urged by

petitioner Gordon and the United States as *amicus curiae,* would unduly interfere, in our view, with the operation of the Securities Exchange Act.

As a threshold matter, we believe that the determination of whether implied repeal of the antitrust laws is necessary to make the Exchange Act provisions work is a matter for the courts, and in particular, for the courts in which the antitrust claims are raised. *Silver* exemplifies this responsibility. In some cases, however, the courts may defer to the regulatory agency involved, in order to take advantage of its special expertise. The decision in the end, however, is for the courts. *Ricci* v. *Chicago Mercantile Exchange,* 409 U. S. 289, 306–308 (1973).

The United States, as *amicus curiae,* suggests not only that the immunity issue is ultimately for the courts to decide, but also that the courts may reach the decision only on a full record. A summary record, as compiled in this case on motions for summary judgment, though voluminous, is said to be an inadequate basis for resolution of the question. We disagree. In *this* case nothing is to be gained from any further factual development that might be possible with a trial on the merits. We have before us the detailed experience of the SEC regulatory activities, and we have the debates in the Congress culminating in the 1975 legislation. This information is sufficient to permit an informed decision as to the existence of an implied repeal.

Our disposition of this case differs from that of the Seventh Circuit in *Thill Securities Corp.* v. *New York Stock Exchange,* 433 F. 2d 264 (1970), cert. denied, 401 U. S. 994 (1971), where antitrust immunity for the NYSE's antirebate rule was claimed and denied. The Court of Appeals reversed a grant of summary judgment in favor of the NYSE, and remanded for further evi-

dence regarding the effects of the antirebate rule on competition, the degree of actual review by the SEC, and the extent to which the rule was necessary to make the Exchange Act work. 433 F. 2d, at 270. This ruling is persuasively distinguishable on at least two grounds from the case at bar: First, there was no evidence presented regarding the extent of SEC review of the challenged rule. Second, the antirebate practice differs from fixed commission rates in that (1) it was not among the items specifically listed in § 19 (b), although the practice might reasonably be thought to be related to the fixing of commission rates, and (2) it does not necessarily apply uniformly, and may be applied in a discriminatory manner. We do not believe it necessary, in the circumstances of this case, to take further evidence concerning the competitive effects of fixed rates, or the necessity of fixed rates as a keystone of the operation of exchanges under the Exchange Act. To the extent that the Court of Appeals in *Thill* viewed the question of implied repeal as a question of fact, concerning whether the particular rule itself is necessary to make the Act work, we decline to follow that lead.

We also regard our specific disposition in *Ricci* v. *Chicago Mercantile Exchange, supra,* as inapposite for this case. In *Ricci,* an antitrust complaint charged that the Chicago Mercantile Exchange arbitrarily transferred a membership, in violation of both the Commodity Exchange Act, 42 Stat. 998, as amended, 7 U. S. C. § 1 *et seq.,* and the exchange rules. We held that consideration of the antitrust claims should be stayed pending determination by the Commodity Exchange Commission as to whether the actions taken were in violation of the Act or the rules. Although we noted that the Act did not confer a general antitrust immunity, we stated that if the actions complained of were in

conformity with the Act and exchange rules, a substantial question would be presented concerning whether the actions were insulated from antitrust attack. It is manifest, then, that *Ricci* involved a deference to the expertise of a regulatory agency in determining if the activities violated the Act or rules, and did not represent a decision on antitrust immunity where the conduct charged was clearly encompassed by the legislation or rules and where there was no factual dispute.

We believe that the United States, as *amicus,* has confused two questions. On the one hand, there is a factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act. On the other hand, there is a legal question as to whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates. The factual question is not before us in this case. Rather, we are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress. The issue of the wisdom of fixed rates becomes relevant only when it is determined that there is no antitrust immunity.

The United States appears to suggest that only if there is a pervasive regulatory scheme, as in the public utility area, can it be concluded that the regulatory scheme ousts the antitrust laws. Brief for United States as *Amicus Curiae* 16, 35. It is true that in some prior cases we have been concerned with the question of the pervasiveness of the regulatory scheme as a factor in determining whether there is an implied repeal of the antitrust laws. See, *e. g., Otter Tail Power Co.* v. *United States,* 410 U. S. 366, 373–375 (1973). In the present case, how-

ever, respondents do not claim that repeal should be implied because of a pervasive regulatory scheme, but because of the specific provision of § 19 (b)(9) and the regulatory action thereunder. Brief for Respondents 35. Hence, whether the Exchange Act amounts to pervasive legislation ousting the antitrust acts is not a question before us.

We agree with the District Court and the Court of Appeals, and with respondents, that to deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards. It is clear from our discussion in Part III, *supra,* that the commission rate practices of the exchanges have been subjected to the scrutiny and approval of the SEC.[13] If antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC. Such different standards are likely to result because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry.[14] Given the expertise of the SEC, the confidence

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[13] We believe that this degree of scrutiny and approval by the SEC is not significantly different for our purposes here than an affirmative order to the exchanges to follow fixed rates. The United States, as *amicus curiae,* agrees that if the SEC "were to order the exchanges to adhere to a fixed commission rate system of some kind, no antitrust liability could arise." Brief for United States as *Amicus Curiae* 48. We conclude that immunity should not rest on the existence of a formal order by the SEC, but that the actions taken by the SEC pursuant to § 19 (b) (9), as outlined in Part III, *supra,* are to be viewed as having an effect equivalent to that of a formal order.

[14] Compare *Pan American World Airways* v. *United States,* 371 U. S. 296, 305–310 (1963), with *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 350–352 (1963). In the latter case

the Congress has placed in the agency, and the active roles the SEC and the Congress have taken, permitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress rather than supplement that scheme.[15]

In Part III, *supra,* we outlined the legislative and regulatory agency concern with the fixing of commission rates. Beginning with the enactment of the Securities Exchange Act in 1934, the Congress persistently has provided for SEC authority to regulate commission rates. Although SEC action in the early years appears to have been minimal, it is clear that since 1959 the SEC has been engaged in deep and serious study of the commission rate practices of the exchanges and of their members, and has required major changes in those practices. The ultimate result of this long-term study has been a regulatory decree requiring abolition of the practice of fixed rates of commission as of May 1, 1975, and the institution of full and complete competition. Significantly, in the new legislation enacted subsequent to the SEC's abolition of commission rate fixing, the Congress has indicated its continued approval of SEC review of the commission rate structure. Although legislatively

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two factors pointed against antitrust immunity: (1) congressional intent in the Bank Merger Act not to immunize activities from antitrust legislation, and (2) the lack of conflict between the Bank Merger Act and Clayton Act standards. Also, there was an absence of continuing oversight by the Comptroller General of the Currency. These factors are not present in, and are inapplicable to, the case at bar.

[15] We note, of course, that judicial review of SEC action is available under the Administrative Procedure Act, 5 U. S. C. §§ 702 and 704, or under § 25 of the Securities Exchange Act, 15 U. S. C. § 78y. See also *Independent Broker-Dealers' Trade Assn.* v. *SEC,* 142 U. S. App. D. C. 384, 442 F. 2d 132, cert. denied, 404 U. S. 828 (1971).

enacting the SEC regulatory provision banning fixed rates, the Congress has explicitly provided that the SEC, under certain circumstances and upon the making of specified findings, may allow reintroduction of fixed rates.

In sum, the statutory provision authorizing regulation, § 19 (b)(9), the long regulatory practice, and the continued congressional approval illustrated by the new legislation, point to one, and only one, conclusion. The Securities Exchange Act was intended by the Congress to leave the supervision of the fixing of reasonable rates of commission to the SEC. Interposition of the antitrust laws, which would bar fixed commission rates as *per se* violations of the Sherman Act, in the face of positive SEC action, would preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity. Implied repeal of the antitrust laws is, in fact, necessary to make the Exchange Act work as it was intended; failure to imply repeal would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates.

Affirmed.

MR. JUSTICE DOUGLAS, concurring.

The Court relies upon three factors—statutory authorization for regulation by the Securities and Exchange Commission (SEC), a long history of actual SEC oversight and approval, and continued congressional affirmation of the SEC's role—in holding that the system of fixed commission rates employed on the securities exchanges is immune from antitrust attack. While I join that opinion, I write separately to emphasize the single factor which, for me, is of prime importance.

The mere existence of a statutory power of review by the SEC over fixed commission rates cannot justify im-

munizing those rates from antitrust challenges. The antitrust laws are designed to safeguard a strong public interest in free and open competition, and immunity from those laws should properly be implied only when some equivalent mechanism is functioning to protect that public interest. Only if the SEC is actively and aggressively exercising its powers of review and approval can we be sure that fixed commission rates are being monitored in the manner which Congress intended. Cf. *Hughes Tool Co.* v. *Trans World Airlines, Inc.,* 409 U. S. 363, 387–389 (1973).

The Court reviews at length the history of the SEC's involvement with fixed commission rates. In light of that history, I am satisfied to join the opinion of the Court and affirm the judgment below.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, concurring.

While joining the opinion of the Court, I add a brief word. The Court has never held, and does not hold today, that the antitrust laws are inapplicable to anticompetitive conduct simply because a federal agency has jurisdiction over the activities of one or more of the defendants. An implied repeal of the antitrust laws may be found only if there exists a "plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia Nat. Bank,* 374 U. S. 321, 351.

The mere existence of the Commission's reserve power of oversight with respect to rules initially adopted by the exchanges, therefore, does not necessarily immunize those rules from antitrust attack. Rather, "exchange self-regulation is to be regarded as justified in response to antitrust charges only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act." *Silver* v. *New York Stock Exchange,* 373

U. S. 341, 361. The question presented by the present case, therefore, is whether exchange rules fixing minimum commission rates are "necessary to make the Securities Exchange Act work." *Id.*, at 357.

As the Court's opinion explains, see *ante*, at 663–667, when Congress enacted the Securities Exchange Act of 1934, it was fully aware of the well-established exchange practice of fixing commission rates, which had existed continuously since 1792. Nevertheless, Congress chose not to prohibit that practice. Instead, in § 19 (b)(9) of the 1934 Act Congress specifically empowered the Commission to exercise direct supervisory authority over exchange rules respecting "the fixing of reasonable rates of commission." Congress thereby unmistakably determined that, until such time as the Commission ruled to the contrary, exchange rules fixing minimum commission rates would further the policies of the 1934 Act. Accordingly, although the Act contains no express exemption from the antitrust laws for exchange rules establishing fixed commission rates, under *Silver* that particular instance of exchange self-regulation is immune from antitrust attack.

UNITED STATES *v.* NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., ET AL.

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

No. 73-1701. Argued March 17, 1975—Decided June 26, 1975

Section 22 (d) of the Investment Company Act of 1940 provides that "no dealer shall sell [mutual-fund shares] to any person except a dealer, a principal underwriter, or the issuer, except at a current public offering price described in the prospectus." Section 22 (f) authorizes mutual funds to impose restrictions on the negotiability and transferability of shares, provided they conform with the fund's registration statement and do not contravene any rules and regulations that the Securities and Exchange Commission (SEC) may prescribe in the interests of the holders of all of the outstanding securities. Section 2 (a)(6) defines a "broker" as a person engaged in the business of effecting transactions in securities for the account of others, and § 2 (a)(11) defines a "dealer" as a person regularly engaged in the business of buying and selling securities for his own account. The Maloney Act of 1938 (§ 15A of the Securities Exchange Act of 1934) supplements the SEC's regulation of over-the-counter markets by providing a system of cooperative self-regulation through voluntary associations of brokers and dealers. The Government brought this action against appellee National Association of Securities Dealers (NASD), certain mutual funds, mutual-fund underwriters, and broker-dealers, alleging that appellees, in violation of § 1 of the Sherman Act, combined and agreed to restrict the sale and fix the resale prices of mutual-fund shares in secondary market transactions between dealers, from an investor to a dealer, and between investors through brokered transactions, and sought to enjoin such agreements. Count I of the complaint charged a horizontal combination and conspiracy among NASD's members to prevent the growth of a secondary dealer market in the purchase and sale of mutual-fund shares, the Government contending that such count was not to be read as a direct attack on NASD rules, but on NASD's interpretations and appellees' extension of the rules so as to include a secondary market. Counts II-VIII alleged various vertical restrictions on secondary

market activities. The District Court dismissed the complaint on the grounds that §§ 22 (d) and (f), when read in conjunction with the Maloney Act, afforded antitrust immunity from all of the challenged practices. It further determined that, apart from this statutory immunity, the pervasive regulatory scheme established by these statutes conferred an implied immunity from antitrust sanction. The court concluded that the § 22 (d) price maintenance mandate for sales by "dealers" applied to transactions in which a broker-dealer acts as statutory "broker" rather than a statutory "dealer," and thus that § 22 (d) governs transactions in which the broker-dealer acts as an agent for an investor as well as those in which he acts as a principal selling shares for his own account. *Held:*

1. Neither the language nor legislative history of § 22 (d) justifies extending the section's price maintenance mandate beyond its literal terms to encompass transactions by broker-dealers acting as statutory "brokers." Pp. 711–720.

(a) To construe § 22 (d) to cover all broker-dealer transactions would displace the antitrust laws by implication and also would impinge on the SEC's more flexible authority under § 22 (f). Implied antitrust immunity can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system, and here no such showing has been made. Pp. 719–720.

(b) Such an expansion of § 22 (d)'s coverage would serve neither this Court's responsibility to reconcile the antitrust and regulatory statutes where feasible nor the Court's obligation to interpret the Investment Company Act in a manner most conducive to the effectuation of its goals. P. 720.

2. The vertical restrictions sought to be enjoined in Counts II–VIII are among the kinds of agreements authorized by § 22 (f), and hence such restrictions are immune from liability under the Sherman Act. Pp. 720–730.

(a) The restrictions on transferability and negotiability contemplated by § 22 (f) include restrictions on the distribution system for mutual-fund shares as well as limitations on the face of the shares themselves. To interpret the section as covering only the latter would disserve the broad remedial function of the section, which, as a complement to § 22 (d)'s protection against disruptive price competition caused by dealers' "bootleg market" trading of mutual-fund shares, authorizes the funds and the SEC to deal more flexibly with other detrimental trading practices

by imposing SEC-approved restrictions on transferability and negotiability. Pp. 722–725.

(b) To contend, as the Government does, that the SEC's exercise of regulatory authority has been insufficient to give rise to an implied immunity for agreements conforming with § 22 (f) misconceives the statute's intended operation. By its terms § 22 (f) authorizes properly disclosed restrictions unless they are inconsistent with SEC rules or regulations and thus authorizes funds to impose transferability or negotiability restrictions subject to SEC disapproval. Pp. 726–728.

(c) The SEC's authority would be compromised if the agreements challenged in Counts II–VIII were deemed actionable under the Sherman Act. There can be no reconciliation of the SEC's authority under § 22 (f) to permit these and similar restrictive agreements with the Sherman Act's declaration that they are illegal *per se*. In this instance the antitrust laws must give way if the regulatory scheme established by the Investment Company Act is to work. Pp. 729–730.

3. The activities charged in Count I are neither required by § 22 (d) nor authorized under § 22 (f), and therefore cannot find antitrust shelter therein. The SEC's exercise of regulatory authority under the Maloney and Investment Company Acts is sufficiently pervasive, however, to confer implied immunity from antitrust liability for such activities. Pp. 730–735.

374 F. Supp. 95, affirmed.

Powell, J., wrote the opinion of the Court, in which Burger, C. J., and Stewart, Blackmun, and Rehnquist, JJ., joined. White, J., filed a dissenting opinion, in which Douglas, Brennan, and Marshall, JJ., joined, *post*, p. 735.

Gerald P. Norton argued the cause for the United States. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Kauper, Howard E. Shapiro,* and *Daniel R. Hunter.*

Lee Loevinger argued the cause for appellees. With him on the brief for appellees Bache & Co., Inc., et al., were *Owen M. Johnson, Jr.,* and *David J. Saylor.* Briefs were filed by *Joseph B. Levin, Lloyd J. Derrickson,* and

Dennis C. Hensley for appellee National Association of Securities Dealers, Inc.; by *Robert E. Jensen* and *Richard M. Phillips* for appellees Wellington Management Co. et al.; by *William R. Meagher* for appellees Fidelity Fund, Inc., et al.; by *Herbert J. Miller, Jr.,* for appellee Vance, Sanders & Co., Inc.; and by *Marvin Schwartz* and *Mark I. Fishman* for appellee Massachusetts Investors Growth Stock Fund, Inc.

Walter P. North argued the cause for the Securities and Exchange Commission as *amicus curiae* urging affirmance. With him on the brief was *Lawrence E. Nerheim.*

Opinion of the Court by MR. JUSTICE POWELL, announced by MR. JUSTICE BLACKMUN.

This appeal requires the Court to determine the extent to which the regulatory authority conferred upon the Securities and Exchange Commission by the Maloney Act, 52 Stat. 1070, as amended, 15 U. S. C. § 78*o*–3, and the Investment Company Act of 1940, 54 Stat. 789, as amended, 15 U. S. C. § 80a–1 *et seq.,* displaces the strong antitrust policy embodied in § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. At issue is whether certain sales and distribution practices employed in marketing securities of open-end management companies, popularly referred to as "mutual funds," are immune from antitrust liability. We conclude that they are, and accordingly affirm the judgment of the District Court.

I

An "investment company" invests in the securities of other corporations and issues securities of its own.[1]

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[1] The Investment Company Act of 1940 defines "investment company" to include any issuer of securities which

"(1) is or holds itself out as being engaged primarily, or pro-

Shares in an investment company thus represent proportionate interests in its investment portfolio, and their value fluctuates in relation to the changes in the value of the securities it owns. The most common form of investment company, the "open end" company or mutual fund, is required by law to redeem its securities on demand at a price approximating their proportionate share of the fund's net asset value at the time of redemption.[2] In order to avoid liquidation through redemption, mutual funds continuously issue and sell new shares. These features—continuous and unlimited distribution and compulsory redemption—are, as the Court recently recognized, "unique characteristic[s]" of this form of investment. *United States* v. *Cartwright,* 411 U. S. 546, 547 (1973).

The initial distribution of mutual-fund shares is conducted by a principal underwriter, often an affiliate of

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poses to engage primarily, in the business of investing, reinvesting, or trading in securities;

"(2) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or

"(3) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis." 15 U. S. C. § 80a-3 (a).

This broad definition is qualified, however, by a series of specific exemptions. See §§ 83a-3 (b) and (c).

[2] See 15 U. S. C. §§ 80a-2 (a)(32), 80a-22 (e).

Management investment companies whose securities lack this redeemability feature are defined as "closed end" companies, § 80a-5, and their sales and distribution practices are regulated under § 23 of the Act. 15 U. S. C. § 80a-23. Section 22 of the Act, the provision under consideration in this appeal, governs the sales and distribution practices of "open end" companies only.

the fund, and by broker-dealers [3] who contract with that underwriter to sell the securities to the public. The sales price commonly consists of two components, a sum calculated from the net asset value of the fund at the time of purchase, and a "load," a sales charge representing a fixed percentage of the net asset value. The load is divided between the principal underwriter and the broker-dealers, compensating them for their sales efforts.[4]

The distribution-redemption system constitutes the primary market in mutual-fund shares, the operation of which is not questioned in this litigation. The parties agree that § 22 (d) of the Investment Company Act requires broker-dealers to maintain a uniform price in sales in this primary market to all purchasers except the fund, its underwriters, and other dealers. And in view of this express requirement no question exists that antitrust immunity must be afforded these sales. This case

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[3] In this opinion we will use the term "broker-dealer" to refer generally to persons registered under the Securities Exchange Act of 1934, 48 Stat. 895, 15 U. S. C. § 78*o et seq.*, and authorized to effect transactions or induce the purchase or sale of securities pursuant to the authorization of that Act. We also will refer separately to "brokers" and "dealers" as defined by the Investment Company Act, see 15 U. S. C. §§ 80a-2 (a)(6) and (11), to describe the capacity in which a broker-dealer acts in a particular transaction.

[4] The Act defines "sales load" to be the difference between the public offering price and the portion of the sales proceeds that is invested or held for investment purposes by the issuer. § 80a-2 (a)(35). Most mutual funds charge this sales load in order to encourage vigorous sales efforts on the part of underwriters and broker-dealers. There are some funds that do not charge this additional sales fee. These "no load" funds generally sell directly to the investor without relying on the promotional and sales efforts of underwriters and broker-dealers. See SEC Report of the Division of Investment Management Regulation, Mutual Fund Distribution and Section 22 (d) of the Investment Company Act of 1940, p. 112 (Aug. 1974) (hereinafter 1974 Staff Report).

focuses, rather, on the potential secondary market in mutual-fund shares.

Although a significant secondary market existed prior to enactment of the Investment Company Act, little presently remains. The United States agrees that the Act was designed to restrict most of secondary market trading, but nonetheless contends that certain industry practices have extended the statutory limitation beyond its proper boundaries. The complaint in this action alleges that the defendants, appellees herein, combined and agreed to restrict the sale and fix the resale prices of mutual-fund shares in secondary market transactions between dealers, from an investor to a dealer, and between investors through brokered transactions.[5] Named as defendants are the National Association of Securities Dealers (NASD),[6] and certain mutual funds,[7] mutual-fund underwriters,[8] and securities broker-dealers.[9]

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[5] Two additional private antitrust actions premised on similar theories were filed in the District Court and subsequently dismissed, *Haddad* v. *Crosby Corp.* and *Gross* v. *National Assn. of Securities Dealers, Inc.*, 374 F. Supp. 95 (DC 1973). The Court of Appeals for the District of Columbia Circuit stayed those appeals to await the resolution of this case, and the petition of one of the parties for certiorari before judgment was denied, *Gross* v. *National Assn. of Securities Dealers, Inc.*, 419 U. S. 843 (1974).

Subsequent to the filing of the United States' complaint some 50 private suits purporting to be class actions under Fed. Rule Civ. Proc. 23 were filed in various District Courts around the country. These cases were transferred to the United States District Court for the District of Columbia by the Judicial Panel on Multidistrict Litigation, *In re Mutual Fund Sales Antitrust Litigation,* Civil Action No. Misc. 103–73. See 374 F. Supp., at 97 n. 4. The District Court deferred determination of whether the actions could be maintained as class actions under Rule 23 and additionally postponed discovery and other activity pending disposition of the motion to dismiss in this case. 374 F. Supp., at 114.

[6] The NASD is registered under § 15A of the Securities Exchange

[*Footnotes 7, 8, and 9 are on p. 701*]

The United States charges that these agreements violate § 1 of the Sherman Act, 15 U. S. C. § 1,[10] and prays that they be enjoined under § 4 of that Act.

Count I charges a horizontal combination and conspiracy among the members of appellee NASD to pre-

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Act of 1934, 15 U. S. C. § 78o–3, the so-called Maloney Act of 1938. The Maloney Act supplements the Securities and Exchange Commission's regulation of the over-the-counter markets by providing a system of cooperative self-regulation through voluntary associations of brokers and dealers. The Act provides that associations may register with the Commission pursuant to specified terms and conditions, and authorizes them to promulgate rules designed to prevent fraudulent and manipulative practices; to promote equitable principles of trade; to safeguard against unreasonable profits and charges; and generally to protect investors and the public interest. § 78o–3 (b) (8). The Act also authorizes the SEC to exercise a significant oversight function over the rules and activities of the registered associations. See, *e. g.*, §§ 78o–3 (b), (e), (h), (j), and (k). The NASD is presently the only association registered under this Act.

[7] The mutual funds named as defendants in this action are Massachusetts Investors Growth Stock Fund, Inc., Fidelity Fund, Inc., and Wellington Fund, Inc.

[8] The defendant underwriters include the Crosby Corp., Vance, Sanders & Co., and the Wellington Management Co.

[9] Named as defendant broker-dealers are the following: Merrill Lynch, Pierce, Fenner & Smith, Inc., Bache & Co., Inc., Reynolds Securities Corp., E. I. duPont, Glore Forgan, Inc., E. F. Hutton, Inc., Walston & Co., Inc., Dean Witter & Co., Inc., Paine, Webber, Jackson & Curtis, Inc., and Hornblower & Weeks-Hemphill, Noyes, Inc.

[10] Section 1 of the Sherman Act provides in pertinent part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

"Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

vent the growth of a secondary dealer market in the purchase and sale of mutual-fund shares. See n. 42, *infra*. Counts II–VIII, by contrast, allege various vertical restrictions on secondary market activities. In Counts II, IV, and VI the United States charges that the principal underwriters and broker-dealers entered into agreements that compel the maintenance of the public offering price in brokerage transactions of specified mutual-fund shares, and that prohibit interdealer transactions by allowing each broker-dealer to sell and purchase shares only to or from investors.[11] Count VIII alleges that the broker-dealers entered into other, similar contracts and combinations with numerous principal underwriters. Counts III, V, and VII allege violations on the part of the principal underwriters and the funds themselves. In Counts III and VII the various defend-

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[11] The violations alleged in Count II are typical of those charged in Counts IV and VI. In Count II, appellee Crosby, a principal underwriter of appellee Fidelity Fund, Inc., is charged with entering into contracts and combinations with appellee broker-dealers, the substantial terms of which are that

"(a) each broker/dealer must maintain the public offering price in any brokerage transaction in which it participates involving the purchase or sale of shares of the Fidelity Funds; and

"(b) each broker/dealer must sell shares of the Fidelity Funds only to investors or the fund and purchase such shares only from investors or the fund." App. 10–11.

Count VI, in addition to charging restrictive agreements similar to the above, alleged that appellee Wellington, a principal underwriter, agreed to act only as an agent of the appropriate mutual fund in all transactions with the broker-dealers. *Id.*, at 15.

The alleged effect of the restrictive agreement charged in ¶ (a) was to inhibit the growth and development of a brokerage market in mutual-fund shares. The alleged effect of the restriction identified in ¶ (b), by contrast, was to inhibit interdealer transactions and thus to restrict the growth and development of a secondary dealer market. App. 11.

ants are charged with entering into contracts requiring the restrictive underwriter-dealer agreements challenged in Counts II and VI. Count V charges that the agreement between one fund and its underwriter restricted the latter to serving as a principal for its own account in all transactions with the public, thereby prohibiting brokerage transactions in the fund's shares. App. 14.

After carefully examining the structure, purpose, and history of the Investment Company Act, 15 U. S. C. § 80a–1 *et seq.*, and the Maloney Act, 15 U. S. C. § 78*o*–3, the District Court held that this statutory scheme was " 'incompatible with the maintenance of (an) antitrust action,' " 374 F. Supp. 95, 109 (DC 1973), quoting *Silver* v. *New York Stock Exchange,* 373 U. S. 341, 358 (1963). The court concluded that §§ 22 (d) and (f) of the Investment Company Act, when read in conjunction with the Maloney Act, afford antitrust immunity for all of the practices here challenged. The court further held that apart from this explicit statutory immunity, the pervasive regulatory scheme established by these statutes confers an implied immunity from antitrust sanction in the "narrow area of distribution and sale of mutual fund shares." 374 F. Supp., at 114. The court accordingly dismissed the complaint, and the United States appealed to this Court.[12]

The position of the United States in this appeal can be summarized briefly. Noting that implied repeals of the antitrust laws are not favored, see, *e. g., United States* v. *Philadelphia National Bank,* 374 U. S. 321, 348 (1963), the United States urges that the antitrust immunity conferred by § 22 of the Investment Company

[12] The Court noted probable jurisdiction on October 15, 1974. 419 U. S. 822. Accordingly, the recent amendments to the Expediting Act, 88 Stat. 1709, 15 U. S. C. § 29 (1970 ed., Supp. IV), do not affect our jurisdiction.

Act should not extend beyond its precise terms, none of which, it maintains, requires or authorizes the practices here challenged. The United States maintains, moreover, that the District Court expanded the limits of the implied-immunity doctrine beyond those recognized by decisions of this Court. In response, appellees advance all of the positions relied on by the District Court. They are joined by the Securities and Exchange Commission (hereinafter SEC or Commission), which asserts as *amicus curiae* that the regulatory authority conferred upon it by § 22 (f) of the Investment Company Act displaces § 1 of the Sherman Act. The SEC contends, therefore, that the District Court properly dismissed Counts II–VIII but takes no position with respect to Count I.

II

A

The Investment Company Act of 1940 originated in congressional concern that the Securities Act of 1933, 48 Stat. 74, 15 U. S. C. § 77a *et seq.*, and the Securities Exchange Act of 1934, 48 Stat. 881, 15 U. S. C. § 78a *et seq.*, were inadequate to protect the purchasers of investment company securities. Thus, in § 30 of the Public Utility Holding Company Act, 49 Stat. 837, 15 U. S. C. § 79z–4, Congress directed the SEC to study the structures, practices, and problems of investment companies with a view toward proposing further legislation. Four years of intensive scrutiny of the industry culminated in the publication of the Investment Trust Study and the recommendation of legislation to rectify the problems and abuses it identified. After extensive congressional consideration, the Investment Company Act of 1940 was adopted.

The Act vests in the SEC broad regulatory authority

over the business practices of investment companies.[13] We are concerned on this appeal with § 22 of the Act, 15 U. S. C. § 80a–22, which controls the sales and distribution of mutual-fund shares. The questions presented require us to determine whether § 22 (d) obligates appellees to engage in the practices challenged in Counts II–VIII and thus necessarily confers antitrust immunity on them. If not, we must determine whether such practices are authorized by § 22 (f) and, if so, whether they are immune from antitrust sanction. Resolution of these issues will be facilitated by examining the nature of the problems and abuses to which § 22 is addressed, a matter to which we now turn.

B

The most thorough description of the sales and distribution practices of mutual funds prior to passage of the

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[13] For example, the Act requires companies to register with the SEC, 15 U. S. C. § 80a–8. See also § 80a–7. Companies also must register all securities they issue, see Securities Act of 1933, 15 U. S. C. § 77f; Investment Company Act, 15 U. S. C. § 80a–24 (a), and must submit for SEC inspection copies of the sales literature they send to prospective investors. § 80a–24 (b). The Investment Company Act requires the submission and periodic updating of detailed financial reports and documentation and the semiannual transmission of reports containing similar information to the shareholders. § 80a–29. It also imposes controls and restrictions on the internal management of investment companies: establishing minimum capital requirements, § 80a–14; limiting permissible methods for selecting directors, § 80a–16; and establishing certain qualifications for persons seeking to affiliate with the companies, § 80a–9. Finally, the Act imposes a number of controls on the internal practices of investment companies. For example, it requires a majority shareholder vote for certain fundamental business decisions, § 80a–13, and limits certain dividend distributions, § 80a–19. See generally The Mutual Fund Industry: A Legal Survey, 44 Notre Dame Law. 732 (1969).

Investment Company Act may be found in Part III of the Investment Trust Study.[14] That Study, as Congress has recognized, see 15 U. S. C. § 80a-1, forms the initial basis for any evaluation of the Act.

Prior to 1940 the basic framework for the primary distribution of mutual-fund shares was similar to that existing today. The fund normally retained a principal underwriter to serve as a wholesaler of its shares. The principal underwriter in turn contracted with a number of broker-dealers to sell the fund's shares to the investing public.[15] The price of the shares was based on the fund's net asset value at the approximate time of sale, and a sales commission or load was added to that price.

Although prior to 1940 the primary distribution system for mutual-fund shares was similar to the present one, a number of conditions then existed that largely disappeared following passage of the Act. The most prominently discussed characteristic was the "two-price system," which encouraged an active secondary market under conditions that tolerated disruptive and discriminatory trading practices. The two-price

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[14] H. R. Doc. No. 279, 76th Cong., 1st Sess. (1940) (hereinafter Investment Trust Study pt. III). Part I of the Investment Trust Study is printed as H. R. Doc. No. 707, 75th Cong., 3d Sess. (1938). Part II of the Study is printed as H. R. Doc. No. 70, 76th Cong., 1st Sess. (1939) (hereinafter Investment Trust Study pt. II). For additional discussion of the operations of open-end management investment companies, see 1974 Staff Report; SEC Report of the Staff on the Potential Economic Impact of a Repeal of Section 22 (d) of the Investment Company Act of 1940 (Nov. 1972); H. R. Rep. No. 2337, 89th Cong., 2d Sess. (1966); SEC Report of the Special Study of Securities Markets, c. XI—Open-End Investment Companies (Mutual Funds), H. R. Doc. No. 95, pt. 4, 88th Cong., 1st Sess. (1963) (hereinafter 1963 Special Study).

[15] The broker-dealers operating within the primary distribution system are denominated "contract dealers" in the Study and will be so identified in this opinion.

system reflected the relationship between the commonly used method of computing the daily net asset value of mutual-fund shares and the manner in which the price for the following day was established. The net asset value of mutual funds, which depends on the market quotations of the stocks in their investment portfolios, fluctuates constantly. Most funds computed their net asset values daily on the basis of the fund's portfolio value at the close of exchange trading, and that figure established the sales price that would go into effect at a specified hour on the following day. During this interim period two prices were known: the present day's trading price based on the portfolio value established the previous day; and the following day's price, which was based on the net asset value computed at the close of exchange trading on the present day. One aware of both prices could engage in "riskless trading" during this interim period. See Investment Trust Study pt. III, pp. 851–852.

The two-price system did not benefit the investing public generally. Some of the mutual funds did not explain the system thoroughly, and unsophisticated investors probably were unaware of its existence. See *id.*, at 867. Even investors who knew of the two-price system and understood its operation were rarely in a position to exploit it fully. It was possible, however, for a knowledgeable investor to purchase shares in a rising market at the current price with the advance information that the next day's price would be higher. He thus could be guaranteed an immediate appreciation in the market value of his investment,[16] although this ad-

[16] The Study indicates that mutual funds increasingly began to disclose more information about the existence and operation of the two-price system. See Investment Trust Study pt. III, pp. 867–868. And in some instances the funds encouraged broker-dealers to explain to potential incoming investors the immediate appreciation in investment value that could be obtained from the pricing system in

vantage was obtained at the expense of the existing shareholders, whose equity interests were diluted by a corresponding amount.[17] The load fee that was charged in the sale of mutual funds to the investing public made it difficult for these investors to realize the "paper gain" obtained in such trading. Because the daily fluctuation in net asset value rarely exceeded the load, public investors generally were unable to realize immediate profits from the two-price system by engaging in rapid in-and-out trading. But insiders, who often were able to purchase shares without paying the load, did not operate under this constraint. Thus insiders could, and sometimes did, purchase shares for immediate redemption at the appreciated value. See n. 24, *infra,* and sources cited therein.

The two-price system often afforded other advantages to underwriters and broker-dealers. In a falling market they could enhance profits by waiting to fill orders with shares purchased from the fund at the next day's anticipated lower price. In a similar fashion, in a rising market they could take a "long position" in mutual-fund shares by establishing an inventory in order to satisfy anticipated purchases with securities previously obtained at a lower price. Investment Trust Study pt. III, pp. 854–855. In each case the investment company would

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the hope of encouraging the purchase of shares. *Id.,* at 854. See Hearings on S. 3580 before a Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess., pt. 1, p. 138 (1940) (hereinafter 1940 Senate Hearings).

[17] The existing shareholders' equity interests were diluted because the incoming investors bought into the fund at less than the actual value of the shares at the time of purchase. Moreover, SEC testimony indicated that this dilution could be substantial. In one instance the Commission calculated that the two-price system resulted in a loss to existing shareholders of one trust of some $133,000 in a single day *Id.,* at 139–140.

receive the lower of the two prevailing prices for its shares, *id.*, at 854, and the equity interests of shareholders would suffer a corresponding dilution.

As a result, an active secondary market in mutual-fund shares existed. *Id.*, at 865–867. Principal underwriters and contract broker-dealers often maintained inventory positions established by purchasing shares through the primary distribution system and by buying from other dealers and retiring shareholders.[18] Additionally, a "bootleg market" sprang up, consisting of broker-dealers having no contractual relationship with the fund or its principal underwriter. These bootleg dealers purchased shares at a discount from contract dealers or bought them from retiring shareholders at a price slightly higher than the redemption price. Bootleg dealers would then offer the shares at a price slightly lower than that required in the primary distribution system, thus "initiating a small scale price war between retailers and tend[ing] generally to disrupt the established offering price." *Id.*, at 865.

Section 22 of the Investment Company Act of 1940 was enacted with these abuses in mind. Sections 22 (a) and (c) were designed to "eliminat[e] or reduc[e] so far as reasonably practicable any dilution of the value of other outstanding securities . . . or any other result of [the] purchase, redemption or sale [of mutual fund securities] which is unfair to holders of such other outstanding securities," 15 U. S. C. § 80a–22 (a). They au-

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[18] Contract dealers trading from an inventory position often could obtain an additional profit from the sales load. When the dealer acted as an agent for the fund and traded from the primary distribution system, the dealer and the underwriter divided the load charge in accordance with the sales agreement. But the dealer could retain the full load when he filled the purchase order from an inventory position in shares purchased from retiring shareholders or other dealers. Investment Trust Study pt. III, pp. 858–859.

thorize the NASD and the SEC to regulate certain pricing and trading practices in order to effectuate that goal.[19] Section 22 (b) authorizes registered securities associations and the SEC to prescribe the maximum sales commissions or loads that can be charged in connection with a primary distribution; and § 22 (e) protects the right of redemption by restricting mutual funds' power to suspend redemption or postpone the date of payment.

The issues presented in this litigation revolve around subsections (d) and (f) of § 22. Bearing in mind the history and purposes of the Investment Company Act, we now consider the effect of these subsections on the

[19] Sections 22 (a) and (c) reflect the same basic relationship between the SEC and the NASD that is established by the Maloney Act. See n. 6, *supra*. Section 22 (a) authorizes registered securities associations, in this case the NASD, to prescribe rules for the regulation of these matters. 15 U. S. C. § 80a-22 (a). The industry thus is afforded the initial opportunity to police its own practices. If, however, industry self-regulation proves insufficient, § 22 (c) authorizes the Commission to make rules and regulations "covering the same subject matter, and for the accomplishment of the same ends as are prescribed in subsection (a)," and proclaims that the SEC rules and regulations supersede any inconsistent rules of the registered securities association. 15 U. S. C. § 80a-22 (c).

Shortly after enactment of the Investment Company Act the NASD proposed, and the SEC approved, a rule establishing twice-daily pricing. See *National Association of Securities Dealers, Inc.*, 9 S. E. C. 38 (1941). Twice-daily pricing reduced the time period in which persons could engage in riskless trading and correspondingly decreased the potential for dilution. The Commission subsequently provided full protection against the dilutive effects of riskless trading. In late 1968 it exercised its authority under § 22 (c) to adopt Rule 22c-1, which requires all funds to establish "forward pricing." Forward pricing eliminates the potential for riskless trading altogether. See *Adoption of Rule 22c-1*, Investment Company Act Rel. No. 5519 (1968), [1967-1969 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 77,616; 17 CFR § 270.22c-1 (1974).

question of potential antitrust liability for the practices here challenged.

III

Section 22 (d) prohibits mutual funds from selling shares at other than the current public offering price to any person except either to or through a principal underwriter for distribution. It further commands that "no dealer shall sell [mutual-fund shares] to any person except a dealer, a principal underwriter, or the issuer, except at a current public offering price described in the prospectus." 15 U. S. C. § 80a-22 (d).[20] By its terms, § 22 (d) excepts interdealer sales from its price maintenance requirement. Accordingly, this section cannot be relied upon by appellees as justification for the restrictions imposed upon interdealer transactions. At issue, rather, is the narrower question whether the § 22 (d) price maintenance mandate for sales by "dealers" applies to transactions in which a broker-dealer acts as a statutory "broker" rather than a statutory "dealer." The District Court concluded that it does, and thus that § 22 (d) governs transactions in which the broker-dealer acts as an agent for an investor as well as those in which he acts as a principal selling shares for his own account.

A

The District Court's decision reflects an expansive

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[20] This section provides in pertinent part:

"No registered investment company shall sell any redeemable security issued by it to any person except either to or through a principal underwriter for distribution or at a current public offering price described in the prospectus, and, if such class of security is being currently offered to the public by or through an underwriter, no principal underwriter of such security and no dealer shall sell any such security to any person except a dealer, a principal underwriter, or the issuer, except at a current public offering price described in the prospectus."

view of § 22 (d). The Investment Company Act specifically defines "broker" and "dealer" [21] and uses the terms distinctively throughout.[22] Appellees maintain, however, that the definition of "dealer" is sufficiently broad to require price maintenance in brokerage transactions. In support of this position appellees assert that the critical elements of the dealer definition are that the term relates to a "person" rather than to a transaction and that the person must engage "regularly" in the sale and purchase of securities to qualify as a dealer. It is argued, therefore, that any person who purchases and sells securities with sufficient regularity to qualify as a statutory dealer is thereafter bound by all dealer restrictions, regardless of the nature of the particular

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[21] The Investment Company Act defines a "dealer" to be:

"[A]ny person regularly engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, insurance company, or investment company, or any person insofar as he is engaged in investing, reinvesting, or trading in securities, or in owning or holding securities, for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business." 15 U. S. C. § 80a-2 (a)(11).

A "broker," by contrast, is defined to be:

"[A]ny person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank or any person solely by reason of the fact that such person is an underwriter for one or more investment companies." § 80a-2 (a)(6).

[22] Congress employed the term "broker" without reference to "dealer" in various sections of the Act. See §§ 80a-3 (c)(2), 80a-10 (b)(1), 80a-17(e)(1) and (2). In other instances, the Act refers to "dealer" without reference to "broker," see §§ 80a-2 (a)(40), 80a-22 (c) and (d). And in some cases, including the very definition of the term "dealer" itself, see n. 21, *supra*, the Act refers to both "broker" and "dealer" in the same provision, see §§ 80a-1 (b)(2), 80a-9 (a)(1) and (2), and 80a-30 (a). Finally, the Act in some cases refers to the more general term "broker-dealer," see §§ 80a-22 (b)(1) and (2).

transaction in question. We do not find this argument persuasive.

Appellees' reliance on the statutory reference to "person" in defining dealer adds little to the analysis, for the Act defines "broker," "investment banker," "issuer," "underwriter," and others to be "persons" as well. See 15 U. S. C. §§ 80a–2 (a)(6), (21), (22), and (40). In each instance, the critical distinction relates to their transactional capacity. Moreover, we think that appellees' reliance on the regularity requirement in the dealer definition places undue emphasis on that element at the expense of the remainder of the provision. On the face of the statute the most apparent distinction between a broker and a dealer is that the former effects transactions for the account of others and the latter buys and sells securities for his own account. We therefore cannot agree that the terms of the Act compel the conclusion that a broker-dealer acting in a brokerage capacity would be bound by the § 22 (d) dealer mandate. Indeed, the language of the Act suggests the opposite result.

Even if we assume, *arguendo*, that the statutory definition is ambiguous, we find nothing in the contemporaneous legislative history of the Investment Company Act to justify interpreting § 22 (d) to encompass brokered transactions. That history is sparse,[23] and

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[23] The original Commission-sponsored bill considered in the initial hearings before a Subcommittee of the Senate Banking and Commerce Committee, S. 3580, 76th Cong., 3d Sess. (1940), contained no provision resembling this subsection. Section 22 (d) first emerged in a compromise proposal advanced after a period of intensive consultation between the SEC and industry representatives that followed initial Senate hearings, see 1940 Senate Hearings, pt. 4, pp. 1105–1107, and the Commission subsequently has indicated that this provision was suggested by the industry. See *Midamerica Mutual Fund, Inc.*, 41 S. E. C. 328, 331 (1963); H. R. Rep. No. 2337, 89th Cong., 2d Sess., 219 (1966). Revised legislation reflecting this compromise was

suggests only that § 22 (d) was considered necessary to curb abuses that had arisen in the sales of securities to insiders.[24]

The prohibition against insider trading would seem adequately served by the first clause of § 22 (d), which prevents mutual funds from selling shares at other than the public offering price to any person except a principal underwriter or dealer. See n. 20, *supra*.[25] The further

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submitted, and further hearings were conducted in the Senate and the House. Both bills were reported favorably by their respective committees, S. Rep. No. 1775, 76th Cong., 3d Sess. (1940); H. R. Rep. No. 2639, 76th Cong., 3d Sess. (1940), and the House bill, with minor amendments not relevant to this appeal, was accepted by the Senate. 86 Cong. Rec. 10069–10071 (1940).

This history perhaps explains the dearth of discussion relating to § 22 (d). The majority of the Senate hearings were completed before this provision was advanced, and both the Senate and House hearings that followed provide relatively little illumination as to the intended purpose or scope of this subsection.

[24] Insider trading abuses were identified as a problem during the Senate hearings that preceded submission of the compromise bill containing § 22 (d), see 1940 Senate Hearings, pt. 2, pp. 526–527 and 660–661. At the close of the initial Senate hearings an industry representative suggested that the Act should contain a provision prohibiting sales at preferential terms to insiders and others. *Id.*, at 1057. The Commission and industry representatives thereafter met to seek a compromise on the various differences that had been identified in the Senate hearings, and the industry memorandum outlining the nature of the resultant agreement again indicated that a provision should be added to the Act to prohibit insider trading. See Framework of Proposed Investment Company Bill (Title I), Memorandum Embodying Suggestions Resulting from Conferences Between Securities and Exchange Commission and Representatives of Investment Companies (May 13, 1940), printed in Hearings on H. R. 10065 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 76th Cong., 3d Sess., 99 (1940).

[25] The insider-trading prohibition is complemented by § 22 (g), which precludes issuance of mutual-fund shares for services or property other than cash or securities. 15 U. S. C. § 80a–22 (g).

restriction on dealer sales bears little relation to insider trading, however, and logically would be thought to serve some other purpose. The obvious effect of the dealer prohibition is to shield the primary distribution system from the competitive impact of unrestricted dealer trading in the secondary markets, a concern that was reflected in the Study, see Investment Trust Study pt. III, p. 865. The SEC perceives this to be one of the purposes of this provision.[26]

But concluding that protection of the primary distribution system is a purpose of § 22 (d) does little to resolve the question whether Congress intended to require strict price maintenance in *all* broker-dealer transactions with the investing public. By its terms, § 22 (d) protects only against the possibly disruptive effects of secondary dealer sales which, as statutorily defined, constituted the most active secondary market existing prior to the Act's passage. Nothing in the contemporary history suggests that Congress was equally concerned with possible disruption from investor transactions in outstanding shares conducted through statutory brokers.

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[26] See *Adoption of Rule N-22D-1,* Investment Company Act Rel. No. 2798, p. 1 (1958), [1957-1961 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 76,625, p. 80,393; *Investors Diversified Services, Inc.,* Investment Company Act Rel. No. 3015 (1960), [1957-1961 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 76,699, p. 80,620; *In re Sideris,* Securities Exchange Act Rel. No. 8816, p. 2 (1970); *Mutual Funds Advisory, Inc.,* Investment Company Act Rel. No. 6932, p. 4 (1972).

The SEC also has suggested that preventing discrimination among investors was one of the purposes of this provision. See, *e. g., In re Sideris, supra; Midamerica Mutual Fund, Inc.,* 41 S. E. C., at 331; *Adoption of Rule N-22D-1, supra.* But we do not think that brokerage transactions inevitably would foster the kind of investor discrimination sought to be remedied by this statute. All investors would be equally free to seek to engage in brokered transactions, and the possibility that the more sophisticated or fortuitous investor would profit from this market does not, by itself, bring this category of transactions within the purview of § 22 (d).

Nor do we think that the history attending subsequent congressional consideration of the Act provides adequate support for appellees' contention that § 22 (d) requires strict price maintenance in all broker-dealer transactions in mutual-fund shares. To be sure, portions of the testimony of SEC Chairman Cohen before the House Subcommittee on Commerce and Finance in 1967 suggested that the price maintenance requirement of § 22 (d) encompassed all broker-dealers, irrespective of how they obtained the traded shares,[27] and on other occasions the Chairman referred to sales by brokers when discussing mutual-fund transactions.[28] Appellees also can point to congressional characterizations of § 22 (d) that suggest that some members of Congress understood the reach of that provision to be as broad as the District Court thought.[29]

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[27] Responding to inquiries concerning the relationship of § 22 (d) and the operation of state law, Chairman Cohen stated:

"The statute is unequivocal. No person, no matter where he gets it, from the issuer, from another dealer, or even from a private person, no broker-dealer may sell a share of a particular fund at a price less than that fixed by the issuer." Hearings on the Investment Company Act Amendments of 1967 before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 90th Cong., 1st Sess., pt. 2, p. 711 (1967).

[28] *Id.*, at pt. 1, p. 53.

[29] Senator Sparkman, Chairman of the Senate Banking and Currency Committee which reported the 1970 amendments to the full Senate, stated on the floor of the Senate that § 22 (d) "now makes it a Federal crime for *anyone* to sell mutual fund shares at a price lower than that fixed by the fund's distributor." 115 Cong. Rec. 838 (1969) (emphasis added). Senator Magnuson reflected perhaps a similar view, stating that, as a result of § 22 (d), "mutual fund sales charges are *totally* insulated from price competition." 114 Cong. Rec. 23057 (1968) (emphasis added).

The testimony of some witnesses suggests that they shared this expansive view. See, *e. g.*, Hearings on S. 1659 before the Senate

Appellees maintain that this history indicates that Congress always intended § 22 (d) to control broker as well as dealer transactions, and that it re-enacted the amended § 22 with that purpose in mind. The District Court accepted this position, and it is not without some support in this historical record.[30] But impressive evidence to the contrary is found in the position consistently maintained by the SEC. Responding to an inquiry in 1941, the SEC General Counsel stated that § 22 (d) did not bar brokerage transactions in mutual-fund shares:

> "In my opinion the term 'dealer,' as used in section 22 (d), refers to the capacity in which a broker-dealer is acting in a particular transaction. It follows, therefore, that if a broker-dealer in a particular transaction is acting solely in the capacity of agent for a selling investor, or for both a selling investor and a purchasing investor, the sale may be made at a price other than the current offering price described in the prospectus. . . .
>
> "On the other hand, if a broker-dealer is acting for his own account in a transaction and as principal

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Committee on Banking and Currency, 90th Cong., 1st Sess., pt. 2, p. 741 (1967) (hereinafter 1967 Senate Hearings) (testimony of Mr. Funston, President of the New York Stock Exchange); *id.*, at pt. 1, pp. 348, 356 (testimony of Professor Samuelson); *id.*, at pt. 2, p. 1064 (testimony of Professor Wallich).

[30] We conclude, however, that the context of the post-enactment history of § 22 (d) limits the force of the statements relied upon by appellees. A broker-dealer can serve in either a broker's or a dealer's capacity, and the distinction between the two functions is rather technical and precise. The parties are in general agreement that no significant number of brokered transactions, as statutorily defined, existed prior or subsequent to passage of the Act. In view of the care with which the statute defines these functions and the absence of focus on these distinctions in the statements in the subsequent consideration of § 22 (d), we think that the broader characterizations of that section must be viewed with some skepticism.

sells a redeemable security to an investor, the public offering price must be maintained, even though the sale is made through another broker who acts as agent for the seller, the investor, or both.

"As section 22 (d) itself states, the offering price is not required to be maintained in the case of sales in which both the buyer and the seller are dealers acting as principals in the transaction." Investment Company Act, Rel. No. 78, Mar. 4, 1941, 11 Fed. Reg. 10992 (1941).

This substantially contemporaneous interpretation of the Act has consistently been maintained in subsequent SEC opinions, see *Oxford Co., Inc.,* 21 S. E. C. 681, 690 (1946); *Mutual Funds Advisory, Inc.,* Investment Company Act Rel. No. 6932, p. 3 (1972). The same position was asserted in a recent staff report, see 1974 Staff Report 105 n. 2, 107 n. 2, and 109, was relied on by the SEC in its subsequent decision to encourage limited price competition in brokered transactions,[31] and is advanced by it as

[31] Acting in accordance with the recommendations of the Staff Report, the SEC Chairman recently requested that the NASD amend its Rules of Fair Practice to prohibit agreements between underwriters and broker-dealers that preclude broker-dealers, acting as agents, "from matching orders to buy and sell fund shares in a secondary market at competitively determined prices and commission rates." Letter from Mr. Ray Garrett, Jr., Chairman of the SEC to Mr. Gordon S. Macklin, President of the NASD, Nov. 22, 1974, printed in Brief for Appellees Bache & Co. et al., Add. 18. The Chairman further revealed the SEC's intention to exercise its regulatory authority under § 22 (f) to neutralize any adverse effects this market might have on the fund's primary distribution system. *Id.,* at Add. 19. As the Staff Report indicates, the Commission's exercise of regulatory authority is premised on its view that § 22 (d) does not require strict price maintenance in brokered transactions. See 1974 Staff Report 104. If § 22 (d) did control these transactions as well as "dealer" sales, the Commission's ability

amicus curiae in this Court. This consistent and long-standing interpretation by the agency charged with administration of the Act, while not controlling, is entitled to considerable weight. See, *e. g., Saxbe* v. *Bustos,* 419 U. S. 65 (1974); *Investment Co. Institute* v. *Camp,* 401 U. S. 617, 626–627 (1971); *Udall* v. *Tallman,* 380 U. S. 1, 16 (1965).

B

The substance of appellees' position is that the dealer prohibition of § 22 (d) should be interpreted in generic rather than statutory terms. The price maintenance requirement of that section accordingly would encompass all broker-dealer transactions with the investing public and would shelter them from antitrust sanction. But such an expansion of § 22 (d) beyond its terms would not only displace the antitrust laws by implication, it also would impinge seriously on the SEC's more flexible regulatory authority under § 22 (f).[32]

Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory sys-

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to encourage controlled competition in this market would be subject to question.

[32] The Department of Justice previously suggested a manner in which its interpretation of § 22 (d) could be reconciled with the Commission's exercise of regulatory authority over brokered transactions. Addressing the question of possible repeal of § 22 (d), the Justice Department suggested that rather than continue to wait for congressional repeal, the Commission should eliminate the adverse effects of price maintenance by freeing all transactions from the § 22 (d) mandate through the exercise of its § 6 (c) power of exemption, 15 U. S. C. § 80a–6 (c). 1974 Staff Report 70. This presumably would leave the SEC free to regulate transactions through the exercise of the powers conferred on it by other provisions of the Act. We need not consider the validity of the Justice Department's broad interpretation of the SEC's power of exemption, for even assuming it to be correct our analysis would not be affected.

tem. See, *e. g., United States* v. *Philadelphia National Bank,* 374 U. S., at 348; *United States* v. *Borden Co.,* 308 U. S. 188, 197–206 (1939). We think no such showing has been made. Moreover, in addition to satisfying our responsibility to reconcile the antitrust and regulatory statutes where feasible, *Silver* v. *New York Stock Exchange,* 373 U. S., at 356–357, we must interpret the Investment Company Act in a manner most conducive to the effectuation of its goals. We conclude that appellees' interpretation of § 22 (d) serves neither purpose, and cannot be justified by the language or history of that section.

We therefore hold that the price maintenance mandate of § 22 (d) cannot be stretched beyond its literal terms to encompass transactions by broker-dealers acting as statutory "brokers." Congress defined the limitations for the mandatory price maintenance requirement of the Investment Company Act. "We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy." *United States* v. *McKesson & Robbins,* 351 U. S. 305, 316 (1956). Accordingly, we hold that the District Court erred in relying on § 22 (d) in determining that the activities here questioned are immune from antitrust liability.

IV

Our determination that the restrictions on the secondary market are not immunized by § 22 (d) does not end the inquiry, for the District Court also found them sheltered from antitrust liability by § 22 (f). Appellees, joined by the SEC, defend this ruling and urge that it requires dismissal of the challenge to the vertical restrictions sought to be enjoined in Counts II–VIII.

Section 22 (f) authorizes mutual funds to impose

restrictions on the negotiability and transferability of their shares, provided they conform with the fund's registration statement and do not contravene any rules and regulations the Commission may prescribe in the interests of the holders of all of the outstanding securities.[33] The Government does not contend that the vertical restrictions are not disclosed in the registration statements of the funds in question. Nor does it assert that the agreements imposing such restrictions violate Commission rules and regulations. Indeed, it could not do so, because to date the SEC has prescribed no such standards. Instead the Government maintains that the contractual restrictions do not come within the meaning of the Act, asserting that § 22 (f) does not authorize the imposition of restraints on the distribution system rather than on the shares themselves. The Government thus apparently urges that the only limitations contemplated by this section are those that appear on the face of the certificate itself. The Government also urges that the SEC's unexercised power to prescribe rules and regulations is insufficient to create repugnancy between its regulatory authority and the antitrust laws.

Our examination of the language and history of § 22 (f) persuades us, however, that the agreements challenged in Counts II–VIII are among the kinds of restrictions Congress contemplated when it enacted that section. And this conclusion necessarily leads to a determination that they are immune from liability under the Sherman Act,

[33] Section 22 (f) of the Act, 15 U. S. C. § 80a–22 (f), provides: "No registered open-end company shall restrict the transferability or negotiability of any security of which it is the issuer except in conformity with the statements with respect thereto contained in its registration statement nor in contravention of such rules and regulations as the Commission may prescribe in the interests of the holders of all of the outstanding securities of such investment company."

for we see no way to reconcile the Commission's power to authorize these restrictions with the competing mandate of the antitrust laws.

A

Unlike § 22 (d), § 22 (f) originated in the Commission-sponsored bill considered in the Senate subcommittee hearings that preceded introduction of the compromise proposal later enacted into law. The Commission-sponsored provision authorized the SEC to promulgate rules, regulations, or orders prohibiting restrictions on the transferability or negotiability of mutual-fund shares, S. 3580, § 22 (d)(2), 76th Cong., 3d Sess. (1940).[34] Commission testimony indicates that it considered this authority necessary to allow regulatory control of industry measures designed to deal with the disruptive effects of "bootleg market" trading and with other detrimental trading practices identified in the Investment Trust Study.[35]

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[34] Section 22 (d) of the original bill, S. 3580, 76th Cong., 3d Sess. (1940), provided, in pertinent part:

"The Commission is authorized, by rules and regulations or order in the public interest or for the protection of investors, to prohibit—

. . . . .

"(2) restrictions upon the transferability or negotiability of any redeemable security of which any registered investment company is the issuer."

[35] Testifying before the Senate subcommittee, an SEC spokesman stated:

"Now coming to subparagraph (2) of (d), it just says that the Commission shall have the right to make rules and regulations with respect to any restrictions upon the transferability or negotiability of any redeemable security of which any registered investment company is the issuer.

"There are some companies that have a provision in their certificates to the effect that you cannot sell that certificate to anybody else, and the only way you can sell it is to sell it back to the com-

The Study indicates, moreover, that a number of funds had begun to deal with these problems prior to passage of the Act. And while their methods may have included the imposition of restrictive legends on the face of the certificate, see n. 35, *supra,* they were by no means confined to such narrow limits. A number of funds imposed controls on the activities of their principal underwriters, see Investment Trust Study pt. III, pp. 868–869; and in some instances the funds required the underwriters to impose similar restrictions on the dealers, see *id.,* at 869, or entered into these restrictive agreements with the dealers themselves, *id.,* at 870–871.

In view of the history of the Investment Company Act, we find no justification for limiting the range of possible transfer restrictions to those that appear on the face of the certificate. The bootleg market was primarily a problem of the distribution system, and bootleg dealers found a source of supply in the contract dealers as well as in retiring shareholders. See *id.,* at 865. Moreover, the Study indicates that part of the bootleg distribution system consisted of "trading firms" that served as wholesalers of mutual-fund securities in much the same fashion as the principal underwriters. These trading firms primarily purchased and sold shares to and from other dealers, Investment Trust Study pt. II, p. 327, frequently offering them at a price slightly lower than

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pany. That is a technical problem. It presents a whole problem which they call the bootleg market. What happens is that dealers keep switching people from one company to another. In order to prevent these switches, some provisions require that you cannot make these switches but must sell the certificate back to the company. . . .

"If the committee wants the provision, we shall recommend what, on the basis of our experience up to the present time, it ought to be; but we think subjects like that ought to be a matter of rules and regulations." 1940 Senate Hearings, pt. 1, pp. 292–293.

the discounted rate charged to dealers in the primary distribution system. *Id.,* at 327–328. Thus trading firms not only helped supply the bootleg dealers whose sales undercut those of the contract dealers, they competed with the principal underwriters by offering a source for lower cost shares that inevitably discouraged participation in the primary distribution system. See *id.,* at 328 n. 85.

The bootleg market was a complex phenomenon whose principal origins lay in the distribution system itself. In view of this history, limitation of the industry's ability, subject of course to SEC regulation, to reach these problems at their source would constitute an inappropriate contraction of the remedial function of the statute.[36] Indeed, in view of the role of trading firms and interdealer transactions in the maintenance of the bootleg market, the narrow interpretation of § 22 (f) urged by the Government would seem to afford inadequate authority to deal with the problem.

Together, §§ 22 (d) and 22 (f) protect the primary distribution system for mutual-fund securities. Section 22 (d), by eliminating price competition in dealer sales, inhibits the most disruptive factor in the pre-1940's mutual market and thus assures the maintenance of a viable sales system. Section 22 (f) complements this protection by authorizing the funds and the SEC to deal more flexibly with other detrimental trading practices by

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[36] Neither are we convinced of the necessity to limit negotiability or transferability restrictions to those appearing on the face of the certificate in order to assure their adequate disclosure to investors. Section 24 of the Act requires that mutual funds submit for SEC inspection copies of all sales literature that they send to prospective investors. 15 U. S. C. § 80a–24 (b). The Commission is therefore fully apprised as to the nature and sufficiency of the disclosure of these restrictions and can, if necessary, require supplementation of the information provided investors.

imposing SEC-approved restrictions on transferability and negotiability. The Government's limiting interpretation of § 22 (f) compromises this flexible mandate, and cannot be accepted.

We find support for our interpretation of § 22 (f) in the views expressed by the SEC shortly after the passage of the Act. Rule 26 (j)(2), proposed by the NASD to curb abuses identified in the Study and the congressional hearings, provided limitations on underwriter sales and redemptions to or from dealers who are not parties to sales agreements. In commenting on this proposed rule, the SEC characterized it as a "restriction on the transferability of securities," and specifically adverted to its power to regulate such restrictions under § 22 (f). *National Association of Securities Dealers, Inc.*, 9 S. E. C. 38, 44–45 and n. 10 (1941). As indicated above, see *supra,* at 719, and sources there cited, this contemporaneous interpretation by the responsible agency is entitled to considerable weight. We therefore conclude that the restrictions on transferability and negotiability contemplated by § 22 (f) include restrictions on the distribution system for mutual-fund shares as well as limitations on the face of the shares themselves. The narrower interpretation of this provision advanced by the Government would disserve the broad remedial function of the statute.[37]

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[37] Neither do we agree with the Government's suggestion that § 22 (f) does not authorize restrictions in contracts between underwriters and dealers in which the fund is not a party. We note, preliminarily, that this position would not save Counts III, V, and VII from dismissal, since they relate to restrictions on underwriter conduct that are imposed by the fund. Even under the most technical reading of the statute these restrictions are "fund-imposed." Moreover, it further appears from the complaint that the agreement challenged in Count II is required by the fund-underwriter agreement challenged in Count III and thus also is "fund-imposed"

The Government's additional contention that the SEC's exercise of regulatory authority has been insufficient to give rise to an implied immunity for agreements conforming with § 22 (f) misconceives the intended operation of the statute. By its terms, § 22 (f) authorizes properly disclosed restrictions unless they are inconsistent with SEC rules or regulations. The provision thus authorizes funds to impose transferability or negotiability restrictions, subject to Commission disapproval. In view of the evolution of this provision, there can be no doubt that this is precisely what Congress intended.

Section 22 (f) as originally introduced would have authorized the SEC to promulgate rules, regulations, or orders prohibiting restrictions on the redeemability or transferability of mutual-fund shares. Congressional consideration of that provision raised some question whether existing restrictions on transferability and negotiability would remain valid unless specifically disapproved by the SEC.[38] The compromise provision, which

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in any but the most literal sense. More importantly, however, we think that the Government's position fails to recognize the relationship between the various participants in the distribution chain. As the history of the Investment Company Act recognizes, the relationship between the fund and its principal underwriter traditionally has been a close one. Sections 15 (b) and (c) reflect this fact, requiring, in effect, that funds establish written contracts with the underwriter that must be approved by a majority of the fund's disinterested directors and cannot remain in force for more than two years. 15 U. S. C. §§ 80a-15 (b) and (c). And NASD Rule 26 (c), in effect since 1941, requires that principal underwriters enter into agreements with the dealers who distribute the fund's securities. See *National Association of Securities Dealers, Inc.*, 9 S. E. C., at 44, 48. In view of these requirements, and the broad remedial purpose of § 22 (f), we think that the underwriter-dealer agreements challenged in this complaint also must be regarded as fund-imposed within the contemplation of the statute.

[38] See 1940 Senate Hearings, pt. 1, p. 293.

subsequently was enacted into law, eliminated this uncertainty, however, and manifested a more positive attitude toward self-regulation.

Thus § 22 (f) specifically recognizes that mutual funds can impose such restrictions on the distribution system provided they are disclosed in the registration statement and conform to any rules and regulations that the SEC might adopt. In addition, § 22 (f) alters the focus of Commission scrutiny. Whereas the original provision allowed the SEC to make rules that serve "the public interest or . . . the protection of investors," S. 3580, § 22 (d)(2), *supra,* § 22 (f) as enacted limits the Commission's rulemaking authority to the protection of the "interests of the holders of all of the outstanding securities of such investment company." 15 U. S. C. § 80a–22 (f). Viewed in this historical context, the statute reflects a clear congressional determination that, subject to Commission oversight, mutual funds should be allowed to retain the initiative in dealing with the potentially adverse effects of disruptive trading practices.

The Commission repeatedly has recognized the role of private agreements in the control of trading practices in the mutual-fund industry. For example, in *First Multifund of America, Inc.,* Investment Company Act Rel. No. 6700 (1971), [1970–1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 78,209, p. 80,602, it looked to restrictive agreements similar to those challenged in this litigation to ascertain an investment advisor's capacity in a particular transaction. At no point did it intimate that those agreements were not legitimate.[39] Likewise,

[39] Commissioner Loomis, dissenting from an SEC determination that an applicant lacked standing to seek an exemption from §§ 17 (a)(1) and 22 (d) of the Act, stated:

"I would conclude that applicant is a dealer in its relationship with the fund underwriter because to do otherwise would require us to

Commission reports repeatedly have acknowledged the significant role that private agreements have played in restricting the growth of a secondary market in mutual-fund shares.[40] Until recently the Commission has allowed the industry to control the secondary market through contractual restrictions duly filed and publicly disclosed. Even the SEC's recently expressed intention to introduce an element of competition in brokered transactions reflects measured caution as to the possibly adverse impact of a totally unregulated and restrained brokerage market on the primary distribution system. See n. 31, *supra.* The Commission's acceptance of fund-initiated restrictions for more than three decades hardly represents abdication of its regulatory responsibilities. Rather, we think it manifests an informed administrative judgment that the contractual restrictions employed by the funds to protect their shareholders were appropriate means for combating the problems of the industry. The SEC's election not to initiate restrictive rules or regulations is precisely the kind of administrative oversight of private practices that Congress contemplated when it enacted § 22 (f).

We conclude, therefore, that the vertical restrictions sought to be enjoined in Counts II–VIII are among the kinds of agreements authorized by § 22 (f) of the Investment Company Act.

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ignore or nullify the perfectly lawful requirement in the dealer agreements that applicant act as a dealer. . . . I do not know of anything unlawful about the generally accepted form of dealer agreement used in the investment company industry." *Mutual Funds Advisory, Inc.,* Investment Company Act Rel. No. 6932, p. 7 (1972) (dissenting opinion).

While the majority disagreed with Commissioner Loomis' assessment of the facts of the case, it did not question his approval of the mentioned dealer agreement.

[40] See 1963 Special Study 98; 1974 Staff Report 104–106.

B

The agreements questioned by the United States restrict the terms under which the appellee underwriters and broker-dealers may trade in shares of mutual funds. Such restrictions, effecting resale price maintenance and concerted refusals to deal, normally would constitute *per se* violations of § 1 of the Sherman Act. See, *e. g., Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U. S. 207, 211–213 (1959); *Fashion Originators' Guild of America, Inc.* v. *FTC,* 312 U. S. 457, 465–468 (1941). Here, however, Congress has made a judgment that these restrictions on competition might be necessitated by the unique problems of the mutual-fund industry, and has vested in the SEC final authority to determine whether and to what extent they should be tolerated "in the interests of the holders of all the outstanding securities" of mutual funds. 15 U. S. C. § 80a–22 (f).

The SEC, the federal agency responsible for regulating the conduct of the mutual-fund industry, urges that its authority will be compromised seriously if these agreements are deemed actionable under the Sherman Act.[41] We agree. There can be no reconciliation of its authority under § 22 (f) to permit these and similar restrictive agreements with the Sherman Act's declaration that they are illegal *per se.* In this instance the antitrust laws must give way if the regulatory scheme established

[41] The SEC maintains:

"It would nullify the effect of this grant of regulatory authority to the Commission [under § 22 (f)] for this Court to hold that a district court may apply antitrust principles to conduct like that alleged in Counts II through VIII, when the expert body designated and empowered by Congress to regulate and supervise that conduct has not heretofore deemed it appropriate to prohibit the conduct." Brief for SEC as *Amicus Curiae* 54.

by the Investment Company Act is to work. *Silver* v. *New York Stock Exchange,* 373 U. S. 341 (1963). We conclude, therefore, that such agreements are not actionable under the Sherman Act, and that the District Court properly dismissed Counts II–VIII.

V

It remains to be determined whether the District Court properly dismissed Count I of the Government's complaint, which charged activities allegedly constituting a horizontal conspiracy between the NASD and its members to "prevent the growth of a secondary dealer market and a brokerage market in the purchase and sale of mutual fund shares." App. 9.

The precise nature of the allegations of the complaint are obscured by subsequent concessions made by the Government to the District Court and reiterated here. It is clear, however, that Count I alleges activities that are neither required by § 22 (d) nor authorized under § 22 (f). And since they cannot find antitrust shelter in these provisions of the Investment Company Act, the question presented is whether the SEC's exercise of regulatory authority under this statute and the Maloney Act is sufficiently pervasive to confer an implied immunity. We hold that it is, and accordingly affirm the District Court's dismissal of this portion of the complaint.

Count I originally appeared to be a general attack on the NASD's role in encouraging the restrictions on secondary market activities challenged in the remainder of the Government's complaint. The acts charged in Count I focused in large part on NASD rules, and on information distributed by that association to its members.[42]

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[42] The complaint averred that, in effectuating the conspiracy to restrain the growth of a secondary market in mutual-fund shares,

Subsequently the Government advised the District Court that its complaint was not to be read as a direct attack on NASD rules, however, and it repeated that position before this Court.[43] The Government now contends that

the NASD, its members, and more particularly the other named defendants,

"(a) established and maintained rules which inhibited the development of a secondary dealer market and a brokerage market in mutual fund shares;

"(b) established and maintained rules which induced broker/dealers to enter into sales agreements with principal underwriters, with knowledge that sales agreements contained restrictive provisions which inhibited the development of a secondary dealer market and brokerage market in mutual fund shares;

"(c) induced member principal underwriters to include restrictive provisions in their sales agreements;

"(d) discouraged persons who made inquiry about the legality of a brokerage market from participating in a brokerage market and distributed misleading information to its members concerning the legality of a brokerage market in mutual fund shares; and

"(e) suppressed market quotations for the secondary dealer market." App. 9.

[43] The Government first indicated abandonment of its attack on the NASD rules during oral argument of appellees' motion to dismiss. See App. 328–332. Notwithstanding clauses (a) and (b) of ¶17 of the complaint, see n. 42, *supra,* the Government's counsel stated that it did not intend to challenge any NASD rule, App. 330. Counsel ambiguously suggested, however, that the members' compliance with those rules had aided and abetted the alleged conspiracy, *id.,* at 332, and stated that informal and secret activities of the Association likewise had tended to inhibit growth of the secondary market, *id.,* at 330. Thereafter, in response to the District Court's invitation to join in the litigation as *amicus curiae,* the SEC expressed its concern that the action might involve an attack on NASD rules, a matter "over which the Commission is granted exclusive original jurisdiction by Section 15A of the Securities Exchange Act of 1934, 15 U. S. C. § 78*o*–3, *et seq.* (the Maloney Act)." Letter from Mr. Lawrence E. Nerheim, General Counsel of the SEC, to the District Court, App. 323. The Government thereafter informed the court that the issues it sought to raise did not represent "an attack

its complaint should be interpreted as a challenge to various unofficial NASD interpretations and to appellees' extension of the rules in a manner that inhibits a secondary market.

In view of the scope of the SEC's regulatory authority over the activities of the NASD, the Government's decision to withdraw from direct attack on the association's rules was prudent. The SEC's supervisory authority over the NASD is extensive. Not only does the Maloney Act require the SEC to determine whether an association satisfies the strict statutory requirements of that Act and thus qualifies to engage in supervised regulation of the trading activities of its membership, 15 U. S. C. § 78*o*–3 (b), it requires registered associations thereafter to submit for Commission approval any proposed rule changes, § 78*o*–3 (j). The Maloney Act additionally authorizes the SEC to request changes in or supplementation of association rules, a power that recently has been exercised with respect to some of the precise conduct questioned in this litigation, see n. 31, *supra*. If such a request is not complied with, the SEC may order such changes itself. § 78*o*–3 (k)(2).

The SEC, in its exercise of authority over association rules and practices, is charged with protection of the public interest as well as the interests of shareholders, see, *e. g.*, §§ 78*o*–3 (a)(1), (b)(3), and (c), and it repeatedly has indicated that it weighs competitive concerns in the exercise of its continued supervisory responsibility. See, *e. g.*, *National Association of Securities Dealers, Inc.*, 19 S. E. C. 424, 436–437, 486–487

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upon NASD Rules as such" but rather "aimed at an over-all course of conduct engaged in by the NASD and its members going beyond the NASD's rule-making authority." Letter from Mr. Bruce B. Wilson, Acting Assistant Attorney General for the Antitrust Division, to the District Court, App. 327. It maintains the same position in this Court. See Brief for United States 51 n. 47.

(1945); *National Association of Securities Dealers, Inc.*, 9 S. E. C., at 43–46; see also 1974 Staff Report 105, 109. As the Court previously has recognized, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 227 n. 60 (1940), the investiture of such pervasive supervisory authority in the SEC suggests that Congress intended to lift the ban of the Sherman Act from association activities approved by the SEC.

We further conclude that the Government's attack on NASD interpretations of those rules cannot be maintained under the Sherman Act, for we see no meaningful distinction between the Association's rules and the manner in which it construes and implements them. Each is equally a subject of SEC oversight.

Finally, we hold that the Government's additional challenges to the alleged activities of the membership of the NASD designed to encourage the kinds of restraints averred in Counts II–VIII likewise are precluded by the regulatory authority vested in the SEC by the Maloney and Investment Company Acts. It should be noted that the Government does not contend that appellees' activities have had the purpose or effect of restraining competition among the various funds.[44] Instead, the Government urges in Count I that appellees' alleged conspiracy was designed to encourage the suppression of intrafund secondary market activities, precisely the restriction that the SEC consistently has approved pursuant to § 22 (f) for nearly 35 years. This close relationship is fatal to the Government's complaint, as the Commission's regulatory approval of the restrictive agree-

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[44] Indeed, it appears that vigorous interbrand competition exists in the mutual-fund industry—between the load funds themselves, between load and no-load funds, between open- and closed-end companies, and between all of these investment forms and other investments. See 1974 Staff Report 20 *et seq.*

ments challenged in Counts II–VIII cannot be reconciled with the Government's attack on the ancillary activities averred in Count I. And this conclusion applies with equal force now that the SEC has determined to introduce a controlled measure of competition into the secondary market.

There can be little question that the broad regulatory authority conferred upon the SEC by the Maloney and Investment Company Acts enables it to monitor the activities questioned in Count I, and the history of Commission regulations suggests no laxity in the exercise of this authority.[45] To the extent that any of appellees' ancillary activities frustrate the SEC's regulatory objectives it has ample authority to eliminate them.[46]

Here implied repeal of the antitrust laws is "necessary to make the [regulatory scheme] work." *Silver* v. *New York Stock Exchange,* 373 U. S., at 357. In generally similar situations, we have implied immunity in particular and discrete instances to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws. See

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[45] As SEC Chairman Garrett observed in his letter submitting the 1974 Staff Report for congressional consideration: "No issuer of securities is subject to more detailed regulation than a mutual fund." Letter from Ray Garrett, Jr., SEC Chairman, to the Honorable John Sparkman, Chairman of the Committee on Banking, Housing, and Urban Affairs, United States Senate (Nov. 4, 1974), contained in 1974 Staff Report, at v.

[46] The Commission can, for example, require amendment of the NASD rules regulating the conduct of its membership, see 15 U. S. C. § 78*o*–3 (k) (2), or exercise the more general rulemaking power conferred by § 38 (a) of the Investment Company Act, 15 U. S. C. § 80a–37 (a), to contain any of the challenged activities that might in any way frustrate its regulation of the restrictions it authorizes under § 22 (f).

Hughes Tool Co. v. *Trans World Airlines,* 409 U. S. 363 (1973); *Pan American World Airways, Inc.* v. *United States,* 371 U. S. 296 (1963). In this instance, maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards. This is hardly a result that Congress would have mandated. We therefore hold that with respect to the activities challenged in Count I of the complaint, the Sherman Act has been displaced by the pervasive regulatory scheme established by the Maloney and Investment Company Acts.

Affirmed.

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

The majority repeats the principle so often applied by this Court that "[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *Ante,* at 719–720. That fundamental rule, though invoked again and again in our decisions, retained its vitality because in the many instances of its evocation it was given life and meaning by a close analysis of the legislation and facts involved in the particular case, an analysis inspired by the "felt indispensable role of antitrust policy in the maintenance of a free economy . . . ." *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 348 (1963). Absent that inspiration the principle becomes an archaism at best, and no longer reflects the tense interplay of differing and at times conflicting public policies.

Although I do not disagree with much of the Court's opinion in its construction of §§ 22 (d) and (f) of the

Investment Company Act, 54 Stat. 824, as amended, 15 U. S. C. §§ 80a–22 (d) and (f), its ultimate holding, which in contrast to the earlier portions of its opinion is devoid of detailed discussion of the applicable law, I find unacceptable. Under that holding, in light of the context of this case, implied antitrust immunity becomes the rule where a regulatory agency has authority to approve business conduct whether or not the agency is directed to consider antitrust factors in making its regulatory decisions and whether or not there is other evidence that Congress intended to displace judicial with administrative antitrust enforcement.

I

If Congress itself expressly permits or directs particular private conduct that would otherwise violate the antitrust laws, it can be safely assumed that Congress has made the necessary policy choices and preferred to permit rather than to prevent the acts in question. There is no dispute in this case, for example, that compliance with § 22 (d)'s requirement that open-end funds and dealers sell at the public offering price is not subject to attack under the antitrust laws.

It also happens that in subjecting areas of commercial activity to regulation, Congress frequently authorizes a regulatory agency to approve certain kinds of transactions if they conform to the appropriate regulatory standard such as the "public interest" or the "public convenience and necessity" and correspondingly provides that, when approved, those transactions will be immune from attack under the antitrust laws. Section 414 of the Federal Aviation Act of 1958, 72 Stat. 770, 49 U. S. C. § 1384, for example, provides that any person affected by an order issued under §§ 408, 409, or 412 of that Act, 49 U. S. C. §§ 1378, 1379, 1382, is "relieved from the

operations of the 'antitrust laws,'" including the Sherman Act, "insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." *Hughes Tool Co.* v. *Trans World Airlines,* 409 U. S. 363 (1973), thus involved acts and transactions expressly immunized from antitrust scrutiny. Section 5 (11) of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U. S. C. § 5 (11), similarly provides that carriers and their employees participating in a transaction approved or authorized under § 5 "shall be and they are relieved from the operation of the antitrust laws . . . ." Also, the Clayton Act itself provides that § 7's prohibitions will not apply to transactions duly consummated pursuant to authority given by certain named agencies under any statutory provisions vesting power in those agencies. 38 Stat. 731, as amended, 15 U. S. C. § 18.

The courts have, of course, recognized express exemptions such as these; but the invariable rule has been "that exemptions from antitrust laws are strictly construed," *FMC* v. *Seatrain Lines, Inc.,* 411 U. S. 726, 733 (1973), and that exemption will not be implied beyond that given by the letter of the law. In *Seatrain* the Maritime Commission was authorized by statute to approve and immunize from antitrust challenge seven categories of agreements between shipping companies, including agreements "controlling, regulating, preventing, or destroying competition." The Court, construing narrowly the category arguably embracing the merger agreement under consideration, held that merger agreements between shipping companies were not subject to approval by the Commission and consequently were not entitled to exemption under the antitrust laws.

Absent express immunization or its equivalent, private business arrangements are not exempt from the antitrust

laws merely because Congress has empowered an agency to authorize the very conduct which is later challenged in court under the antitrust laws. Where the regulatory standard is the "public interest," or something similar, there is no reason whatsoever to conclude that Congress intended the strong policy of the antitrust laws to be displaced or to be ignored in determining the public interest and in approving or disapproving the questioned conduct. This has been the consistent position of this Court. In *United States* v. *Radio Corp. of America,* 358 U. S. 334 (1959), the approval of the Federal Communications Commission of an exchange of television stations was sought as required by statute, The Commission approved the exchange, finding, in accordance with the statutory standard, that the public interest, convenience, and necessity would be served. The United States brought an antitrust action to require divestiture. It was urged in defense that the Commission had been empowered to consider and adjudicate antitrust issues and that its approval immunized the transaction. The Court rejected the defense, Mr. Justice Harlan concurring in the judgment and summarizing the Court's holding as follows:

> "[A] Commission determination of 'public interest, convenience, and necessity' cannot either constitute a binding adjudication upon any antitrust issues that may be involved in the Commission's proceeding or serve to exempt a licensee *pro tanto* from the antitrust laws, and . . . these considerations alone are dispositive of this appeal." *Id.,* at 353.

In *California* v. *FPC,* 369 U. S. 482 (1962), the question was whether the authority in the Federal Power Commission to approve mergers in the public interest foreclosed antitrust challenge to an approved

merger. The Court held that agency approval did not confer immunity from § 7 of the Clayton Act, even though the agency had taken the competitive factors into account in passing upon the application. A year later, in *United States* v. *Philadelphia Nat. Bank, supra,* the Court rejected the contention that "the Bank Merger Act, by directing the banking agencies to consider competitive factors before approving mergers . . . immunizes approved mergers from challenge under the federal antitrust laws." 374 U. S., at 350 (footnote omitted). More recently, we applied this principle in *Otter Tail Power Co.* v. *United States,* 410 U. S. 366 (1973). There the Court held that the authority of the Federal Power Commission to order interconnections between power systems of two companies did not exempt company refusal to interconnect from antitrust attack.

Under these and other cases it could not be clearer that "[a]ctivities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws," *id.,* at 372, and that agency approval of particular transactions does not itself confer antitrust immunity.

The foregoing were the governing principles both before and after *Silver* v. *New York Stock Exchange,* 373 U. S. 341 (1963). There, stock exchange members were directed to discontinue private wire service to two nonmember broker-dealers, who were given no notice or opportunity to be heard on the discontinuance. The latter brought suit under §§ 1 and 2 of the Sherman Act, but the Court of Appeals held that the stock exchanges had been exempted from the antitrust laws by the Securities Exchange Act of 1934. This Court reversed. The Act contained no express immunity, and immunity would be implied "only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent nec-

essary." 373 U. S., at 357. Conceding that there would be instances of permissible self-regulation which otherwise would violate the antitrust laws, the Court concluded that nothing in the Act required that the deprivations there imposed be immune from the antitrust laws. In arriving at this conclusion, it was noted that the Securities and Exchange Commission had no authority to review specific instances of enforcement of the exchange rules involved and that it was therefore unnecessary to consider any problem of conflict or coextensiveness with the agency's regulatory power. The Court observed, however, that if there had been jurisdiction in the Commission, with judicial review following, "a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity . . . ." *Id.*, at 358 n. 12.

Such a different case, we said, was before us in *Ricci* v. *Chicago Mercantile Exchange,* 409 U. S. 289, 302 (1973). That case arose in the context of the Commodity Exchange Act. We held that a district court entertaining a private antitrust action should stay its hand while the Commodity Exchange Commission exercised whatever jurisdiction it might have to adjudicate specific claims of violation of exchange rules; but that adjudication, we said, was not a substitute for antitrust enforcement, and the fact that the Commission had jurisdiction to approve or disapprove the challenged conduct and might hold the conduct to be consistent with exchange rules would not, in itself, answer the immunity question. *Id.*, at 302–303, n. 13.

On occasion, however, Congress has authorized an agency to adjudicate the legality of specifically defined transactions or commercial behavior in accordance with a competitive standard inconsistent with the controlling criteria under the antitrust laws. In these circumstances, the

Court has concluded that Congress intended to replace normal antitrust enforcement with the administrative regime provided by the statute, subject to judicial review. *Pan American World Airways, Inc.* v. *United States,* 371 U. S. 296 (1963), involved certain business conduct within the jurisdiction of the Civil Aeronautics Board. Under the Federal Aviation Act, various transactions by air carriers, if approved by the Board, were expressly immunized from antitrust attack. Also, the Board was given explicit authority under § 411 of that Act, 49 U. S. C. § 1381, to investigate and bring to a halt all "unfair . . . practices" and "unfair methods of competition," the power under this section to be administered in the light of the "competitive regime" clearly delineated elsewhere in the Act. See 371 U. S., at 308–309. The Court concluded that Congress, having directed itself to the matter of competition in the airlines industry and having provided a competitive standard to be administered by an agency, had intended to displace the usual enforcement of the antitrust laws through the courts, at least insofar as Government injunction suits were concerned. *United States* v. *Philadelphia National Bank, supra,* made it plain that *Pan American* had not disturbed the usual rule that, without more, agency power to approve, and agency approval itself, do not confer antitrust immunity. 374 U. S., at 351–352.

Gordon v. *N. Y. Stock Exchange, Inc., ante,* p. 659, decided today, is another instance where Congress has provided an administrative substitute for antitrust enforcement. Section 19 (b) of the Securities Exchange Act of 1934, 48 Stat. 898, as amended, 15 U. S. C. § 78s (b), contemplated the fixing by the exchange, and approval or prescription by the Securities and Exchange Commission, of "reasonable rates of commission" to be charged by exchange members. Price fixing

by competitors, however, is wholly at odds with the Sherman Act; under that statute prices fixed by agreement are inherently unreasonable, whatever the level at which they are set. This was the law long prior to the Securities Exchange Act:

> "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions." *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, 397–398 (1927).

Thus Congress could not have anticipated that the antitrust laws would apply to stock exchange price fixing approved by the Commission. In this respect, there is a "plain repugnancy between the antitrust and regulatory provisions," *United States* v. *Philadelphia National Bank, supra,* at 351 (footnote omitted).

The rule of law that should be applied in this case, therefore, as it comes to us from these precedents, is that, absent an express antitrust immunization conferred

by Congress in a statute, such an immunity can be implied only if Congress has clearly supplanted the antitrust laws and their model of competition with a differing competitive regime, defined by particularized competitive standards and enforced by an administrative agency, and has thereby purged an otherwise obvious antitrust violation of its illegality. When viewed in the light of this rule of law, the argument for implied immunity in this case becomes demonstrably untenable.

II

Section 22 (f) of the Investment Company Act provides that "[n]o registered open-end company shall restrict the transferability or negotiability of any security of which it is the issuer except in conformity with the statements with respect thereto contained in its registration statement nor in contravention of such rules and regulations as the Commission may prescribe in the interests of the holders of all of the outstanding securities of such investment company." The majority concludes from these words and their sparse legislative history that the "funds and the SEC" have the authority to impose "SEC-approved restrictions on transferability and negotiability," *ante*, at 724, 725, including the restrictions involved here effecting resale price maintenance and concerted refusals to deal, all aimed at stifling competition that might come from the secondary market. The majority concludes that "[t]here can be no reconciliation of [SEC] authority . . . to permit these and similar restrictive agreements" with their illegality under the Sherman Act and that therefore "the antitrust laws must give way if the regulatory scheme established by the Investment Company Act is to work." *Ante*, at 729, 730.

For several reasons, the majority's conclusions are infirm under the controlling authorities. It is plain

that the Act itself contains no express exemptions from the antitrust laws. It is equally plain that the Act does not expressly permit the specific restrictions at issue here in the way that it deals with the public offering price under § 22 (d). It would be incredible even to suggest that Congress intended to give participants in the mutual-fund industry, individually or collectively, *carte blanche* authority to impose whatever restrictions were thought desirable and without regard to the policies of the antitrust laws. The majority does not contend otherwise and rests its case on the power which it finds in the Commission to approve, or to fail to disapprove, the practices challenged here and to immunize them from antitrust scrutiny.

It is immediately obvious that the majority has failed to heed the teaching of our cases in several respects. It ignores the rule that "exemptions from antitrust laws are strictly construed" and that implied exemptions are "'strongly disfavored.'" *FMC* v. *Seatrain Lines, Inc.*, 411 U. S., at 733. Lurking in the *prohibition* of § 22 (f) against any restrictions on "transferability or negotiability" except those stated in the registration statement, the Court discovers the affirmative power to impose resale price maintenance restrictions, as well as the authority to engage in concerted refusals to deal and similar practices wholly at odds with the antitrust laws. Never before has the Court labored to find hidden immunities from the antitrust laws; and the necessity for the effort is itself at odds with our precedents.

The Court's holding that Commission approval automatically brings with it antitrust immunity is also contrary to those cases which have consistently refused to equate agency power to approve conduct with an exemption under the antitrust laws. Those cases, as demonstrated above, uniformly held that actual agency

approval of the very transaction which the statute empowers the agency to approve is not in itself sufficient to exempt the transaction from liability under the Sherman Act, absent express exemption, or its equivalent, under the regulatory statute itself. This is true even where the agency is required to take antitrust considerations into account in approving the transaction or agreement and, *a fortiori,* where there is no evidence that such factors played any part in agency approval.

Here, the Court finds authority in open-end funds, subject to Commission approval, to impose restrictions on "negotiability and transferability"; construes those words generously to include price fixing and concerted boycotts; and then concludes that Commission approval—rather, its failure to disapprove—automatically and without more confers antitrust immunity on the selling practices followed by the particular open-end funds in this case. This result disregards the fact that there is no express provision for immunity in the statute, no direction to the Commission to consider competitive factors, no statutory standard provided for the Commission to follow with respect to competition in the investment company business, no indication that the Commission has considered the competitive impact of the restrictions at issue here, and no other basis for concluding that Congress intended the unilateral business judgment of an investment company, followed by Commission approval, to substitute for and supplant the antitrust laws.

The position of the Securities and Exchange Commission, as described and embraced by the Court, is that "its authority will be compromised" if industry practices which the Commission has the power to approve are subject to scrutiny under the antitrust laws. See *ante,* at 729. But the Commission has made no effort to analyze and

explain the need for these seriously anticompetitive restrictions in the mutual-fund industry. It has never affirmatively and formally approved the specific practices involved in this case, by rule or adjudication. Until recently, it has seemingly left investors and the public to the tender mercies of the industry itself. In fashioning antitrust immunity for these practices, the majority acts in complete disregard of the basic approach mandated by our cases, including the principles approved by the unanimous Court in *FMC* v. *Seatrain Lines, Inc., supra:*

"The Commission vigorously argues that such agreements can be interpreted as falling within the third category—which concerns agreements 'controlling, regulating, preventing, or destroying competition.' Without more, we might be inclined to agree that many merger agreements probably fit within this category. But a broad reading of the third category would conflict with our frequently expressed view that exemptions from antitrust laws are strictly construed, see, *e. g., United States* v. *McKesson & Robbins, Inc.,* 351 U. S. 305, 316 (1956), and that '[r]epeals 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 (1963) (footnotes omitted). As we observed only recently: 'When . . . 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.' *Otter Tail Power Co.* v. *United States,* 410 U. S. 366, 374 (1973). See also *Silver* v. *New York Stock Exchange,* 373 U. S.

341 (1963); *Pan American World Airways, Inc.* v. *United States,* 371 U. S. 296 (1963); *California* v. *FPC,* 369 U. S. 482 (1962); *United States* v. *Borden Co.,* 308 U. S. 188 (1939). This principle has led us to construe the Shipping Act as conferring only a 'limited antitrust exemption' in light of the fact that 'antitrust laws represent a fundamental national economic policy.' *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S., at 219, 218." 411 U. S., at 732–733 (footnotes omitted).

III

Exempting the NASD from antitrust scrutiny based on the existence of Commission power to approve or disapprove NASD rules is likewise unacceptable under our cases for very similar reasons. The majority relies on *Hughes Tool Co.* v. *Trans World Airlines,* 409 U. S. 363 (1973), and *Pan American World Airways* v. *United States,* 371 U. S. 296 (1963). But in *Hughes* exemption for the transactions there involved was based on the express immunities conferred by § 414 of the Federal Aviation Act; and in *Pan American* immunity followed from the Board's authority to adjudicate unfair competitive practices in accordance with the distinctive competitive standard Congress itself supplied in the regulatory statute. Nothing comparable is to be found in the relevant provisions of the statutes involved here.

It is especially interesting to find the Court on the one hand concluding that the selling practices under scrutiny here are essential to the working of the statutory scheme but on the other hand recognizing that the Commission itself has requested that the NASD rules be amended to prohibit agreements between underwriters and broker-dealers that preclude broker-dealers, acting as agents, from matching orders to buy and sell fund

shares in a secondary market at competitively determined prices and commission rates. *Ante,* at 718–719, n. 31.

The majority's opinion, as a whole, seems to me to reject the basic position found in our cases that "antitrust laws represent a fundamental national economic policy . . . ." *Carnation Co.* v. *Pacific Conference,* 383 U. S. 213, 218 (1966). I cannot follow that course and accordingly dissent.

Syllabus

WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. *v.* SALFI ET AL.

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

No. 74-214. Argued March 19, 1975—Decided June 26, 1975

After her husband of less than six months died, appellee widow filed applications for mother's Social Security insurance benefits for herself and child's insurance benefits for her daughter by a previous marriage, but the Social Security Administration (SSA), both initially and on reconsideration at the regional level, denied the applications on the basis of the duration-of-relationship requirements of the Social Security Act (Act), 42 U. S. C. §§ 416 (c)(5) and (e)(2) (1970 ed. and Supp. III), which define "widow" and "child" so as to exclude surviving wives and stepchildren who had their respective relationships to a deceased wage earner for less than nine months prior to his death. Appellees widow and child, seeking declaratory and injunctive relief, then brought a class action in Federal District Court on behalf of all widows and stepchildren denied benefits because of the nine-month requirements. A three-judge court, after concluding that it had federal-question jurisdiction under 28 U. S. C. § 1331, held that the nine-month requirements constituted constitutionally invalid "irrebuttable presumptions," and accordingly enjoined appellants Department of Health, Education, and Welfare (HEW), its Secretary, and the SSA and various of its officials from denying benefits on the basis of those requirements. *Held:*

1. The District Court did not have federal-question jurisdiction under 28 U. S. C. § 1331, because such jurisdiction is barred by the third sentence of 42 U. S. C. § 405 (h), which provides that no action against the United States, the HEW Secretary, or any officer or employee thereof shall be brought under, *inter alia,* 28 U. S. C. § 1331 to recover on any claim arising under Title II of the Act, which covers old-age, survivors', and disability insurance benefits. Pp. 756-762.

(a) That § 405 (h)'s third sentence, contrary to the District Court's view, does not merely codify the doctrine of exhaustion of remedies, is plain from its sweeping language; and, moreover, to construe it so narrowly would render it superfluous in view of

§ 405 (h)'s first two sentences, which provide that the Secretary's findings and decision after a hearing shall be binding upon all parties to the hearing and shall not be reviewed except as provided in § 405 (g), which, *inter alia,* requires administrative exhaustion. Pp. 756–759.

(b) There is no merit to appellees' argument that because their action arises under the Constitution and not under the Act, it is not barred by § 405 (h), since, although their claim does arise under the Constitution, it also arises under the Act, which furnishes both the standing and substantive basis for the constitutional claim. Pp. 760–761.

(c) Section 405 (h)'s third sentence extends to any "action" seeking "to recover on any [Social Security] claim"—irrespective of whether resort to judicial processes is necessitated by discretionary decisions of the Secretary or by his nondiscretionary application of allegedly unconstitutional statutory retrictions—and, although not precluding constitutional challenges, simply requires that they be brought under jurisdictional grants contained in the Act, and thus in conformity with the same standards that apply to nonconstitutional claims arising under the Act. *Johnson* v. *Robison,* 415 U. S. 361, distinguished. Pp. 761–762.

2. The District Court had no jurisdiction over the unnamed members of the class under 42 U. S. C. § 405 (g), which provides that "[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action," since the complaint as to such class members is deficient in that it contains no allegations that they have even filed an application for benefits with the Secretary, much less that he has rendered any decision, final or otherwise, review of which is sought. Pp. 763–764.

3. The District Court had jurisdiction over the named appellees under § 405 (g). While the allegations of the complaint with regard to exhaustion of remedies fall short of meeting § 405 (g)'s literal requirement that there shall have been a "final decision of the Secretary made after a hearing" and of satisfying the Secretary's regulations specifying that the finality required for judicial review be achieved only after the further steps of a hearing before an administrative judge and possibly consideration by the Appeals Council, nevertheless the Secretary by not challenging the sufficiency of such allegations has apparently determined that for purposes of this action the reconsideration determination is "final."

Under the Act's administrative scheme, the Secretary may make such a determination, because the term "final decision" is left undefined by the Act and its meaning is to be fleshed out by the Secretary's regulations, 42 U. S. C. § 405 (a), and because no judicial or administrative interest would be served by further administrative proceedings once the Secretary concluded that a matter is beyond his jurisdiction to determine, and that the claim is neither otherwise invalid nor cognizable under a different section of the Act. Similar considerations control with regard to the requirement that the Secretary's decision be made "after a hearing," since under such circumstances a hearing would be futile and wasteful and since, moreover, the Secretary may award benefits without requiring a hearing. Pp. 764–767.

4. The nine-month duration-of-relationship requirements of §§ 416 (c)(5) and (e)(2) are not unconstitutional. Pp. 767–785.

(a) A statutory classification in the area of social welfare such as the Social Security program is constitutional if it is rationally based and free from invidious discrimination. Pp. 768–770.

(b) A noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status, although of course there may not be invidious discrimination among such claimants. *Stanley* v. *Illinois,* 405 U. S. 645; *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632, distinguished. The benefits here are available upon compliance with an objective criterion, one that the Legislature considered to bear a sufficiently close nexus with underlying policy objectives as to be used as the test for eligibility. Appellees are free to present evidence that they meet the specified requirements, failing which, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test, *Vlandis* v. *Kline,* 412 U. S. 441, distinguished. Pp. 770–773.

(c) The duration-of-relationship test meets the constitutional standard that Congress, its concern having been reasonably aroused by the possibility of an abuse—the use of sham marriages to secure Social Security benefits—which it legitimately desired to avoid, could rationally have concluded that a particular limitation or qualification would protect against its occurrence and that the expense and other difficulties of individual determinations justified the inherent imprecision of an objective, easily administered prophylactic rule. Pp. 773–780.

(d) Neither the fact that § 416 (c)(5) excludes some wives who married with no anticipation of shortly becoming widows nor the fact that the requirement does not filter out every such claimant, if a wage earner lives longer than anticipated or has an illness that can be recognized as terminal more than nine months prior to death, necessarily renders the statutory scheme unconstitutional. While it is possible to debate the wisdom of excluding legitimate claimants in order to discourage sham relationships, and of relying on a rule that may not exclude some obviously sham arrangements, Congress could rationally choose to adopt such a course. Pp. 781–783.

373 F. Supp. 961, reversed.

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, *post*, p. 785. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 786.

Harriet S. Shapiro argued the cause for appellants. On the brief were *Solicitor General Bork, Assistant Attorney General Hills, William L. Patton,* and *William Kanter.*

Don B. Kates, Jr., argued the cause for appellees. With him on the brief were *Bruce N. Berwald* and *John Gant.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellants, the Department of Health, Education, and Welfare, its Secretary, the Social Security Administration and various of its officials, appeal from a decision of the United States District Court for the Northern District of California invalidating duration-of-relationship

*Briefs of *amici curiae* urging affirmance were filed by *Ralph Santiago Abascal, Philip Goar,* and *Sanford Jay Rosen* for the San Francisco Neighborhood Legal Assistance Foundation, Inc., et al., and by *Christopher H. Clancy* and *Jonathan A. Weiss* for Legal Services for the Elderly Poor.

Social Security eligibility requirements for surviving wives and stepchildren of deceased wage earners. 373 F. Supp. 961 (1974).

That court concluded that it had jurisdiction of the action by virtue of 28 U. S. C. § 1331, and eventually certified the case as a class action. On the merits, it concluded that the nine-month requirements of §§ 216 (c)(5) and (e)(2) of the Social Security Act, 49 Stat. 620, as added, 64 Stat. 510, and as amended, 42 U. S. C. §§ 416 (c)(5) and (e)(2) (1970 ed. and Supp. III), constituted "irrebuttable presumptions" which were constitutionally invalid under the authority of *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632 (1974); *Vlandis* v. *Kline,* 412 U. S. 441 (1973); and *Stanley* v. *Illinois,* 405 U. S. 645 (1972). We hold that the District Court did not have jurisdiction of this action under 28 U. S. C. § 1331, and that while it had jurisdiction of the claims of the named appellees under the provisions of 42 U. S. C. § 405 (g), it had no jurisdiction over the claims asserted on behalf of unnamed class members. We further decide that the District Court was wrong on the merits of the constitutional question tendered by the named appellees.

I

Appellee Salfi married the deceased wage earner, Londo L. Salfi, on May 27, 1972. Despite his alleged apparent good health at the time of the marriage, he suffered a heart attack less than a month later, and died on November 21, 1972, less than six months after the marriage. Appellee Salfi filed applications for mother's insurance benefits for herself and child's insurance benefits for her daughter by a previous marriage, appellee Doreen Kalnins.[1] These applications were denied by the So-

[1] Title 42 U. S. C. § 402 (g)(1) (1970 ed. and Supp. III) provides for benefits for the "widow" of an insured wage earner, regardless of

cial Security Administration, both initially and on reconsideration at the regional level, solely on the basis of the duration-of-relationship requirements of §§ 416 (c)(5) and (e)(2), which define "widow" and "child." The definitions exclude surviving wives and stepchildren who had their respective relationships to a deceased wage earner for less than nine months prior to his death.[2]

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her age, if she has in her care a "child" of such wage earner who is entitled to child's insurance benefits. Title 42 U. S. C. § 402 (d) (1970 ed. and Supp. III) provides for benefits for the "child" of a deceased insured wage earner who was dependent upon him at his death.

[2] Title 42 U. S. C. § 416 (c) (1970 ed., Supp. IV) provides in full:

"(c) The term 'widow' (except when used in section 402 (i) of this title) means the surviving wife of an individual, but only if (1) she is the mother of his son or daughter, (2) she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (3) he legally adopted her son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (4) she was married to him at the time both of them legally adopted a child under the age of eighteen, (5) she was married to him for a period of not less than nine months immediately prior to the day on which he died, or (6) in the month prior to the month of her marriage to him (A) she was entitled to, or on application therefor and attainment of age 62 in such prior month would have been entitled to, benefits under subsection (b), (e), or (h) of section 402 of this title, (B) she had attained age eighteen and was entitled to, or on application therefor would have been entitled to, benefits under subsection (d) of such section (subject, however, to section 402 (s) of this title), or (C) she was entitled to, or upon application therefor and attainment of the required age (if any) would have been entitled to, a widow's, child's (after attainment of age 18), or parent's insurance annuity under section 231a of Title 45."

It is undisputed that appellee Salfi cannot qualify as a "widow" by satisfying condition (1), (2), (3), (4), or (6).

Title 42 U. S. C. § 416 (e) (1970 ed., Supp. III) provides in part:

"(e) Child.

"The term 'child' means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for

The named appellees then filed this action, principally relying on 28 U. S. C. § 1331 for jurisdiction. They sought to represent the class of "all widows and stepchildren of deceased wage earners who are denied widow's [*sic*] or children's insurance benefits because the wage earner died within nine months of his marriage to the applicant or (in case of a stepchild) the applicant's mother." App. 8. They alleged at least partial exhaustion of remedies with regard to their personal claims, but made no similar allegations with regard to other class members. They sought declaratory relief against the challenged statute, and injunctive relief restraining appellants from denying mother's and child's benefits on the basis of the statute. In addition to attorneys' fees and costs, they also sought "damages or sums due and owing equivalent to the amount of benefits to which plaintiffs became entitled as of the date of said entitlement." *Id.*, at 13.

A three-judge District Court heard the case on cross-motions for summary judgment, and granted substantially all of the relief prayed for by appellees. The District Court rendered a declaratory judgment holding the challenged statute to be unconstitutional, certified a class consisting of "all otherwise eligible surviving spouses and stepchildren . . . heretofore disqualified from receipt of . . . benefits by operation" of the duration-of-relationship requirements, enjoined appellants from denying benefits on the basis of those requirements, and ordered them to provide such benefits "from the time of

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not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died . . . ."

Prior to 1967, the required duration of relationship was a full year. The reduction to nine months was accomplished in Pub. L. 90–248, §§ 156 (a) and (b), 81 Stat. 866.

original entitlement." 373 F. Supp., at 966. We noted probable jurisdiction of the appeal from that judgment. 419 U. S. 992 (1974).

In addition to their basic contention that the duration-of-relationship requirements pass constitutional muster, appellants present several contentions bearing on the scope of the monetary relief awarded by the District Court. They contend that the award is barred by sovereign immunity insofar as it consists of retroactive benefits, that regardless of sovereign immunity invalidation of the duration-of-relationship requirements should be given prospective effect only, and that the District Court did not properly handle certain class-action issues. Because we conclude that the duration-of-relationship requirements are constitutional, we have no occasion to reach the retroactivity and class-action issues. We are confronted, however, by a serious question as to whether the District Court had jurisdiction over this suit.

II

The third sentence of 42 U. S. C. § 405 (h) provides in part:

> "No action against the United States, the Secretary, or any officer or employee thereof shall be brought under [§ 1331 *et seq.*] of Title 28 to recover on any claim arising under [Title II of the Social Security Act]." [3]

On its face, this provision bars district court federal-question jurisdiction over suits, such as this one, which

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[3] The literal wording of this section bars actions under 28 U. S. C. § 41. At the time § 405 (h) was enacted, and prior to the 1948 recodification of Title 28, § 41 contained all of that title's grants of jurisdiction to United States district courts, save for several special-purpose jurisdictional grants of no relevance to the constitutionality of Social Security statutes.

seek to recover Social Security benefits. Yet it was § 1331 jurisdiction which appellees successfully invoked in the District Court. That court considered this provision, but concluded that it was inapplicable because it amounted to no more than a codification of the doctrine of exhaustion of administrative remedies. The District Court's reading of § 405 (h) was, we think, entirely too narrow.

That the third sentence of § 405 (h) is more than a codified requirement of administrative exhaustion is plain from its own language, which is sweeping and direct and which states that *no* action shall be brought under § 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted. Moreover, if the third sentence is construed to be nothing more than a requirement of administrative exhaustion, it would be superfluous. This is because the first two sentences of § 405 (h), which appear in the margin,[4] assure that administrative exhaustion will be required. Specifically, they prevent review of decisions of the Secretary save as provided in the Act, which provision is made in § 405 (g).[5] The latter section pre-

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[4] Title 42 U. S. C. § 405 (h) provides in full:

"Finality of Secretary's decision.

"The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

[5] Title 42 U. S. C. § 405 (g) provides:

"Judicial review.

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of

scribes typical requirements for review of matters before an administrative agency, including administrative exhaustion.[6] Thus the District Court's treatment of the

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such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive not-

[*Footnote 6 is on p. 759*]

third sentence of § 405 (h) not only ignored that sentence's plain language, but also relegated it to a function which is already performed by other statutory provisions.

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withstanding any change in the person occupying the office of Secretary or any vacancy in such office."

[6] Nor can it be argued that the third sentence of § 405 (h) simply serves to prevent a bypass of the § 405 (g) requirements by filing a district court complaint alleging entitlement prior to applying for benefits through administrative channels. The entitlement sections of the Act specify the filing of an application as a prerequisite to entitlement, so a court could not in any event award benefits absent an application. See 42 U. S. C. §§ 402 (a)-(h) (1970 ed. and Supp. III). See also § 402 (j) (1). Once the application is filed, it is either approved, in which event any suit for benefits would be mooted, or it is denied. Even if the denial is nonfinal, it is still a "decision of the Secretary" which, by virtue of the second sentence of § 405 (h), may not be reviewed save pursuant to § 405 (g).

Our Brother BRENNAN relies heavily, *post,* at 790–792, on a passage from a Senate document entitled "Monograph of the Attorney General's Committee on Administrative Procedure." S. Doc. No. 10, 77th Cong., 1st Sess., pt. 3, p. 39 (1941). The basic monograph itself is described as "embodying the results of the investigations made by the staff of said committee relative to the [administrative] practices and procedures of" several agencies of the Government. *Id.,* at II. Following the text of the monograph is the "Appendix," which in turn is described in a "Foreword" as follows: "This statement, developed from a report by the Bureau of Old-Age and Survivors Insurance making certain recommendations for the Board's consideration, describes the essential features of a hearing and review system which has been authorized by the Board and which is designed to meet both the statutory requirements and the social purposes of the old-age and survivors insurance program. It has been developed during several months under the leadership of Ralph F. Fuchs, professor of law, Washington University, St. Louis, Mo., a consultant of this Bureau, by whom the Bureau's report, in the main, was written." *Id.,* at 34. After the "Foreword" follows a three-part report in somewhat smaller type, the second of which parts is entitled "Considerations Affecting the Hearing and Review System." Within this second part, appears the language which MR. JUSTICE BRENNAN's dissent characterizes as "the reading which the Social

A somewhat more substantial argument that the third sentence of § 405 (h) does not deprive the District Court of federal-question jurisdiction relies on the fact that it only affects actions to recover on "any claim arising under [Title II]" of the Social Security Act.[7] The argument is that the present action arises under the Constitution and not under Title II. It would, of course, be fruitless to contend that appellees' claim is one which does not arise under the Constitution, since their constitutional arguments are critical to their complaint. But it is just as fruitless to argue that this action does not also arise under the Social Security Act. For not only is it Social Security benefits which appellees seek to recover, but it is the Social Security Act which provides

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Security Board itself gave to the provision soon after it went into effect." *Post,* at 790.

We have some doubts that the report of a consultant can be properly characterized as incorporating the "reading which the Social Security Board itself gave" to this provision. Even if the report as a whole is stated to have been "approved" by the Board, there is no indication that such approval extends beyond the report's broad-brush conceptualization of "the essential features of a hearing and review system." In any event, we do not agree that an administrative agency's general discussion of a statute, occurring after its passage, and in a context which does not require it to focus closely on the operative impact of a particular provision, is either an important indicator of congressional intent, as the dissent suggests, *post,* at 792, or an authoritative source for the proposition that a provision serves a particular function. Finally, even if the report is an accurate reading of the Act, its significance goes only to whether the third sentence of § 405 (h) serves a function *in addition to* that which we believe it serves; the possibility that the District Court's interpretation renders the third sentence only largely superfluous rather than totally so is not sufficient to disturb our analysis of the role of that sentence in this case.

[7] Title II contains the old-age, survivors, and disability insurance programs codified at 42 U. S. C. § 401 *et seq.*

both the standing and the substantive basis for the presentation of their constitutional contentions. Appellees sought, and the District Court granted, a judgment directing the Secretary to pay Social Security benefits. To contend that such an action does not arise under the Act whose benefits are sought is to ignore both the language and the substance of the complaint and judgment. This being so, the third sentence of § 405 (h) precludes resort to federal-question jurisdiction for the adjudication of appellees' constitutional contentions.

It has also been argued that *Johnson* v. *Robison,* 415 U. S. 361 (1974), supports the proposition that appellees are not seeking to recover on a claim arising under Title II. In that case we considered 38 U. S. C. § 211 (a), which provides:

> "[T]he decisions of the [Veterans'] Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

We were required to resolve whether this language precluded an attack on the constitutionality of a statutory limitation. We concluded that it did not, basically because such a limitation was not a "decision" of the Administrator "on any question of law or fact"; indeed, the "decision" had been made by Congress, not the Administrator, and the issue was one which the Administrator considered to be beyond his jurisdiction. 415 U. S., at 367-368. Thus the question sought to be litigated was simply not within § 211 (a)'s express language, and there was accordingly no basis for conclud-

ing that Congress sought to preclude review of the constitutionality of veterans' legislation.

The language of § 405 (h) is quite different. Its reach is not limited to decisions of the Secretary on issues of law or fact. Rather, it extends to any "action" seeking "to recover on any [Social Security] claim"—irrespective of whether resort to judicial processes is necessitated by discretionary decisions of the Secretary or by his nondiscretionary application of allegedly unconstitutional statutory restrictions.

There is another reason why *Johnson* v. *Robison* is inapposite. It was expressly based, at least in part, on the fact that if § 211 (a) reached constitutional challenges to statutory limitations, then absolutely no judicial consideration of the issue would be available. Not only would such a restriction have been extraordinary, such that "clear and convincing" evidence would be required before we would ascribe such intent to Congress, 415 U. S., at 373, but it would have raised a serious constitutional question of the validity of the statute as so construed. *Id.*, at 366–367. In the present case, as will be discussed below, the Social Security Act itself provides jurisdiction for constitutional challenges to its provisions. Thus the plain words of the third sentence of § 405 (h) do not preclude constitutional challenges. They simply require that they be brought under jurisdictional grants contained in the Act, and thus in conformity with the same standards which are applicable to nonconstitutional claims arising under the Act. The result is not only of unquestionable constitutionality, but it is also manifestly reasonable, since it assures the Secretary the opportunity prior to constitutional litigation to ascertain, for example, that the particular claims involved are neither invalid for other reasons nor allowable under other provisions of the Social Security Act.

As has been stated, the Social Security Act itself provides for district court review of the Secretary's determinations. Title 42 U. S. C. § 405 (g) provides that "[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision . . . ." See n. 5, *supra*. The question with which we must now deal is whether this provision could serve as a jurisdictional basis for the District Court's consideration of the present case. We conclude that it provided jurisdiction only as to the named appellees and not as to the unnamed members of the class.[8]

Section 405 (g) specifies the following requirements for judicial review: (1) a final decision of the Secretary made after a hearing; (2) commencement of a civil action within 60 days after the mailing of notice of such decision (or within such further time as the Secretary

[8] Since § 405 (g) is the basis for district court jurisdiction, there is some question as to whether it had authority to enjoin the operation of the duration-of-relationship requirements. Section 405 (g) accords authority to affirm, modify, or reverse a decision of the Secretary. It contains no suggestion that a reviewing court is empowered to enter an injunctive decree whose operation reaches beyond the particular applicants before the court. In view of our dispositions of the class-action and constitutional issues in this case, the only significance of this problem goes to our own jurisdiction. If a § 405 (g) court is not empowered to enjoin the operation of a federal statute, then a three-judge District Court was not required to hear this case, 28 U. S. C. § 2282, and we are without jurisdiction under 28 U. S. C. § 1253. However, whether or not the three-judge court was properly convened, that court did hold a federal statute unconstitutional in a civil action to which a federal agency and officers are parties. We thus have direct appellate jurisdiction under 28 U. S. C. § 1252. *McLucas* v. *DeChamplain,* 421 U. S. 21, 31–32 (1975).

may allow); and (3) filing of the action in an appropriate district court, in general that of the plaintiff's residence or principal place of business. The second and third of these requirements specify, respectively, a statute of limitations and appropriate venue. As such, they are waivable by the parties, and not having been timely raised below, see Fed. Rules Civ. Proc. 8 (c), 12 (h)(1), need not be considered here. We interpret the first requirement, however, to be central to the requisite grant of subject-matter jurisdiction—the statute empowers district courts to review a particular type of decision by the Secretary, that type being those which are "final" and "made after a hearing."

In the present case, the complaint seeks review of the denial of benefits based on the plain wording of a statute which is alleged to be unconstitutional. That a denial on such grounds, which are beyond the power of the Secretary to affect, is nonetheless a decision of the Secretary for these purposes has been heretofore established. *Flemming* v. *Nestor,* 363 U. S. 603 (1960). As to class members, however, the complaint is deficient in that it contains no allegations that they have even filed an application with the Secretary, much less that he has rendered any decision, final or otherwise, review of which is sought. The class thus cannot satisfy the requirements for jurisdiction under 42 U. S. C. § 405 (g). Other sources of jurisdiction being foreclosed by § 405 (h), the District Court was without jurisdiction over so much of the complaint as concerns the class, and it should have entered an appropriate order of dismissal.

The jurisdictional issue with respect to the named appellees is somewhat more difficult. In a paragraph entitled "Exhaustion of Remedies," the complaint alleges that they fully presented their claims for benefits "to their district Social Security Office and, upon denial, to

the Regional Office for reconsideration." It further alleges that they have no dispute with the Regional Office's findings of fact or applications of statutory law, and that the only issue is a matter of constitutional law which is beyond the Secretary's competence. On their face these allegations with regard to exhaustion fall short of meeting the literal requirement of § 405 (g) that there shall have been a "final decision of the Secretary made after a hearing." They also fall short of satisfying the Secretary's regulations, which specify that the finality required for judicial review is achieved only after the further steps of a hearing before an administrative law judge and, possibly, consideration by the Appeals Council. See 20 CFR §§ 404.916, 404.940, 404.951 (1974).

We have previously recognized that the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue. *Parisi* v. *Davidson,* 405 U. S. 34 (1972); *McKart* v. *United States,* 395 U. S. 185 (1969). Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review. See, *e. g., id.,* at 193–194. Plainly these purposes have been served once the Secretary has satisfied himself that the only issue is the constitutionality of a statutory requirement, a matter which is beyond his jurisdiction to determine, and that the claim is neither otherwise invalid nor cognizable under a different section of the Act. Once a benefit applicant has presented his or her claim at a sufficiently high level of review to satisfy the Secretary's administrative needs, further exhaustion would not merely be futile for the applicant,

but would also be a commitment of administrative resources unsupported by any administrative or judicial interest.

The present case, of course, is significantly different from *McKart* in that a "final decision" is a statutorily specified jurisdictional prerequisite. The requirement is, therefore, as we have previously noted, something more than simply a codification of the judicially developed doctrine of exhaustion, and may not be dispensed with merely by a judicial conclusion of futility such as that made by the District Court here. But it is equally true that the requirement of a "final decision" contained in § 405 (g) is not precisely analogous to the more classical jurisdictional requirements contained in such sections of Title 28 as 1331 and 1332. The term "final decision" is not only left undefined by the Act, but its meaning is left to the Secretary to flesh out by regulation.[9] Section 405 (*l*) accords the Secretary complete authority to delegate his statutory duties to officers and employees of the Department of Health, Education, and Welfare. The statutory scheme is thus one in which the Secretary may specify such requirements for exhaustion as he deems serve his own interests in effective and efficient administration. While a court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary, we believe it would be inconsistent with the congressional scheme to bar the Secretary from de-

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[9] Title 42 U. S. C. § 405 (a):

"The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder."

termining in particular cases that full exhaustion of internal review procedures is not necessary for a decision to be "final" within the language of § 405 (g).

Much the same may be said about the statutory requirement that the Secretary's decision be made "after a hearing." Not only would a hearing be futile and wasteful, once the Secretary has determined that the only issue to be resolved is a matter of constitutional law concededly beyond his competence to decide, but the Secretary may, of course, award benefits without requiring a hearing. We do not understand the statute to prevent him from similarly determining in favor of the applicant, without a hearing, all issues with regard to eligibility save for one as to which he considers a hearing to be useless.

In the present case the Secretary does not raise any challenge to the sufficiency of the allegations of exhaustion in appellees' complaint. We interpret this to be a determination by him that for the purposes of this litigation the reconsideration determination is "final." The named appellees thus satisfy the requirements for § 405 (g) judicial review, and we proceed to the merits of their claim.[10]

III

The District Court relied on congressional history for the proposition that the duration-of-relationship requirement was intended to prevent the use of sham marriages to secure Social Security payments. As such, concluded the court, "the requirement constitutes a presumption that marriages like Mrs. Salfi's, which did not precede

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[10] Section 405 (g) jurisdiction in *Weinberger* v. *Wiesenfeld,* 420 U. S. 636 (1975), was similarly present. In that case the Secretary stipulated that exhaustion would have been futile, and he did not make any contentions that Wiesenfeld had not complied with the requirements of § 405 (g). *Id.,* at 641 n. 8.

the wage earner's death by at least nine months, were entered into for the purpose of securing Social Security benefits." 373 F. Supp., at 965. The presumption was, moreover, conclusive, because applicants were not afforded an opportunity to disprove the presence of the illicit purpose. The court held that under our decisions in *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632 (1974); *Vlandis* v. *Kline,* 412 U. S. 441 (1973); and *Stanley* v. *Illinois,* 405 U. S. 645 (1972), the requirement was unconstitutional, because it presumed a fact which was not necessarily or universally true.

Our ultimate conclusion is that the District Court was wrong in holding the duration-of-relationship requirement unconstitutional. Because we are aware that our various holdings in related cases do not all sound precisely the same note, we will explain ourselves at some length.

The standard for testing the validity of Congress' Social Security classification was clearly stated in *Flemming* v. *Nestor,* 363 U. S., at 611:

> "Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."

In *Richardson* v. *Belcher,* 404 U. S. 78 (1971), a portion of the Social Security Act which required an otherwise entitled disability claimant to be subjected to an "offset" by reason of his simultaneous receipt of state workmen's compensation benefits was attacked as being violative of the Due Process Clause of the Fifth Amendment. The claimant in that case asserted that the provision was arbitrary in that it required offsetting of a

state workmen's compensation payment, but not of a similar payment made by a private disability insurer. The Court said:

> "If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment." 404 U. S., at 84.

Two Terms earlier the Court had decided the case of *Dandridge* v. *Williams,* 397 U. S. 471 (1970), in which it rejected a claim that Maryland welfare legislation violated the Equal Protection Clause of the Fourteenth Amendment. The Court had said:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78. 'The 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. . . .
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> "To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a

different constitutional standard. . . . It is a standard that has consistently been applied to state legislation restricting the availability of employment opportunities. *Goesaert* v. *Cleary,* 335 U. S. 464; *Kotch* v. *Board of River Port Pilot Comm'rs,* 330 U. S. 552. See also *Flemming* v. *Nestor,* 363 U. S. 603. And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Id.,* at 485–486.

The relation between the equal protection analysis of *Dandridge* and the Fifth Amendment due process analysis of *Flemming* v. *Nestor* and *Richardson* v. *Belcher* was described in the latter case in this language:

"A statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the Fourteenth Amendment if it is 'rationally based and free from invidious discrimination.' *Dandridge* v. *Williams,* 397 U. S. 471, 487. While the present case, involving as it does a federal statute, does not directly implicate the Fourteenth Amendment's Equal Protection Clause, a classification that meets the test articulated in *Dandridge* is perforce consistent with the due process requirement of the Fifth Amendment. Cf. *Bolling* v. *Sharpe,* 347 U. S. 497, 499." 404 U. S., at 81.

These cases quite plainly lay down the governing principle for disposing of constitutional challenges to classifications in this type of social welfare legislation. The District Court, however, chose to rely on *Cleveland Board of Education* v. *LaFleur, supra; Vlandis* v. *Kline, supra;* and *Stanley* v. *Illinois, supra.* It characterized this recent group of cases as dealing with "the appropriateness

of conclusive evidentiary presumptions." 373 F. Supp., at 965.

Stanley v. *Illinois* held that it was a denial of the equal protection guaranteed by the Fourteenth Amendment for a State to deny a hearing on parental fitness to an unwed father when such a hearing was granted to all other parents whose custody of their children was challenged. This Court referred to the fact that the "rights to conceive and to raise one's children have been deemed 'essential,' *Meyer* v. *Nebraska,* 262 U. S. 390, 399 (1923), 'basic civil rights of man,' *Skinner* v. *Oklahoma,* 316 U. S. 535, 541 (1942), and '[r]ights far more precious . . . than property rights,' *May* v. *Anderson,* 345 U. S. 528, 533 (1953)." 405 U. S., at 651.

In *Vlandis* v. *Kline,* a statutory definition of "residents" for purposes of fixing tuition to be paid by students in a state university system was held invalid. The Court held that where Connecticut purported to be concerned with residency, it might not at the same time deny to one seeking to meet its test of residency the opportunity to show factors clearly bearing on that issue. 412 U. S., at 452.

In *LaFleur* the Court held invalid, on the authority of *Stanley* and *Vlandis,* school board regulations requiring pregnant school teachers to take unpaid maternity leave commencing four to five months before the expected birth. The Court stated its longstanding recognition "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," 414 U. S., at 639–640, and that "overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms." *Id.,* at 640.

We hold that these cases are not controlling on the issue before us now. Unlike the claims involved in

Stanley and *LaFleur,* a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status, *Dandridge* v. *Williams, supra,* though of course Congress may not invidiously discriminate among such claimants on the basis of a "bare congressional desire to harm a politically unpopular group," *U. S. Dept. of Agriculture* v. *Moreno,* 413 U. S. 528, 534 (1973), or on the basis of criteria which bear no rational relation to a legitimate legislative goal. *Jimenez* v. *Weinberger,* 417 U. S. 628, 636 (1974); *U. S. Dept. of Agriculture* v. *Murry,* 413 U. S. 508, 513–514 (1973). Unlike the statutory scheme in *Vlandis,* 412 U. S., at 449, the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona fides inadmissible. As in *Starns* v. *Malkerson,* 326 F. Supp. 234 (Minn. 1970), summarily aff'd, 401 U. S. 985 (1971), the benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. Like the plaintiffs in *Starns,* appellees are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test.

We think that the District Court's extension of the holdings of *Stanley, Vlandis,* and *LaFleur* to the eligibility requirement in issue here would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution. For example, the very

section of Title 42 which authorizes an action such as this, § 405 (g), requires that a claim be filed within 60 days after administrative remedies are exhausted. It is indisputable that this requirement places people who file their claims more than 60 days after exhaustion in a different "class" from people who file their claims within the time limit. If we were to follow the District Court's analysis, we would first try to ascertain the congressional "purpose" behind the provision, and probably would conclude that it was to prevent stale claims from being asserted in court. We would then turn to the questions of whether such a flat cutoff provision was necessary to protect the Secretary from stale claims, whether it would be possible to make individualized determinations as to any prejudice suffered by the Secretary as the result of an untimely filing, and whether or not an individualized hearing on that issue should be required in each case. This would represent a degree of judicial involvement in the legislative function which we have eschewed except in the most unusual circumstances, and which is quite unlike the judicial role mandated by *Dandridge, Belcher,* and *Nestor,* as well as by a host of cases arising from legislative efforts to regulate private business enterprises.

In *Williamson* v. *Lee Optical Co.,* 348 U. S. 483 (1955), the Court dealt with a claim that the Equal Protection Clause of the Fourteenth Amendment was violated by an Oklahoma statute which subjected opticians to a system of detailed regulation, but which exempted sellers of ready-to-wear glasses. In sustaining the statute the Court said:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think." *Id.,* at 489.

More recently, in *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356 (1973), the Court sustained the constitutionality of a regulation promulgated under the Truth in Lending Act which made the Act's disclosure provisions applicable whenever credit is offered to a consumer " 'for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four installments.' " *Id.*, at 362. The regulation was challenged because it was said to conclusively presume that payments made under an agreement providing for more than four installments necessarily included a finance charge, when in fact that might not be the case. The Court rejected the constitutional challenge in this language:

> "The rule was intended as a prophylactic measure; it does not presume that all creditors who are within its ambit assess finance charges, but, rather, imposes a disclosure requirement on all members of a defined class in order to discourage evasion by a substantial portion of that class." *Id.*, at 377.

If the Fifth and Fourteenth Amendments permit this latitude to legislative decisions regulating the private sector of the economy, they surely allow no less latitude in prescribing the conditions upon which funds shall be dispensed from the public treasury. *Dandridge* v. *Williams*, *supra*. With these principles in mind, we turn to consider the statutory provisions which the District Court held invalid.

Title 42 U. S. C. § 402 (1970 ed. and Supp. III) is the basic congressional enactment defining eligibility for old-age and survivors insurance benefit payments, and is divided into 23 lettered subsections. Subsection (g) is entitled "Mother's insurance benefits," and primarily governs the claim of appellee Salfi. Subsection (d) governs eligibility for child's insurance benefits, and is the pro-

vision under which appellee Kalnins makes her claim. These subsections, along with others in § 402, specify the types of social risks for which protection is provided by what is basically a statutory insurance policy.

A different insurance system, but similarly defined by statute and operated by a governmental entity, was the subject of our consideration in *Geduldig* v. *Aiello,* 417 U. S. 484 (1974), and our disposition of that case is instructive. We reversed the judgment of a District Court which had held that a California state disability insurance program was invalid insofar as it failed to provide benefits for disabilities associated with normal pregnancy. In our opinion we said:

> "The District Court suggested that moderate alterations in what it regarded as 'variables' of the disability insurance program could be made to accommodate the substantial expense required to include normal pregnancy within the program's protection. The same can be said, however, with respect to the other expensive class of disabilities that are excluded from coverage—short-term disabilities. If the Equal Protection Clause were thought to compel disability payments for normal pregnancy, it is hard to perceive why it would not also compel payments for short-term disabilities suffered by participating employees.
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> "It is evident that a totally comprehensive program would be substantially more costly than the present program and would inevitably require state subsidy, a higher rate of employee contribution, a lower scale of benefits for those suffering insured disabilities, or some combination of these measures. There is nothing in the Constitution, however, that requires the State to subordinate or compromise its legitimate interests solely to create

a more comprehensive social insurance program than it already has." *Id.*, at 495–496.

The present case is somewhat different, since the Secretary principally defends the duration-of-relationship requirement, not as a reasonable legislative decision to exclude a particular type of risk from coverage, but instead as a method of assuring that payments are made only upon the occurrence of events the risk of which is covered by the insurance program.[11] Commercial insurance policies have traditionally relied upon fixed, prophylactic rules to protect against abuses which could expand liability beyond the risks which are within the general concept of its coverage. For example, life insurance policies often cover deaths by suicide, but not those suicides which were contemplated when the policy was purchased. Frequently the method chosen to contain liability within these conceptual bounds is a strict rule that deaths by suicide are covered if, and only if, they occur some fixed period of time after the policy is issued. See, *e. g.*, 9 G. Couch, Cyclopedia of Insurance Law § 40.50 (2d ed. 1962). While such a limitation doubtless proves in particular cases to be "under-inclusive" or "over-inclusive," in light of its presumed purpose, it is nonetheless a widely accepted response to legitimate interests in administrative economy and certainty of coverage for those who meet its terms. When the Government chooses to follow this tradition in its own social insurance programs, it does not come up against a constitutional stone wall. Rather, it may rely on such rules so long as

[11] The Secretary also briefly argues that the duration-of-relationship requirement rationally serves the interest in providing benefits only for persons who are likely to have become dependent upon the wage earner. Brief for Appellants 11–12. In view of our conclusion with regard to his principal argument, we need not consider this justification.

they comport with the standards of legislative reasonableness enunciated in cases like *Dandridge* v. *Williams* and *Richardson* v. *Belcher*.

Under those standards, the question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions, and would be directly contrary to our holding in *Mourning, supra*. Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. We conclude that the duration-of-relationship test meets this constitutional standard.

The danger of persons entering a marriage relationship not to enjoy its traditional benefits, but instead to enable one spouse to claim benefits upon the anticipated early death of the wage earner, has been recognized from the very beginning of the Social Security program. While no early legislative history addresses itself specifically to the duration-of-relationship requirement for mother's and child's benefits, there were discussions of the analogous requirement for receipt of wife's benefits under § 402 (b). See 42 U. S. C. § 416 (b) (1970 ed., Supp. IV), defining "wife." Dr. A. J. Altmeyer, Chairman of the Social Security Board, noted that a five-year requirement "should be strict enough to prevent marriage in anticipa-

tion of the larger benefit payments." Hearings on Social Security before the House Committee on Ways and Means, 76th Cong., 1st Sess., vol. 3, p. 2297 (1939). Similarly, the Advisory Council on Social Security stated:

> "The requirement that the wives' allowance be payable only where marital status existed prior to the husband's attainment of age 60 is intended to serve as protection against abuse of the plan through the contracting of marriages solely for the purpose of acquiring enhanced benefits. If the marriage takes place at least 5 years before any old-age benefits can be paid, a reasonable assumption exists that it was contracted in good faith." *Id.*, vol. 1, p. 31.

The Advisory Council also stated, with regard to § 402 (e) widow's benefits which, like mother's benefits, depend on the § 416 (c) definition of "widow":

> "As in the case of wives' allowances, it is believed desirable to protect the provisions for widows' benefits against abuse by the requirement of a minimum period of marital status." *Id.*, at 32.

Similar concerns were reflected in the House and Senate Reports on the 1946 amendment which reduced to three years the required duration of a marriage for the purposes of an eligible "wife." It was stated:

> "The original provision was intended to prevent exploitation of the fund by claims for benefits from persons who married beneficiaries solely to get wife's benefits. Experience has shown that the requirement is unnecessarily restrictive for this purpose and that, in a number of cases, a wife is permanently barred from benefits even though the marriage was entered into many years before the wage earner became a beneficiary. The amendment, taken with the provision in section 202 (b) that the wife be

living with her husband in order to be eligible for benefits, should be sufficient protection for the trust fund and will remedy situations which now seem inequitable. Few persons are likely to marry because of the prospect of receiving a modest insurance benefit which will not be payable until after 3 years." H. R. Rep. No. 2526, 79th Cong., 2d Sess., 25; S. Rep. No. 1862, 79th Cong., 2d Sess., 33.

Later amendments to the Act have been accompanied by discussions of the duration-of-relationship requirements contained in the definitions of "widow" and "child." Like the early history of analogous requirements, they reflect congressional concern with the possibility of relationships entered for the purpose of obtaining benefits. In 1967, when the durational period was reduced from one year to nine months, the House Report stated:

> "Your committee's bill would reduce the duration-of-relationship requirements for widows, widowers, and stepchildren of deceased workers from 1 year to 9 months. The present law contains a 1-year duration-of-relationship requirement which was adopted as a safeguard against the payment of benefits where a relationship was entered into in order to secure benefit rights. While the present requirements have generally worked out satisfactorily, situations have been called to the committee's attention in which benefits were not payable because the required relationship had existed for somewhat less than 1 year. Although some duration-of-relationship requirement is appropriate, a less stringent requirement would be adequate." H. R. Rep. No. 544, 90th Cong., 1st Sess., 56.

When in 1972 Congress added the provisions of 42 U. S. C. § 416 (k)(2) (1970 ed., Supp. III) (eliminating

the nine-month requirement with respect to remarriages of persons who had previously been married for more than nine months), the House Report observed: "This duration-of-relationship requirement is included in the law as a general precaution against the payment of benefits where the marriage was undertaken to secure benefit rights." H. R. Rep. No. 92–231, p. 55 (1971).

Undoubtedly the concerns reflected in this congressional material are legitimate, involving as they do the integrity of both the Social Security Trust Fund and the marriage relationship. It is also undoubtedly true that the duration-of-relationship requirement operates to lessen the likelihood of abuse through sham relationships entered in contemplation of imminent death. We also think that Congress could rationally have concluded that any imprecision from which it might suffer was justified by its ease and certainty of operation.

We note initially that the requirement is effective only within a somewhat narrow range of situations lacking certain characteristics which might reasonably be thought to establish the genuineness of a marital relationship which involves children (and thus the potential for mother's and child's benefits). Even though a surviving wife has not been married for a period of nine months immediately prior to her husband's death, she is nonetheless within the definition of "widow" if she meets one of the other disjunctive requirements of § 416 (c). If she is the mother of her late husband's son or daughter; if she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of 18; if he legally adopted her son or daughter under the same circumstances; or if during their marriage, however short, they legally adopted a child under the age of 18—in any of these circumstances the surviving wife may claim widow's or mother's benefits

even though she has not been married to her husband for a full nine months.[12] The common denominator of these disjunctive requirements appears to us to be the assumption of responsibilities normally associated with marriage, and we think that Congress has treated them as alternative *indicia* of the fact that the marriage was entered into for a reason other than the desire to shortly acquire benefits. The marriages in which the widow must depend on qualifying under the nine-month requirement are those in which none of these other objective evidences of the assumption of marital responsibilities are present.

Even so, § 416 (c)(5) undoubtedly excludes some surviving wives who married with no anticipation of shortly becoming widows, and it may be that appellee Salfi is among them. It likewise may be true that the requirement does not filter out every such claimant, if a wage earner lingers longer than anticipated, or in the case of illnesses which can be recognized as terminal more than nine months prior to death. But neither of these facts necessarily renders the statutory scheme unconstitutional.

While it is possible to debate the wisdom of excluding legitimate claimants in order to discourage sham relationships, and of relying on a rule which may not exclude some obviously sham arrangements, we think it clear that Congress could rationally choose to adopt such a course. Large numbers of people are eligible for these programs and are potentially subject to inquiry as to the validity of their relationships to wage earners. These people include not only the classes which appellees represent,[13] but also claimants in other programs for which

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[12] Similarly, the natural or adopted child of a deceased wage earner need not meet the nine-month requirement. See 42 U. S. C. § 416 (e)(1) (1970 ed., Supp. III).

[13] According to the Social Security Administration, in calendar 1973 there were 125,000 applicants for mother's benefits, 1,313,000

the Social Security Act imposes duration-of-relationship requirements.[14] Not only does the prophylactic approach thus obviate the necessity for large numbers of individualized determinations, but it also protects large numbers of claimants who satisfy the rule from the uncertainties and delays of administrative inquiry into the circumstances of their marriages. Nor is it at all clear that individual determinations could effectively filter out sham arrangements, since neither marital intent, life expectancy, nor knowledge of terminal illness has been shown by

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for child's benefits, and 403,000 for widow's/widower's benefits. While these figures include large numbers of persons who qualify on bases other than the duration of their relationship with a wage earner, they also doubtlessly exclude persons who did not even apply because of the durational restriction, or who were thereby dissuaded from entering the relationship. A feel for the magnitude of the potential for case-by-case determinations can also be developed by reference to the Social Security Administration's estimate that judgment for the class which the named appellees sought to represent would involve payments of $30 million, assuming retroactivity to 1967. This figure does not reflect payments in behalf of persons who met the objective nine-month requirement, or who could not meet it and therefore either never applied or never entered the relationship.

[14] See 42 U. S. C. §§ 416 (b), (f), and (g), defining "wife," "husband," and "widower." These various definitions impose duration-of-relationship requirements with regard to "wife's" benefits, 42 U. S. C. § 402 (b) (1970 ed. and Supp. III), "husband's" benefits, 42 U. S. C. § 402 (c), and "widower's" benefits, 42 U. S. C. § 402 (f) (1970 ed. and Supp. III). In addition, "widow's" benefits, 42 U. S. C. § 402 (e) (1970 ed. and Supp. III), are available only to those women who satisfy § 416 (c)'s definition of "widow." "Parent's" benefits, 42 U. S. C. § 402 (h), are also subject to an objective eligibility requirement which is similar to a duration-of-relationship requirement. Under § 402 (h)(3), stepparents and adoptive parents may receive benefits with respect to a deceased child who was providing at least half of their support, but only if the marriage or adoption creating their relationship occurred prior to the child's 16th birthday.

appellees to be reliably determinable.[15] Finally, the very possibility of prevailing at a hearing could reasonably be expected to encourage sham relationships.

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[15] Appellees do not contend that marital intent or life expectancy can be reliably determined. They argue, however, that because a marriage could not be entered in contemplation of imminent death unless the wage earner's "terminal illness" was known, the inquiry need go no farther than the issue of whether the parties to the marriage knew of such an illness. They claim that applicants could demonstrate the state of their knowledge by physicians' affidavits or documentary medical evidence. These contentions are not, however, supported by any factual rebuttals of the variety of difficulties which Congress was entitled to expect to be encountered. See *McGowan* v. *Maryland,* 366 U. S. 420, 426 (1961).

For example, all evidence of "knowledge of terminal illness" would ordinarily be under the control of applicants, which suggests that they should bear the burden of proof. But this burden could be convincingly carried only with respect to wage earners who happened to have had physical examinations shortly before their weddings; on the other hand, awarding benefits where the wage earner had not had an examination, and no medical evidence was available, would encourage participants in sham arrangements to conceal their own adverse medical evidence. Even when adequate medical evidence was available there could easily be difficulties in determining whether a wage earner's physical condition amounted to a "terminal illness"; if that concept were restricted to conditions which were virtually certain to result in an early death, benefits would probably be too broadly available, since certainty of imminent death rather than a mere high probability of it is not a prerequisite to a sham relationship; yet inquiries into the degree of likelihood of death could become very complex indeed.

Additional problems with appellees' proposed test arise because it, like the duration-of-relationship requirement, is not precisely related to the objective of denying benefits which are sought on the basis of sham relationships. In the first place, it presumably would be necessary to limit the requirement of terminal illness inquiries to instances in which death occurred within a specified period after marriage. It would also appear to be necessary to set an outside limit on the length of the period within which death was expected that would disqualify applicants (after all, and paraphrasing Lord Keynes, in the long run we are all expected to die). Yet there will

The administrative difficulties of individual eligibility determinations are without doubt matters which Congress may consider when determining whether to rely on rules which sweep more broadly than the evils with which they seek to deal. In this sense, the duration-of-relationship requirement represents not merely a substantive policy determination that benefits should be awarded only on the basis of genuine marital relationships, but also a substantive policy determination that limited resources would not be well spent in making individual determinations. It is an expression of Congress' policy choice that the Social Security system, and its millions of beneficiaries, would be best served by a prophylactic rule which bars claims arising from the bulk of sham marriages which are actually entered, which discourages such mar-

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always be persons on one side of such lines who are seriously disadvantaged vis-à-vis persons on the other side. More basically, appellees' test would clearly exclude persons who knew of a wage earner's imminent death, but who entered their marriages for reasons entirely unrelated to Social Security benefits, such as to fulfill the promises of a longstanding engagement. Thus appellees' proposed test would be subject to exactly the same constitutional attacks which they direct toward the test on which Congress chose to rely.

Appellees point out that 42 U. S. C. § 416 (k) (1970 ed., Supp. III) provides for limited exceptions to the duration-of-relationship requirement, unless the Secretary determines that at the time of the marriage the wage earner "could not have reasonably been expected to live for nine months." They argue that this represents Congress' recognition that case-by-case consideration would not impose an inordinate administrative burden. The argument is without merit. Section 416 (k) expresses Congress' willingness to accept case-by-case inquiries with regard to limited classes which bear particular indices of genuineness (the section is applicable in cases of accidental death, death in the line of military duty, and remarriages of persons previously married for more than nine months). This says nothing about the feasibility of making such inquiries in other circumstances, much less the rationality of choosing not to do so.

riages from ever taking place, and which is also objective and easily administered.

The Constitution does not preclude such policy choices as a price for conducting programs for the distribution of social insurance benefits. Cf. *Geduldig* v. *Aiello,* 417 U. S., at 496. Unlike criminal prosecutions, or the custody proceedings at issue in *Stanley* v. *Illinois,* such programs do not involve affirmative Government action which seriously curtails important liberties cognizable under the Constitution. There is thus no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce.

The judgment of the District Court is

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

I agree with MR. JUSTICE BRENNAN that because there is clearly jurisdiction the Court's extended discussion of the subject is unwarranted.

On the merits, I believe that the main problem with these legislatively created presumptions is that they frequently invade the right to a jury trial. See *Tot* v. *United States,* 319 U. S. 463, 473 (1943) (Black, J., concurring). The present law was designed to bar payment of certain Social Security benefits when the purpose of the marriage was to obtain such benefits. Whether this was the aim of a particular marriage is a question of fact, to be decided by the jury in an appropriate case. I therefore would vacate and remand the case to give Mrs. Salfi the right to show that her

marriage did not offend the statutory scheme, that it was not a sham.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

The District Court did not err, in my view, either in holding that it had jurisdiction by virtue of 28 U. S. C. § 1331, or in holding that the nine-month requirements of 42 U. S. C. §§ 416 (c)(5) and (e)(2) (1970 ed. and Supp. III) are constitutionally invalid.

I

Jurisdiction

The jurisdictional issue to which the Court devotes 10 pages, only to conclude that there is indeed jurisdiction over the merits of this case both here and in the District Court, was not raised in this Court by the parties before us nor argued, except most peripherally,[1] in the briefs or

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[1] The appellants in their jurisdictional statement raised as one of the questions presented "[w]hether sovereign immunity bars this [suit] *insofar as it seeks retroactive social security benefits.*" Jurisdictional Statement 2 (emphasis added). Their argument was that no retroactive benefits were available to the class, because 28 U. S. C. § 1331 does not waive sovereign immunity, because 42 U. S. C. § 405 (h) bars a suit *seeking retroactive benefits* except under § 405 (g), and because the exhaustion requirements of § 405 (g) were not met. Brief for Appellants 16–18. See also Tr. of Oral Arg. 7–8:

"Question: . . . [I]s the United States satisfied there was jurisdiction in the district court here?

"Mrs. Shapiro: We are not satisfied that there was jurisdiction to *the extent that it . . . identified a class and required retroactive payments to all members of the class.*" (Emphasis added.)

Thus, the appellants never claimed here that the District Court was without jurisdiction over the merits of this case, for they conceded, apparently, jurisdiction to grant declaratory and injunctive relief.

at oral argument. The question involves complicated questions of legislative intent and a statutory provision, 42 U. S. C. § 405 (h), which has baffled district courts and courts of appeals for years in this and other contexts.[2] Of course, this Court is always obliged to inquire into its own jurisdiction, when there is a substantial question about whether jurisdiction is proper either in the lower courts or in this Court. But since here there is, according to the Court, jurisdiction over the cause of action in any event,[3] I would have thought it the wiser

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[2] See, *e. g.*, on the effect of §§ 405 (g) and (h) on cases seeking to invalidate as unconstitutional a provision of Title II of the Social Security Act, *Bartley* v. *Finch*, 311 F. Supp. 876 (ED Ky. 1970), summarily aff'd on the merits *sub nom. Bartley* v. *Richardson*, 404 U. S. 980 (1971); *Gainville* v. *Richardson*, 319 F. Supp. 16 (Mass. 1970); *Griffin* v. *Richardson*, 346 F. Supp. 1226 (Md.), summarily aff'd, 409 U. S. 1069 (1972); *Diaz* v. *Weinberger*, 361 F. Supp. 1 (SD Fla. 1973); *Wiesenfeld* v. *Weinberger*, 367 F. Supp. 981 (NJ 1973), aff'd, 420 U. S. 636 (1975); *Kohr* v. *Weinberger*, 378 F. Supp. 1299 (ED Pa. 1974) (appeal docketed, No. 74–5538).

Bartley v. *Finch*, *supra*, was the only one of these cases holding that § 405 (g) is the *exclusive* means of determining the constitutionality of a provision of the Social Security Act, and that there was, because of noncompliance with § 405 (g), no jurisdiction. The District Court then went on to decide the merits. This Court's affirmance was explicitly on the merits, and thus must be taken to have held that there *was* jurisdiction even though § 405 (g) was not complied with.

Other courts have grappled with §§ 405 (g) and (h) in other contexts. See, *e. g.*, *Filice* v. *Celebrezze*, 319 F. 2d 443 (CA9 1963); compare *Cappadora* v. *Celebrezze*, 356 F. 2d 1 (CA2 1966), with *Stuckey* v. *Weinberger*, 488 F. 2d 904 (CA9 1973) (en banc). In *Cappadora*, *supra*, Judge Friendly, in considering the application of §§ 405 (g) and (h) to review of a decision not to reopen a claim of statutory qualification, cautioned against overly literal interpretation of the sections. 356 F. 2d, at 4–5.

[3] If the Court had determined to affirm on the merits, then the question actually raised by the appellants—whether there is jurisdiction to award retroactive benefits despite noncompliance with

course merely to note that there was jurisdiction in the District Court *either* under 28 U. S. C. § 1331 *or* under 42 U. S. C. § 405 (g), leaving the resolution of the question of which is applicable to a case in which the decision is of some consequence, and in which the parties have, either of their own volition or upon request of the Court, briefed and argued the issue.[4] Surely, the Court does not intend to adopt a new policy of always on its own canvassing, with a full discussion, all jurisdictional issues lurking behind every case, whether or not the issue has any impact at all on the resolution of the case.

Because the Court nonetheless treats the question fully, I am obliged to do so as well. For, at least insofar as my own research and consideration, unaided by the help ordinarily offered by adversary consideration, is adequate, I am convinced that the Court is quite wrong about the intended reach of § 405 (h), and that its construction attributes to Congress a purpose both contrary

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§ 405 (g)—may have been fairly before us, and may have entailed canvassing the jurisdictional questions the Court today discusses. But since the Court reverses on the merits, the *source* of the District Court's jurisdiction is immaterial and, particularly, it is irrelevant whether or not there was jurisdiction over the class complaint. The Court's decision on the latter question, *ante,* at 764, can only be characterized as dictum.

[4] In *Norton* v. *Weinberger,* appeal docketed, No. 74-6212, the District Court did not declare the contested portion of Title II of the Social Security Act unconstitutional, and we therefore lack jurisdiction under 28 U. S. C. § 1252. Thus, if § 405 (g) is the exclusive route for determination of constitutional attacks on Title II, and if, as the Court suggests, *ante,* at 763 n. 8, there is a question regarding the power of a court to grant an injunction under § 405 (g), we could be without jurisdiction under 28 U. S. C. § 1253 in *Norton* because the three-judge court, without power to enjoin the statute, was improperly convened under 28 U. S. C. § 2282. Thus, *Norton,* unlike this case, would be the appropriate vehicle for determination of the jurisdictional question decided today.

to all established notions of administrative exhaustion and absolutely without support in the clear language or legislative history of the statute. Further, today's decision is in square conflict with *Johnson* v. *Robison,* 415 U. S. 361 (1974). And finally, even if § 405 (g) is the exclusive route for adjudicating actions seeking payment of a claim, I do not see how it can apply to the declaratory and injunctive aspects of this suit.

A

The Court rejects the District Court's conclusion that § 405 (h) is no more than a codified requirement of administrative exhaustion on the basis of the third sentence of the section, which it characterizes as "sweeping and direct and [stating] that *no* action shall be brought under § 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted." *Ante,* at 757. But the sentence does not say that no action of any kind shall be brought under § 1331, or other general grants of jurisdiction, which may result in entitling someone to benefits under Title II of the Act; it says merely that no action shall be brought under § 1331 *et seq.* "to *recover* on any claim *arising under* [Title II]." (Emphasis added.) This action, I believe, does not "arise under" Title II in the manner intended by § 405 (h), and it is, at least in part, not an action to "recover" on a claim. See Parts B and C, *infra.*

Section 405 (h), I believe, only bans, except under § 405 (g), suits which arise under Title II in the sense that they require the application of the statute to a set of facts, and which seek nothing more than a determination of eligibility claimed to arise under the Act. Thus, I basically agree with the District Court that § 405 (h), including its last sentence, merely codifies the usual

requirements of administrative exhaustion. The last sentence, in particular, provides that a plaintiff cannot avoid § 405 (g) and the first two sentences of § 405 (h) by bringing an action under a general grant of jurisdiction claiming that the Social Security Act *itself* provides him certain rights. Rather, on *such* a claim a plaintiff *must* exhaust administrative remedies, and the District Court is limited to *review* of the Secretary's decision, in the manner prescribed by § 405 (g).

The Court suggests that this reading of § 405 (h) makes the last sentence redundant. But this is the reading which the Social Security Board itself gave to the provision soon after it went into effect. In a document prepared for and approved by the Board in January 1940 as an outline of the procedures to be followed under the newly enacted Social Security Act Amendments of 1939,[5] the interaction between §§ 405 (g) and (h) is described as follows:

> "The judicial review section of the act, section [405 (g)], provides for civil suits against the Social Security Board in the United States District Courts. These may be filed by parties to hearings before the Board who are dissatisfied with final decisions of the Board. The review of the Board's actions in these suits will consist of a review of the Board's records in these cases. *Thus, on the one hand, the Board is protected against the possibility of reversals of its decisions in separate actions filed for the purpose . . . . Actions of this kind are specifically excluded by section* [405 (h)]. On the other hand, judicial review

[5] Sections 405 (g) and (h) were part of these amendments. See Social Security Act Amendments of 1939, Tit. II, § 201, 53 Stat. 1362. Before that, the Social Security Act contained no explicit provisions concerning judicial review. See H. R. Rep. No. 728, 76th Cong., 1st Sess., 43 (1939).

> on the basis of the Board's records in the cases makes it necessary that the record in each case be in the best possible state so as to avoid difficulties if a challenge in court occurs." Federal Security Agency, Social Security Board, Basic Provisions Adopted by the Social Security Board for the Hearing and Review of Old-Age and Suvivors Insurance Claims With a Discussion of Certain Administrative Problems and Legal Consideration (1940), in Attorney General's Committee on Administrative Procedure, Administrative Procedures in Government Agencies, S. Doc. No. 10, 77th Cong., 1st Sess., pt. 3, p. 39 (1941).

Since the last sentence of § 405 (h) is the only part of the section which "specifically exclude[s]" any "action," the italicized portion obviously refers to that sentence.

Thus, the agency responsible for the enforcement of Title II adopted a construction of the statute which gave the last sentence the very meaning which the Court now rejects as "superfluous" and "already performed by other statutory provisions." *Ante,* at 757, 759, and n. 6. As explained in the margin,[6] the sentence is not superfluous,

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[6] The Court argues, *ante,* at 759 n. 6, that if the third sentence of § 405 (h) merely forbids a bypass of § 405 (g) via a separate action not framed as a review of the Secretary's decision, it is superfluous because an application is a prerequisite to entitlement and "[o]nce the application is filed, it is either approved . . . or it is denied," resulting in a decision of the Secretary which, under the second sentence of § 405 (h), cannot be reviewed "save pursuant to § 405 (g)." This analysis is faulty in several respects. First, without the last sentence of § 405 (h), an applicant might first file an application and then, before it is acted upon at all, file a suit for benefits under Title II. Second, it is not true that *all* entitlement to benefits hinge upon filing an application. In some instances, a person already receiving one type of benefits need not file a new application in order to receive another category of benefits. See, *e. g.,*

and the Board obviously did not regard it as such. Administrative interpretations by agencies of statutes which they administer are ordinarily entitled to great weight, see, *e. g., Johnson* v. *Robison,* 415 U. S., at 367–368; *Udall* v. *Tallman,* 380 U. S. 1, 16 (1965). And in this instance, the contemporary Social Security Board was intimately involved in the formulation of the 1939 amendments,[7] and thus must be presumed to have had insight into the legislative intent.[8]

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42 U. S. C. §§ 402 (e)(1)(C)(ii) and (f)(1)(C) (1970 ed., Supp. III); § 402 (g)(1)(D). Finally, even if an application has been filed and a decision made upon it, the applicant might try to file a suit seeking not review of the administrative record but a *de novo* determination of eligibility. This would raise the question whether the second sentence of § 405 (g) should be read only to prescribe the *way* in which the administrative record "shall be reviewed"; the third sentence makes clear, however, that no action *except* review of the administrative record is available for suits claiming eligibility *under* the statute.

[7] See Report of the Social Security Board, Proposed Changes in the Social Security Act, H. R. Doc. No. 110, 76th Cong., 1st Sess. (1939); Hearings on Social Security before the House Committee on Ways and Means, 76th Cong., 1st Sess., vols. 1, 3, pp. 45–69, 2163–2433 (1939) (testimony of Dr. Altmeyer, Chairman of the Social Security Board).

[8] Other indices of legislative intent and administrative interpretation, although sparse, also suggest that §§ 405 (g) and (h) were intended and interpreted as nothing more than a codification of ordinary administrative exhaustion requirements, applicable to cases presenting questions of fact and of interpretation of the statute. The 1939 Report of the Social Security Board, see n. 7, *supra,* suggested that the amendments include a "[p]rovision that findings of fact and decisions of the Board in the allowance of claims shall be final and conclusive. Such a provision would follow the precedent of the World War Veterans' Act and of other legislation with respect to agencies similar to the Board which handle a large number of small claims." *Id.,* at 13. At the hearings on the amendments, Dr. Altmeyer explained this recommendation as "follow[ing] the

Indeed, to adopt the Court's view of the last sentence of § 405 (h) is, as far as I can determine, to assume that it was inserted precisely to cover the situation here—a suit attacking the constitutionality of a section of Title II and seeking to establish eligibility *despite* the provisions of the statute. Yet, the Court is able to point to no evidence at all that Congress was concerned with this kind of lawsuit when it formulated these sections, and I have not been able to find any either.

Without any clear evidence, indeed without any

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precedent laid down in . . . other acts, *where there is a volume of small claims, and where a review of the findings of fact would lead to . . . duplicate administration of the law.*" Hearings, n. 7, *supra,* vol. 3, p. 2288. (Emphasis added.) Thus, at their inception the exhaustion provisions which became §§ 405 (g) and (h) were clearly intended to apply only to run-of-the-mill claims under the statutory provisions, in which factual determinations would be paramount.

The House of Representatives Report says of § 405 (g): "The provisions of this subsection are similar to those made for the review of decisions of many administrative bodies." H. R. Rep. No. 728, 76th Cong., 1st Sess., 43 (1939). The Report describes § 405 (h) basically in its own words. *Id.,* at 43–44. There is no indication that the latter section was intended in any way to alter the intent indicated by the quoted sentence—to legislate only ordinary administrative exhaustion requirements.

Finally, a statement inserted by Mr. Mitchell, Commissioner of Social Security, into the record of the 1959 Hearings on the Administration of the Social Security Disability Insurance Program before the Subcommittee on the Administration of the Social Security Laws of the House Committee on Ways and Means, 86th Cong., 1st Sess., 977 (1960), again reflects the view that §§ 405 (g) and (h) together merely reiterate, even if a bit redundantly, that "the jurisdiction of a court to review a determination of the Secretary is limited to a review of the record made before the Secretary. This is made amply clear by the second and third sentences of § [405 (g)] and by the provisions of [§ 405 (h)]. . . . The court has no power to hold a hearing and determine the merits of the claim because the statute makes it clear that the determination of claims is solely a function of the Secretary."

evidence, the Court should not attribute to Congress an intention to filter through § 405 (g) this sort of constitutional attack. "Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Oestereich* v. *Selective Service Bd.*, 393 U. S. 233, 242 (1968) (Harlan, J., concurring in result); *Johnson* v. *Robison*, 415 U. S., at 368.[9] See 3 K. Davis, Administrative Law Treatise § 20.04 (1958). Thus, in a case such as this one, in which no facts are in dispute and no other sections of the Act are possibly applicable, "the only question of exhaustion was whether to require exhaustion of nonexistent administrative remedies." *Id.*, at 78. See *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 773 (1947). To assume, with no basis in the legislative history or in the clear words of the statute, that Congress intended to require exhaustion in this kind of case, is to impute to Congress a requirement of futile exhaustion, in which the only issues in the case are not discussed, in which the actual issues are in no way clarified, in which no factual findings are made, and in which there is no agency expertise to apply. I see no basis for imputing such an odd intent, especially since, as discussed below, I believe the clear import of the wording of the statute is to the contrary.

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[9] At least twice, claimants who attempted to exhaust pursuant to § 405 (g) on a constitutional attack on Title II have been met with an administrative holding that constitutional claims are beyond the competence of the administrative agency. See *In re Ephram Nestor*, Referee's Decision, Jan. 31, 1958, at Tr. 9, *Flemming* v. *Nestor*, O. T. 1959, No. 54; *In re Lillian Daniels*, Administrative Law Judge's Decision, Nov. 14, 1973, cited in Appellees' Motion to Affirm and/or Dismiss 21 n. 34. This administrative determination of the agency's jurisdiction is due great deference. *Johnson* v. *Robison*, 415 U. S. 361, 367–368 (1974).

B

I think it quite clear that a claim "arising under" Title II is one which alleges that the Title grants someone certain rights. This claim does not "arise under" the Title because, if the statute itself were applied, Mrs. Salfi would certainly lose. Instead, this case "arises under" the Constitution and seeks to hold invalid the result which would be reached under the statute itself. *Johnson* v. *Robison, supra,* as well as cases construing the meaning of "arising under" in other jurisdictional statutes,[10] dictate this result.

In *Johnson,* construing the language which appears *ante,* at 761, we said, 415 U. S., at 367:

> "The prohibitions would appear to be aimed at review only of those decisions of law or fact that arise in the *administration* by the Veterans' Administration of a *statute* providing benefits for veterans. A decision of law or fact 'under' a statute is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts. . . . Thus, . . . '[t]he questions of law presented in these proceedings arise under the Constitution, not under the statute whose validity is challenged.'" (Citation omitted.)

The Court, *ante,* at 761–762, suggests that this interpretation turned on the precise wording of the statute construed in *Johnson,* specifically on the words "decisions . . . on any question of law and fact." First, as the quotation above shows, *Johnson* in fact concentrated not upon what constitutes a "decision" of the admin-

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[10] The last sentence of § 405 (h), upon which the Court relies so heavily, refers expressly to old § 41 of Title 28, now 28 U. S. C. § 1331 *et seq.* Thus, it is appropriate to assume that "arising under" is used in § 405 (h) in the same sense as it is used in the general jurisdictional statutes.

istrator but upon what is a decision "under" a statute. But more significantly, the statute construed in *Johnson* had, between 1957 and 1970, read in part:

> "[D]ecisions of the Administrator on any question of law or fact *concerning a claim for benefits or payments* under any law administered by the Veterans' Administration shall be final and conclusive . . . ." 38 U. S. C. § 211 (a) (1964 ed., Supp. V) (emphasis added).

See *Johnson,* 415 U. S., at 368–369, n. 9. The italicized language is obviously quite similar to that used in § 405 (h). The Court's opinion in *Johnson* made clear that the holding that the section does not apply to constitutional attacks on veterans' benefits legislation encompasses all prior versions of the section, and that the "claim for benefits" language in no way affected this construction of the statute.[11]

Aside from *Johnson,* our cases concerning the meaning of "arising under" in the jurisdictional statutes affirm that this claim arises under the Constitution and *not* under the Social Security Act. We have consistently held that a controversy regarding title to land does not "arise under" federal law "merely because one of the parties to it has derived his title under an act of Congress." *Shulthis* v. *McDougal,* 225 U. S. 561, 570 (1912). See *Oneida Indian Nation* v. *County of Oneida,*

[11] *Johnson* discusses at length the reasons why the "concerning a claim for benefits or payments" language was eliminated. 415 U. S., at 371–373. These reasons had nothing to do with the problem of constitutional attacks presented in *Johnson* and presented here. The Court concluded: "Nothing whatever in the legislative history of the 1970 amendment, or *predecessor no-review clauses,* suggests any congressional intent to preclude judicial cognizance of constitutional challenges to veterans' benefits legislation." *Id.,* at 373. (Emphasis added.)

414 U. S. 661, 676, and n. 11 (1974). Rather, "a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the . . . laws of the United States." *Shoshone Mining Co.* v. *Rutter,* 177 U. S. 505, 507 (1900); *Oneida Indian Nation, supra,* at 683 (REHNQUIST, J., concurring). Unless the dispute requires, for its resolution, a decision concerning federal law, the case does not arise under federal law even if, but for a federal statute, there would be no right at all. *Shulthis* v. *McDougal, supra,* at 569; *Oneida Indian Nation, supra,* at 677.

Thus, "arising under" is a term of art in jurisdictional statutes referring, at least in part, to the body of law necessary to consider in order to determine the rights in question. Here, there is no dispute about the application of the Social Security Act; the only controversy concerns whether the Constitution permits the result which the Social Security Act would require. Therefore, this case does not concern a "claim arising under" Title II, and is not precluded by the last sentence of § 405 (h) from consideration under 28 U. S. C. § 1331.

C

Not only does this case not concern a "claim arising under" Title II, but it is, at least in part, not an "action . . . to *recover* on any claim." (Emphasis added.) A three-judge District Court dealt with the "recover on [a] claim" aspect of § 405 (h) in *Gainville* v. *Richardson,* 319 F. Supp. 16, 18 (Mass. 1970).[12] Judge Wyzanski wrote concerning the effect of the last sentence of § 405 (h):

"In the present action, while plaintiff does, per-

[12] This Court, 409 U. S. 1069 (1972), summarily affirmed *Griffin* v. *Richardson,* 346 F. Supp. 1226, 1230 (Md.), which expressed basically the same view, albeit somewhat less clearly.

haps improperly, seek damages, his complaint also has prayers for a declaratory judgment that § 203 (f)(3) of the Social Security Act, 42 U. S. C. § 403 (f)(3) is unconstitutional, and for an injunction restraining defendant from applying that section. If he were to be successful with respect to those prayers, plaintiff would not, in the language of the statute, 'recover on any claim' for benefits. For recovery of benefits he would still need to resort to the administrative process. The only effect of a declaratory judgment or injunction by this court would be to preclude the Secretary from making the challenged deduction." 319 F. Supp., at 18.

This holding seems eminently sensible to me. The legislative history and administrative interpretation of § 405 (h), *supra,* at 790–792, and n. 8, reveal no basis for supposing that the section was to apply to suits which did not request immediate payment of a claim as part of the relief. To construe the statute to cover all actions which may later, *after* administrative consideration, result in eligibility under Title II is to mutilate the statutory language.

The holding in *Gainville, supra,* applies squarely to this case. The complaint sought declaratory and injunctive relief with respect to both the named plaintiffs and the class, as well as retroactive benefits. App. 12–13. The injunction sought was *either* an order to provide benefits *or* "an opportunity for a hearing on the genuineness of their status, [for] plaintiffs and all those similarly situated." *Id.,* at 13. Thus, even if § 405 (h) precludes granting retroactive benefits except under § 405 (g), it would not, under the rationale of *Gainville, supra,* preclude granting any declaratory and injunctive relief to the class, since the relief requested would not necessarily be tantamount to recovery on a claim. Indeed,

the appellants seem to have conceded as much in this case, since it argued here that §§ 405 (g) and (h) were preclusive *only* with regard to retroactive benefits, see n. 1, *supra*.

The Court concludes that there was jurisdiction over the claim for retroactive benefits for the named plaintiffs under § 405 (g). (But see Part D, *infra*.) Under the *Gainville* rationale, there would be jurisdiction under § 1331 over the claims for class declaratory and injunctive relief. And if there was jurisdiction under one jurisdictional statute or another for each part of the action, surely there was jurisdiction over the whole.[13]

D

Finally, even if I could agree, and I do not, that § 405 (g) is the exclusive route for consideration of this kind of case, I would dissent from the Court's treatment of the exhaustion requirement of § 405 (g), *ante*, at 764–767.

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[13] Although this case was argued here as if the District Court granted retroactive benefits to the class, I am not sure this is so. The injunction issued ordered the Secretary "to provide benefits, from the time of original entitlement, to plaintiffs and the class they represent, *provided said plaintiffs and class are otherwise fully eligible to receive said benefits*." 373 F. Supp. 961, 966 (ND Cal. 1974). (Emphasis added.)

As the Court points out, *ante*, at 759 n. 6, in most instances, see n. 6, *supra*, a person is not "eligible" for benefits until he files an application. Further, the order obviously contemplates administrative proceedings in order to determine whether "such persons are otherwise fully eligible." Finally, if exhaustion of § 405 (g) is indeed, as the Court holds, always a prerequisite to eligibility, then a person would not be "otherwise fully eligible" unless and until he exhausts § 405 (g). Thus, I believe that the order can be read not to mandate retroactive benefits but only to require that claims of the class members be treated as if the nine-month marriage requirement did not exist. Such an order does not constitute recovery on a claim and, in my view, was proper under 28 U. S. C. § 1331.

The Court admits, *ante,* at 765, that the purposes of administrative exhaustion "have been served once the Secretary has satisfied himself that the only issue is the constitutionality of a statutory requirement, a matter which is beyond his jurisdiction to determine, and that the claim is neither otherwise invalid nor cognizable under a different section of the Act." Nonetheless, the Court construes the statute so as to permit "the *Secretary* [to] specify such requirements for exhaustion as *he deems* serve *his own* interests in effective and efficient administration. . . . [A] court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary." *Ante,* at 766. (Emphasis supplied.)

If, as the Court holds, the finality and hearing requirements of § 405 (g) are not jurisdictional,[14] *ibid.,* then I fail to see why it is left to the Secretary to determine when the point of futility is reached, a power to be exercised, apparently, with regard only to the Secretary's needs and without taking account of the claimants' interest in not exhausting futile remedies,[15] and in ob-

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[14] The Court has to ignore plain language of the statute in order to avoid the absurd result of requiring full exhaustion on *all* claims such as this one, even after the point of futility is reached. The statute says that judicial review can be had only "after a hearing," § 405 (g), and it is apparent that the hearing contemplated is a full, evidentiary hearing, see § 405 (b). Rather than avoiding the statutory language by holding that the Secretary can nonetheless dispense with a hearing, the Court would do better to recognize that the patent inapplicability of the statutory language to this kind of case suggests that the statute was never intended to apply at all to constitutional attacks beyond the Secretary's competence.

[15] Indeed, in some cases similar to this one, administrative exhaustion is functionally impossible. For example, in *Weinberger* v. *Wiesenfeld,* 420 U. S. 636 (1975), the applicant was ineligible for benefits because he was a man, a fact obviously apparent as soon as he appeared at the Social Security office. Not surprisingly, he

taining promptly benefits which have been unconstitutionally denied. Further, the Court leaves the way open for a lawless application of this power, since the Secretary can evidently, once the case is in court, assert or not assert the full exhaustion requirements of § 405 (g), as he pleases.

Moreover, and significantly, it flagrantly distorts the record in this case to say that the Secretary waived the exhaustion requirements of § 405 (g), recognizing their futility. True, the Secretary does not *here* claim a lack of jurisdiction for failure to exhaust on the individual claim, see n. 1, *supra*. But he did, in the District Court, move to dismiss the entire action for lack of subject-matter jurisdiction. See Notice and Motion to Dismiss or for Summary Judgment, at Record 114–117. The Secretary said, referring to §§ 405 (g) and (h):

> "From the above provisions, it is clear that the only civil action permitted to an individual on any claim arising under Title II of the Act is an action to review the 'final decision of the Secretary made after a hearing . . . .' The complaint, however, does not allege jurisdiction under section [405 (g)] . . . . Moreover, *there has been no 'final decision' by the Secretary on the matters herein com-*

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was refused an opportunity even to file an application for benefits. *Id.*, at 640 n. 6. This case is slightly different, since Mrs. Salfi was precluded not by the obvious fact of her sex, but by a fact which presumably did not appear until she filled out the application—that she had not been married long enough. Yet, the Court suggests that we had jurisdiction in *Wiesenfeld* only because of a stipulation that exhaustion would have been futile. *Ante*, at 767 n. 10. Does this intimate that the Secretary could have refused to waive exhaustion and thereby have eliminated § 405 (g) jurisdiction, even though Wiesenfeld could not possibly have complied with the statute without wrestling an application from the clerk and somehow forcing him to file it?

> *plained of . . . and plaintiffs have not exhausted their administrative remedies.* The exhaustion of any available administrative remedies is a *condition precedent* to the plaintiffs [*sic*] bringing this action against the defendants, and the issue is one of subject matter jurisdiction." Defendants' Memorandum in Opposition to the Plaintiffs' Motion for Preliminary Injunction, at Record 65. (First emphasis added.)

In the face of this statement, the Court's conclusion that the Secretary determined "that for the purposes of this litigation the reconsideration determination is 'final,'" *ante,* at 767, is patently indefensible.

II

The merits of this case can be dealt with very briefly. For it is, I believe, apparent on the face of the Court's opinion that today's holding is flatly contrary to several recent decisions, specifically *Vlandis* v. *Kline,* 412 U. S. 441 (1973); *U. S. Dept. of Agriculture* v. *Murry,* 413 U. S. 508 (1973); and *Jimenez* v. *Weinberger,* 417 U. S. 628 (1974).

In *Vlandis,* we said, 412 U. S., at 446: "[P]ermanent irrebuttable presumptions have long been disfavored under the Due Process [Clause] of the . . . Fourteenth [Amendment]." The Court today distinguishes *Stanley* v. *Illinois,* 405 U. S. 645 (1972), and *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632 (1974), two cases which struck down conclusive presumptions, because both dealt with protected rights, while this case deals with "a noncontractual claim to receive funds from the public treasury [which] enjoys no constitutionally protected status." *Ante,* at 772. But *Vlandis* also dealt with a Government benefit program—the provision of an

education at public expense. Since the Court cannot dispose of *Vlandis* as it does *Stanley* and *LaFleur,* it attempts to wish away *Vlandis* by noting that "where Connecticut purported to be concerned with residency, it might not at the same time deny to one seeking to meet its test of residency the opportunity to show factors clearly bearing on that issue." *Ante,* at 771.

Yet, the Connecticut statute in *Vlandis* did not set "residency," undefined, as the criteria of eligibility; it *defined* residency in certain ways. The definitions of "resident" were precisely parallel to the statute here, which defines "widow" and "child" in part by the number of months of marriage, 42 U. S. C. §§ 416 (c) and (e) (1970 ed. and Supp. III).

Similarly, *Murry, supra,* and *Jimenez, supra,* both dealt with conclusive presumptions contained in statutes setting out criteria for eligibility for Government benefits. The Court distinguishes them as cases in which the "criteria . . . bear no rational relation to a legitimate legislative goal." *Ante,* at 772. But if the presumptions in *Murry* and *Jimenez* were irrational, the presumption in this case is even more irrational. We have been presented with no evidence at all that the problem of collusive marriages is one which exists at all. Indeed, the very fact that Congress has continually moved back the amount of time required to avoid the irrebuttable presumption, *ante,* at 778–780, suggests that it found, for each time period set, that it was depriving deserving people of benefits without alleviating any real problem of collusion. There is no reason to believe that the nine-month period is any more likely to discard a high proportion of collusive marriages than the five-year, three-year, or one-year periods employed earlier.

The Court says: "The administrative difficulties of individual eligibility determinations are without doubt

matters which Congress may consider when determining whether to rely on rules which sweep more broadly than the evils with which they seek to deal." *Ante,* at 784. But, as we said in *Stanley* v. *Illinois, supra:*

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." 405 U. S., at 656.

This is not to say, nor has the Court ever held, that *all* statutory provisions based on assumptions about underlying facts are *per se* unconstitutional unless individual hearings are provided. But in this case, as in the others in which we have stricken down conclusive presumptions, it *is* possible to specify those factors which, if proved in a hearing, would disprove a rebuttable presumption. See, *e. g., Vlandis,* 412 U. S., at 452. For example, persuasive evidence of good health at the time of marriage would be sufficient, I should think, to disprove that the marriage was collusive. Also, in this case, as in *Stanley,* 405 U. S., at 655, and *La-Fleur,* 414 U. S., at 643, the presumption, insofar as it precludes people as to whom the presumed fact is untrue from so proving, runs counter to the general legislative policy—here, providing true widows and children with survivors' benefits. And finally, the presumption here, like that in *Vlandis, Murry,* and *Jimenez,* involves a measure of social opprobrium; the assumption is that the individual has purposely undertaken to evade legitimate requirements. When these factors are present, I believe

that the Government's interests in efficiency must be surrendered to the individual's interest in proving that the facts presumed are not true as to him.

I would affirm the judgment of the District Court.

FARETTA *v.* CALIFORNIA

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

No. 73-5772. Argued November 19, 1974—Decided June 30, 1975

The Sixth Amendment as made applicable to the States by the Fourteenth guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation and that he may proceed to defend himself *without* counsel when he voluntarily and intelligently elects to do so; and in this case the state courts erred in forcing petitioner against his will to accept a state-appointed public defender and in denying his request to conduct his own defense. Pp. 812-836.

Vacated and remanded.

Stewart, J., delivered the opinion of the Court, in which Douglas, Brennan, White, Marshall, and Powell, JJ., joined. Burger, C. J., filed a dissenting opinion, in which Blackmun and Rehnquist, JJ., joined, *post,* p. 836. Blackmun, J., filed a dissenting opinion, in which Burger, C. J., and Rehnquist, J., joined, *post,* p. 846.

Jerome B. Falk, Jr., by appointment of the Court, 417 U. S. 906, argued the cause for petitioner. With him on the briefs was *Roger S. Hanson.*

Howard J. Schwab, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Evelle J. Younger,* Attorney General, *Jack R. Winkler,* Chief Assistant Attorney General, *S. Clark Moore,* Assistant Attorney General, and *Russell Iungerich* and *Donald J. Oeser,* Deputy Attorneys General.*

John E. Thorne, pro se, filed a brief as *amicus curiae.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment. This clear constitutional rule has emerged from a series of cases decided here over the last 50 years.[1] The question before us now is whether a defendant in a state criminal trial has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so. Stated another way, the question is whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense. It is not an easy question, but we have concluded that a State may not constitutionally do so.

I

Anthony Faretta was charged with grand theft in an information filed in the Superior Court of Los Angeles County, Cal. At the arraignment, the Superior Court Judge assigned to preside at the trial appointed the public defender to represent Faretta. Well before the date of trial, however, Faretta requested that he be permitted to represent himself. Questioning by the judge revealed that Faretta had once represented himself in a criminal prosecution, that he had a high school education, and that he did not want to be represented by the public defender because he believed that that office was "very loaded down with . . . a heavy case load." The judge

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[1] See, *e. g., Powell* v. *Alabama,* 287 U. S. 45; *Johnson* v. *Zerbst,* 304 U. S. 458; *Betts* v. *Brady,* 316 U. S. 455; *Gideon* v. *Wainwright,* 372 U. S. 335; *Argersinger* v. *Hamlin,* 407 U. S. 25.

responded that he believed Faretta was "making a mistake" and emphasized that in further proceedings Faretta would receive no special favors.[2] Nevertheless, after establishing that Faretta wanted to represent himself and did not want a lawyer, the judge, in a "preliminary ruling," accepted Faretta's waiver of the assistance of counsel. The judge indicated, however, that he might reverse this ruling if it later appeared that Faretta was unable adequately to represent himself.

Several weeks thereafter, but still prior to trial, the judge *sua sponte* held a hearing to inquire into Faretta's ability to conduct his own defense, and questioned him specifically about both the hearsay rule and the state law governing the challenge of potential jurors.[3] After con-

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[2] The judge informed Faretta:

"You are going to follow the procedure. You are going to have to ask the questions right. If there is an objection to the form of the question and it is properly taken, it is going to be sustained. We are going to treat you like a gentleman. We are going to respect you. We are going to give you every chance, but you are going to play with the same ground rules that anybody plays. And you don't know those ground rules. You wouldn't know those ground rules any more than any other lawyer will know those ground rules until he gets out and tries a lot of cases. And you haven't done it."

[3] The colloquy was as follows:

"THE COURT: In the Faretta matter, I brought you back down here to do some reconsideration as to whether or not you should continue to represent yourself.

"How have you been getting along on your research?

"THE DEFENDANT: Not bad, your Honor.

"Last night I put in the mail a 995 motion and it should be with the Clerk within the next day or two.

"THE COURT: Have you been preparing yourself for the intricacies of the trial of the matter?

"THE DEFENDANT: Well, your Honor, I was hoping that the case could possibly be disposed of on the 995.

"Mrs. Ayers informed me yesterday that it was the Court's policy to hear the pretrial motions at the time of trial. If possible, your

sideration of Faretta's answers, and observation of his demeanor, the judge ruled that Faretta had not made an intelligent and knowing waiver of his right to the assist-

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Honor, I would like a date set as soon as the Court deems adequate after they receive the motion, sometime before trial.

"THE COURT: Let's see how you have been doing on your research.

"How many exceptions are there to the hearsay rule?

"THE DEFENDANT: Well, the hearsay rule would, I guess, be called the best evidence rule, your Honor. And there are several exceptions in case law, but in actual statutory law, I don't feel there is none.

"THE COURT: What are the challenges to the jury for cause?

"THE DEFENDANT: Well, there is twelve peremptory challenges.

"THE COURT: And how many for cause?

"THE DEFENDANT: Well, as many as the Court deems valid.

"THE COURT: And what are they? What are the grounds for challenging a juror for cause?

"THE DEFENDANT: Well, numerous grounds to challenge a witness—I mean, a juror, your Honor, one being the juror is perhaps suffered, was a victim of the same type of offense, might be prejudiced toward the defendant. Any substantial ground that might make the juror prejudice[d] toward the defendant.

"THE COURT: Anything else?

"THE DEFENDANT: Well, a relative perhaps of the victim.

"THE COURT: Have you taken a look at that code section to see what it is?

"THE DEFENDANT: Challenge a juror?

"THE COURT: Yes.

"THE DEFENDANT: Yes, your Honor. I have done—

"THE COURT: What is the code section?

"THE DEFENDANT: On voir diring a jury, your Honor?

"THE COURT: Yes.

"THE DEFENDANT: I am not aware of the section right offhand.

"THE COURT: What code is it in?

"THE DEFENDANT: Well, the research I have done on challenging would be in Witkins Jurisprudence.

"THE COURT: Have you looked at any of the codes to see where these various things are taken up?

[*Footnote 3 is continued on p. 810*]

ance of counsel, and also ruled that Faretta had no constitutional right to conduct his own defense.[4] The judge, accordingly, reversed his earlier ruling permitting self-representation and again appointed the public defender to represent Faretta. Faretta's subsequent request for leave to act as cocounsel was rejected, as were his efforts to make certain motions on his own behalf.[5] Throughout

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"THE DEFENDANT: No, your Honor, I haven't.

"THE COURT: Have you looked in any of the California Codes with reference to trial procedure?

"THE DEFENDANT: Yes, your Honor.

"THE COURT: What codes?

"THE DEFENDANT: I have done extensive research in the Penal Code, your Honor, and the Civil Code.

"THE COURT: If you have done extensive research into it, then tell me about it.

"THE DEFENDANT: On empaneling a jury, your Honor?

"THE COURT: Yes.

"THE DEFENDANT: Well, the District Attorney and the defendant, defense counsel, has both the right to 12 peremptory challenges of a jury. These 12 challenges are undisputable. Any reason that the defense or prosecution should feel that a juror would be inadequate to try the case or to rule on a case, they may then discharge that juror.

"But if there is a valid challenge due to grounds of prejudice or some other grounds, that these aren't considered in the 12 peremptory challenges. There are numerous and the defendant, the defense and the prosecution both have the right to make any inquiry to the jury as to their feelings toward the case."

[4] The judge concluded:

"[T]aking into consideration the recent case of People versus Sharp, where the defendant apparently does not have a constitutional right to represent himself, the Court finds that the ends of justice and requirements of due process require that the prior order permitting the defendant to represent himself in pro per should be and is hereby revoked. That privilege is terminated."

[5] Faretta also urged without success that he was entitled to counsel of his choice, and three times moved for the appointment of a lawyer other than the public defender. These motions, too, were denied.

the subsequent trial, the judge required that Faretta's defense be conducted only through the appointed lawyer from the public defender's office. At the conclusion of the trial, the jury found Faretta guilty as charged, and the judge sentenced him to prison.

The California Court of Appeal, relying upon a then-recent California Supreme Court decision that had expressly decided the issue,[6] affirmed the trial judge's ruling that Faretta had no federal or state constitutional right

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[6] *People* v. *Sharp*, 7 Cal. 3d 448, 499 P. 2d 489.

When Sharp was tried the California Constitution expressly provided that the accused in a criminal prosecution had the right "to appear and defend, in person and with counsel." Cal. Const., Art. 1, § 13. In an earlier decision the California Supreme Court had held that this language meant that the accused had the right to appear by himself or with counsel. *People* v. *Mattson*, 51 Cal. 2d 777, 336 P. 2d 937. This view was rejected in *Sharp*, the California Supreme Court there holding that the defendant in a criminal prosecution has no right under the State or the Federal Constitution to represent himself at trial. See generally Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 57–60 (4th ed. 1974); Note, 10 Calif. Western L. Rev. 196 (1973); Note, 24 Hastings L. J. 431 (1973); Comment, 64 J. Crim. L. 240 (1973).

Although immaterial to the court's decision, shortly before *Sharp* was decided on appeal the California Constitution had been amended to delete the right of self-representation from Art. 1, § 13, and to empower the legislature expressly "to require the defendant in a felony case to have the assistance of counsel." The new statutes on their face require counsel only in capital cases. See Cal. Penal Code §§ 686 (2), 686.1, 859, 987 (1970 and Supp. 1975). In other than capital cases the accused retains by statutory terms a right "to appear and defend in person and with counsel." § 686 (2). However, this language tracks the old language of Art. 1, § 13, of the California Constitution; and in construing the constitutional language in *Sharp* to exclude any right of self-representation under former Art. 1, § 13, of the State Constitution, the California Supreme Court also stated that § 686 (2) does not provide any right of self-representation.

to represent himself.[7] Accordingly, the appellate court affirmed Faretta's conviction. A petition for rehearing was denied without opinion, and the California Supreme Court denied review.[8] We granted certiorari. 415 U. S. 975.

II

In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, enacted by the First Congress and signed by President Washington one day before the Sixth Amend-

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[7] The Court of Appeal also held that the trial court had not "abused its discretion in concluding that Faretta had not made a knowing and intelligent waiver of his right to be represented by counsel," since "Faretta did not appear aware of the possible consequences of waiving the opportunity for skilled and experienced representation at trial."

[8] The California courts' conclusion that Faretta had no constitutional right to represent himself was made in the context of the following not unusual rules of California criminal procedure: An indigent criminal defendant has no right to appointed counsel of his choice. See *Drumgo* v. *Superior Court,* 8 Cal. 3d 930, 506 P. 2d 1007; *People* v. *Miller,* 7 Cal. 3d 562, 574, 498 P. 2d 1089, 1097; *People* v. *Massie,* 66 Cal. 2d 899, 910, 428 P. 2d 869, 876–877; *People* v. *Taylor,* 259 Cal. App. 2d 448, 450–451, 66 Cal. Rptr. 514, 515–517. The appointed counsel manages the lawsuit and has the final say in all but a few matters of trial strategy. See, *e. g., People* v. *Williams,* 2 Cal. 3d 894, 905, 471 P. 2d 1008, 1015; *People* v. *Foster,* 67 Cal. 2d 604, 606–607, 432 P. 2d 976, 977–978; *People* v. *Monk,* 56 Cal. 2d 288, 299, 363 P. 2d 865, 870–871; see generally *Rhay* v. *Browder,* 342 F. 2d 345, 349 (CA9). A California conviction will not be reversed on grounds of ineffective assistance of counsel except in the extreme case where the quality of representation was so poor as to render the trial a "farce or a sham." *People* v. *Ibarra,* 60 Cal. 2d 460, 386 P. 2d 487; see *People* v. *Miller, supra,* at 573, 498 P. 2d, at 1096–1097; *People* v. *Floyd,* 1 Cal. 3d 694, 709, 464 P. 2d 64, 73; *People* v. *Hill,* 70 Cal. 2d 678, 689, 452 P. 2d 329, 334; *People* v. *Reeves,* 64 Cal. 2d 766, 774, 415 P. 2d 35, 39.

ment was proposed, provided that "in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of . . . counsel . . . ." The right is currently codified in 28 U. S. C. § 1654.

With few exceptions, each of the several States also accords a defendant the right to represent himself in any criminal case.[9] The Constitutions of 36 States explicitly confer that right.[10] Moreover, many state courts have

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[9] See, *e. g., Mackreth* v. *Wilson,* 31 Ala. App. 191, 15 So. 2d 112; *Cappetta* v. *State,* 204 So. 2d 913 (Fla. Dist. Ct. App.); *Lockard* v. *State,* 92 Idaho 813, 451 P. 2d 1014; *People* v. *Nelson,* 47 Ill. 2d 570, 268 N. E. 2d 2; *Blanton* v. *State,* 229 Ind. 701, 98 N. E. 2d 186; *Westberry* v. *State,* 254 A. 2d 44 (Me.); *Allen* v. *Commonwealth,* 324 Mass. 558, 87 N. E. 2d 192; *People* v. *Haddad,* 306 Mich. 556, 11 N. W. 2d 240; *State* v. *McGhee,* 184 Neb. 352, 167 N. W. 2d 765; *Zasada* v. *State,* 19 N. J. Super. 589, 89 A. 2d 45; *People* v. *McLaughlin,* 291 N. Y. 480, 53 N. E. 2d 356; *State* v. *Pritchard,* 227 N. C. 168, 41 S. E. 2d 287; *State* v. *Hollman,* 232 S. C. 489, 102 S. E. 2d 873; *State* v. *Thomlinson,* 78 S. D. 235, 100 N. W. 2d 121; *State* v. *Penderville,* 2 Utah 2d 281, 272 P. 2d 195; *State* v. *Woodall,* 5 Wash. App. 901, 491 P. 2d 680. See generally Annot., 77 A. L. R. 2d 1233 (1961); 5 R. Anderson, Wharton's Criminal Law and Procedure § 2016 (1957).

[10] Some States grant the accused the right to be heard, or to defend, in person *and* by counsel: Ariz. Const., Art. 2, § 24; Ark. Const., Art. 2, § 10; Colo. Const., Art. 2, § 16; Conn. Const., Art. 1, § 8; Del. Const., Art. 1, § 7; Idaho Const., Art. 1, § 13; Ill. Const., Art. 1, § 8; Ind. Const., Art. 1, § 13; Ky. Const. Bill of Rights, § 11; Mo. Const., Art. 1, § 18 (a); Mont. Const., Art. 3, § 16; Nev. Const., Art. 1, § 8; N. H. Const., pt. 1, Art. 15; N. M. Const., Art. 2, § 14; N. Y. Const., Art. 1, § 6; N. D. Const., Art. 1, § 13; Ohio Const., Art. 1, § 10; Okla. Const., Art. 2, § 20; Ore. Const., Art. 1, § 11; Pa. Const., Art. 1, § 9; S. D. Const., Art. 6, § 7; Tenn. Const., Art. 1, § 9; Utah Const., Art. 1, § 12; Vt. Const., c. 1, Art. 10; Wis. Const., Art. 1, § 7; see La. Const., Art. 1, § 9.

Others grant the right to defend in person *or* by counsel: Kan.

expressed the view that the right is also supported by the Constitution of the United States.[11]

This Court has more than once indicated the same view. In *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 279, the Court recognized that the Sixth Amendment right to the assistance of counsel implicitly embodies a "correlative right to dispense with a lawyer's help." The defendant in that case, indicted for federal mail fraud violations, insisted on conducting his own defense without benefit of counsel. He also requested a bench trial and signed a waiver of his right to trial by jury. The prosecution consented to the waiver of a jury, and the waiver was accepted by the court. The defendant was convicted, but the Court of Appeals reversed the conviction on the ground that a person accused of a felony could not competently waive his right to trial by jury except upon the advice of a lawyer. This Court reversed and reinstated the conviction, holding that "an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel." *Id.,* at 275.

The *Adams* case does not, of course, necessarily resolve the issue before us. It held only that "the Constitution

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Const. Bill of Rights, § 10; Mass. Const., pt. 1, Art. 12; Neb. Const., Art. 1, § 11; Wash. Const., Art. 1, § 22.

Still others provide the accused the right to defend either by himself, by counsel, or both: Ala. Const., Art. 1, § 6; Fla. Const., Art. 1, § 16; Me. Const., Art. 1, § 6; Miss. Const., Art. 3, § 26; S. C. Const., Art. 1, § 14; Tex. Const., Art. 1, § 10.

[11] See, *e. g., Lockard* v. *State, supra; People* v. *Nelson, supra; Blanton* v. *State, supra; Zasada* v. *State, supra; People* v. *McLaughlin, supra; State* v. *Mems,* 281 N. C. 658, 190 S. E. 2d 164; *State* v. *Verna,* 9 Ore. App. 620, 498 P. 2d 793.

does not force a lawyer upon a defendant." *Id.*, at 279.[12] Whether the Constitution forbids a State from forcing a lawyer upon a defendant is a different question. But the Court in *Adams* did recognize, albeit in dictum, an affirmative right of self-representation:

> "The right to assistance of counsel and the *correlative right to dispense with a lawyer's help* are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. . . .
>
> ". . . What were contrived as protections for the accused should not be turned into fetters. . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.
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> ". . . When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution." *Id.*, at 279–280 (emphasis added).

In other settings as well, the Court has indicated that

[12] The holding of *Adams* was reaffirmed in a different context in *Carter* v. *Illinois*, 329 U. S. 173, 174–175, where the Court again adverted to the right of self-representation:

"Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person *the right to defend himself* or to confess guilt. Under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant." (Emphasis added.) See also *Moore* v. *Michigan*, 355 U. S. 155, 161.

a defendant has a constitutionally protected right to represent himself in a criminal trial. For example, in *Snyder* v. *Massachusetts,* 291 U. S. 97, the Court held that the Confrontation Clause of the Sixth Amendment gives the accused a right to be present at all stages of the proceedings where fundamental fairness might be thwarted by his absence. This right to "presence" was based upon the premise that the "defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, *for it will be in his power,* if present, to give advice or suggestion or *even to supersede his lawyers altogether and conduct the trial himself.*" *Id.,* at 106 (emphasis added). And in *Price* v. *Johnston,* 334 U. S. 266, the Court, in holding that a convicted person had no absolute right to argue his own appeal, said this holding was in "sharp contrast" to his "recognized privilege of conducting his own defense at the trial." *Id.,* at 285.

The United States Courts of Appeals have repeatedly held that the right of self-representation is protected by the Bill of Rights. In *United States* v. *Plattner,* 330 F. 2d 271, the Court of Appeals for the Second Circuit emphasized that the Sixth Amendment grants the accused the rights of confrontation, of compulsory process for witnesses in his favor, and of assistance of counsel as minimum procedural requirements in federal criminal prosecutions. The right to the assistance of counsel, the court concluded, was intended to supplement the other rights of the defendant, and not to impair "the absolute and primary right to conduct one's own defense *in propria persona.*" *Id.,* at 274. The court found support for its decision in the language of the 1789 federal statute; in the statutes and rules governing criminal procedure, see 28 U. S. C. § 1654, and Fed. Rule Crim. Proc. 44; in the many state constitutions that expressly guarantee self-

representation; and in this Court's recognition of the right in *Adams* and *Price*. On these grounds, the Court of Appeals held that implicit in the Fifth Amendment's guarantee of due process of law, and implicit also in the Sixth Amendment's guarantee of a right to the assistance of counsel, is "the right of the accused personally to manage and conduct his own defense in a criminal case." 330 F. 2d, at 274. See also *United States ex rel. Maldonado* v. *Denno,* 348 F. 2d 12, 15 (CA2); *MacKenna* v. *Ellis,* 263 F. 2d 35, 41 (CA5); *United States* v. *Sternman,* 415 F. 2d 1165, 1169–1170 (CA6); *Lowe* v. *United States,* 418 F. 2d 100, 103 (CA7); *United States* v. *Warner,* 428 F. 2d 730, 733 (CA8); *Haslam* v. *United States,* 431 F. 2d 362, 365 (CA9); compare *United States* v. *Dougherty,* 154 U. S. App. D. C. 76, 86, 473 F. 2d 1113, 1123 (intimating right is constitutional but finding it unnecessary to reach issue) with *Brown* v. *United States,* 105 U. S. App. D. C. 77, 79–80, 264 F. 2d 363, 365–366 (plurality opinion stating right is no more than statutory in nature).

This Court's past recognition of the right of self-representation, the federal-court authority holding the right to be of constitutional dimension, and the state constitutions pointing to the right's fundamental nature form a consensus not easily ignored. "[T]he mere fact that a path is a beaten one," Mr. Justice Jackson once observed, "is a persuasive reason for following it." [13] We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.

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[13] Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Col. L. Rev. 1, 26 (1945).

III

This consensus is soundly premised. The right of self-representation finds support in the structure of the Sixth Amendment, as well as in the English and colonial jurisprudence from which the Amendment emerged.

A

The Sixth Amendment includes a compact statement of the rights necessary to a full defense:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Because these rights are basic to our adversary system of criminal justice, they are part of the "due process of law" that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States.[14] The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it. See *California* v. *Green,* 399 U. S. 149, 176 (Harlan, J., concurring).

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[14] *Gideon* v. *Wainwright,* 372 U. S. 335, and *Argersinger* v. *Hamlin,* 407 U. S. 25 (right to counsel); *Pointer* v. *Texas,* 380 U. S. 400 (right of confrontation); *Washington* v. *Texas,* 388 U. S. 14 (right to compulsory process). See also *In re Oliver,* 333 U. S. 257, 273.

The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment.[15] The right to de-

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[15] This Court has often recognized the constitutional stature of rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process. It is now accepted, for example, that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings, *Snyder* v. *Massachusetts,* 291 U. S. 97; to testify on his own behalf, see *Harris* v. *New York,* 401 U. S. 222, 225; *Brooks* v. *Tennessee,* 406 U. S. 605, 612; cf. *Ferguson* v. *Georgia,* 365 U. S. 570; and to be convicted only if his guilt is proved beyond a reasonable doubt, *In re Winship,* 397 U. S. 358; *Mullaney* v. *Wilbur,* 421 U. S. 684.

The inference of rights is not, of course, a mechanical exercise. In *Singer* v. *United States,* 380 U. S. 24, the Court held that an accused has no right to a bench trial, despite his capacity to waive his right to a jury trial. In so holding, the Court stated that "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." *Id.,* at 34–35. But that statement was made only *after* the Court had concluded that the Constitution does not affirmatively protect any right to be tried by a judge. Recognizing that an implied right must arise independently from the design and history of the constitutional text, the Court searched for, but could not find, any "indication that the colonists considered the ability to waive a jury trial to be of equal importance to the right to demand one." *Id.,* at 26. Instead, the Court could locate only "isolated instances" of a right to trial by judge, and concluded that these were "clear departures from the common law." *Ibid.*

We follow the approach of *Singer* here. Our concern is with an

fend is given directly to the accused; for it is he who suffers the consequences if the defense fails.

The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master;[16] and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. Cf. *Henry* v. *Mississippi,* 379 U. S. 443, 451; *Brookhart* v. *Janis,* 384 U. S. 1, 7–8; *Fay* v. *Noia,* 372 U. S. 391, 439. This allocation can only be justified, however, by the defendant's consent, at the

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independent right of self-representation. We do not suggest that this right arises mechanically from a defendant's power to waive the right to the assistance of counsel. See *supra,* at 814–815. On the contrary, the right must be independently found in the structure and history of the constitutional text.

[16] Such a result would sever the concept of counsel from its historic roots. The first lawyers were personal friends of the litigant, brought into court by him so that he might "take 'counsel' with them" before pleading. 1 F. Pollock & F. Maitland, The History of English Law 211 (2d ed. 1909). Similarly, the first "attorneys" were personal agents, often lacking any professional training, who were appointed by those litigants who had secured royal permission to carry on their affairs through a representative, rather than personally. *Id.,* at 212–213.

outset, to accept counsel as his representative. An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.

B

The Sixth Amendment, when naturally read, thus implies a right of self-representation. This reading is reinforced by the Amendment's roots in English legal history.

In the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber. That curious institution, which flourished in the late 16th and early 17th centuries, was of mixed executive and judicial character, and characteristically departed from common-law traditions. For those reasons, and because it specialized in trying "political" offenses, the Star Chamber has for centuries symbolized disregard of basic individual rights.[17] The Star Chamber not merely allowed but required defendants to have counsel. The defendant's answer to an indictment was not accepted unless it was signed by counsel. When counsel refused to sign the answer, for whatever reason, the defendant was

[17] "The court of star chamber was an efficient, somewhat arbitrary arm of royal power. It was at the height of its career in the days of the Tudor and Stuart kings. Star chamber stood for swiftness and power; it was not a competitor of the common law so much as a limitation on it—a reminder that high state policy could not safely be entrusted to a system so chancy as English law. . . ." L. Friedman, A History of American Law 23 (1973). See generally 5 W. Holdsworth, A History of English Law 155–214 (1927).

considered to have confessed.[18] Stephen commented on this procedure: "There is something specially repugnant to justice in using rules of practice in such a manner as

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[18] "The proceedings before the Star Chamber began by a Bill 'engrossed in parchment and filed with the clerk of the court.' It must, like the other pleadings, be signed by counsel . . . . However, counsel were obliged to be careful what they signed. If they put their hands to merely frivolous pleas, or otherwise misbehaved themselves in the conduct of their cases, they were liable to rebuke, suspension, a fine, or imprisonment." Holdsworth, *supra* n. 17, at 178–179. Counsel, therefore, had to be cautious that any pleadings they signed would not unduly offend the Crown. See 1 J. Stephen, A History of the Criminal Law of England 340–341 (1883).

This presented not merely a hypothetical risk for the accused. Stephen gives the following account of a criminal libel trial in the Star Chamber:

"In 1632 William Prynne was informed against for his book called *Histrio Mastix.* Prynne's answer was, amongst other things, that his book had been licensed, and one of the counsel, Mr. Holbourn, apologised, not without good cause, for his style. . . . His trial was, like the other Star Chamber proceedings, perfectly decent and quiet, but the sentence can be described only as monstrous. He was sentenced to be disbarred and deprived of his university degrees; to stand twice in the pillory, and to have one ear cut off each time; to be fined £5,000; and to be perpetually imprisoned, without books, pen, ink, or paper. . . .

"Five years after this, in 1637, Prynne, Bastwick, and Burton, were tried for libel, and were all sentenced to the same punishment as Prynne had received in 1632, Prynne being branded on the cheeks instead of losing his ears.

"The procedure in this case appears to me to have been as harsh as the sentence was severe, though I do not think it has been so much noticed. . . . Star Chamber defendants were not only allowed counsel, but were required to get their answers signed by counsel. The effect of this rule, and probably its object was, that no defence could be put before the Court which counsel would not take the responsibility of signing—a responsibility which, at that time, was extremely serious. If counsel would not sign the defendant's answer he was taken to have confessed the information. Prynne's answer was of such a character that one of the counsel assigned to him

to debar a prisoner from defending himself, especially when the professed object of the rules so used is to provide for his defence." 1 J. Stephen, A History of the Criminal Law of England 341–342 (1883). The Star Chamber was swept away in 1641 by the revolutionary fervor of the Long Parliament. The notion of obligatory counsel disappeared with it.

By the common law of that time, it was not representation by counsel but self-representation that was the practice in prosecutions for serious crime. At one time, every litigant was required to "appear before the court in his own person and conduct his own cause in his own words." [19] While a right to counsel developed early in civil cases and in cases of misdemeanor, a prohibition against the assistance of counsel continued for centuries in prosecutions for felony or treason.[20] Thus, in the 16th and 17th centuries the accused felon or traitor stood alone, with neither counsel nor the benefit of other rights—to notice, confrontation, and compulsory process—that we now associate with a genuinely fair adversary proceeding. The trial was merely a "long argument between the prisoner and the

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refused to sign it at all, and the other did not sign it till after the proper time. Bastwick could get no one to sign his answer. Burton's answer was signed by counsel, but was set aside as impertinent. Upon the whole, the case was taken to be admitted by all the three, and judgment was passed on them accordingly. . . ." Stephen, *supra,* at 340–341.

That Prynne's defense was foreclosed by the refusal of assigned counsel to endorse his answer is all the more shocking when it is realized that Prynne was himself a lawyer. I. Brant, The Bill of Rights 106 (1965). On the operation of the Star Chamber generally, see Barnes, Star Chamber Mythology, 5 Am. J. Legal Hist. 1–11 (1961), and Barnes, Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber, 6 Am. J. Legal Hist. 221–249, 315–346 (1962).

[19] Pollock & Maitland, *supra,* n. 16, at 211.

[20] *Ibid.* See also Stephen, *supra,* n. 18, at 341.

counsel for the Crown."[21] As harsh as this now seems, at least "the prisoner was allowed to make what statements he liked. . . . Obviously this public oral trial presented many more opportunities to a prisoner than the secret enquiry based on written depositions, which, on the continent, had taken the place of a trial. . . ."[22]

With the Treason Act of 1695, there began a long and important era of reform in English criminal procedure. The 1695 statute granted to the accused traitor the rights to a copy of the indictment, to have his witnesses testify under oath, and "to make . . . full Defence, by Counsel learned in the Law."[23] It also provided for court appointment of counsel, *but only if the accused so desired.*[24]

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[21] *Id.*, at 326.

The trial would begin with accusations by counsel for the Crown. The prisoner usually asked, and was granted, the privilege of answering separately each matter alleged against him:

"[T]he trial became a series of excited altercations between the prisoner and the different counsel opposed to him. Every statement of counsel operated as a question to the prisoner, . . . the prisoner either admitting or denying or explaining what was alleged against him. The result was that . . . the examination of the prisoner . . . was the very essence of the trial, and his answers regulated the production of the evidence. . . . As the argument proceeded the counsel [for the Crown] would frequently allege matters which the prisoner denied and called upon them to prove. The proof was usually given by reading depositions, confessions of accomplices, letters, and the like . . . . When the matter had been fully inquired into . . . the presiding judge 'repeated' or summed up to the jury the matters alleged against the prisoner, and the answers given by him; and the jury gave their verdict." *Id.*, at 325-326.

[22] Holdsworth, *supra*, n. 17, at 195-196.

[23] 7 Will. 3, c. 3, § 1. The right to call witnesses under oath was extended to felony cases by statute in 1701. 1 Anne, Stat. 2, c. 9, § 3.

[24] The statute provided, in pertinent part, that the accused "shall be received and admitted to make his and their full Defence, by Counsel learned in the Law, and to make any Proof that he or they can

Thus, as new rights developed, the accused retained his established right "to make what statements he liked." [25] The right to counsel was viewed as guaranteeing a choice between representation by counsel and the traditional practice of self-representation. The ban on counsel in felony cases, which had been substantially eroded in the courts,[26] was finally eliminated by statute in 1836.[27] In more recent years, Parliament has provided for court appointment of counsel in serious criminal cases, but only at the accused's request.[28] At no point in this process of reform in England was counsel ever forced upon the

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produce by lawful Witness or Witnesses, who shall then be upon Oath, for his and their just Defence in that Behalf; and in case any Person or Persons so accused or indicted shall desire Counsel, the Court before whom such Person or Persons shall be tried, or some Judge of that Court, shall and is hereby authorized and required immediately, upon his or their Request, to assign to such Person and Persons such and so many Counsel, not exceeding Two, as the Person or Persons shall desire, to whom such Counsel shall have free Access at all seasonable Hours; any Law or Usage to the contrary notwithstanding."

[25] Holdsworth, *supra,* n. 17, at 195.

[26] In Mary Blandy's 1752 murder trial, for example, the court declared that counsel for the defendant could not only speak on points of law raised by the defense, but could also examine defense witnesses and cross-examine those of the Crown. 18 How. St. Tr. 1117. Later in that century judges often allowed counsel for the accused "to instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact . . . [or] law." 4 W. Blackstone, Commentaries *355–356.

[27] 6 & 7 Will. 4, c. 114, § 1. The statute provided in pertinent part that the accused "shall be admitted, after the Close of the Case for the Prosecution, to make full Answer and Defence thereto by Counsel learned in the Law, or by Attorney in Courts where Attornies practise as Counsel."

[28] See, *e. g.,* Poor Prisoners' Defence Act, 1903, 3 Edw. 7, c. 38, § 1; Poor Prisoners' Defense Act, 1930, 20 & 21 Geo. 5, c. 32; Legal Aid and Advice Act, 1949, 12 & 13 Geo. 6, c. 51.

defendant. The common-law rule, succinctly stated in *R.* v. *Woodward,* [1944] K. B. 118, 119, [1944] 1 All E. R. 159, 160, has evidently always been that "no person charged with a criminal offence can have counsel forced upon him against his will." [29] See 3 Halsbury's Laws of England ¶ 1141, pp. 624–625 (4th ed. 1973); *R.* v. *Maybury,* 11 L. T. R. (n. s.) 566 (Q. B. 1865).

C

In the American Colonies the insistence upon a right of self-representation was, if anything, more fervent than in England.

The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers. When the Colonies were first settled, "the lawyer was synonymous with the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King's Court, all bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions." [30] This prejudice gained strength in the Colonies where "distrust

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[29] Counsel had been appointed for the defendant Woodward but withdrew shortly before trial. When the trial court appointed a substitute counsel, the defendant objected: "I would rather not have legal aid. I would rather conduct the case myself." The trial court insisted, however, that the defendant proceed to trial with counsel, and a conviction resulted. On appeal, the Crown did not even attempt to deny a basic right of self-representation, but argued only that the right had been waived when the accused accepted the first counsel. The Court of Appeal rejected this argument: "The prisoner right at the beginning [of the trial] said that he wished to defend himself . . . and he was refused what we think was his right to make his own case to the jury instead of having it made for him by counsel." This, the court held, was an "injustice to the prisoner," and "although there was a good deal of evidence against the prisoner," the court quashed the conviction.

[30] C. Warren, A History of the American Bar 7 (1911).

of lawyers became an institution." [31] Several Colonies prohibited pleading for hire in the 17th century.[32] The prejudice persisted into the 18th century as "the lower classes came to identify lawyers with the upper class." [33] The years of Revolution and Confederation saw an upsurge of antilawyer sentiment, a "sudden revival, after the War of the Revolution, of the old dislike and distrust of lawyers as a class." [34] In the heat of these sentiments the Constitution was forged.

This is not to say that the Colonies were slow to recognize the value of counsel in criminal cases. Colonial judges soon departed from ancient English practice and allowed accused felons the aid of counsel for their defense.[35] At the same time, however, the basic right of

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[31] D. Boorstin, The Americans; The Colonial Experience 197 (1958).

[32] For example, the Massachusetts Body of Liberties (1641) in Art. 26 provided:

"Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines. . . ."

Pleading for hire was also prohibited in 17th century Virginia, Connecticut, and the Carolinas. Friedman, *supra*, n. 17, at 81.

[33] *Id.*, at 82.

[34] Warren, *supra*, n. 30, at 212.

[35] For example, Zephaniah Swift, in one of the first American colonial treatises on law, made clear that a right to counsel was recognized in Connecticut. He wrote:

"We have never admitted that cruel and illiberal principle of the common law of England, that when a man is on trial for his life, he shall be refused counsel, and denied those means of defence, which are allowed, when the most trifling pittance of property is in question. The flimsy pretence, that the court are to be counsel for the prisoner will only heighten our indignation at the practice: for it is apparent to the least consideration, that a court can never furnish a

self-representation was never questioned. We have found no instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer. Indeed, even where counsel was permitted, the general practice continued to be self-representation.[36]

The right of self-representation was guaranteed in many colonial charters and declarations of rights. These early documents establish that the "right to counsel" meant to the colonists a right to choose between pleading through a lawyer and representing oneself.[37] After the

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person accused of a crime with the advice, and assistance necessary to make his defence. . . .

"Our ancestors, when they first enacted their laws respecting crimes, influenced by the illiberal principles which they had imbibed in their native country, denied counsel to prisoners to plead for them to any thing but points of law. It is manifest that there is as much necessity for counsel to investigate matters of fact, as points of law, if truth is to be discovered." 2 Z. Swift, A System of the Laws of the State of Connecticut 398–399 (1796).

Similarly, colonial Virginia at first based its court proceedings on English judicial customs, but "[b]y the middle of the eighteenth century the defendant was permitted advice of counsel if he could afford such services." H. Rankin, Criminal Trial Proceedings in the General Court of Colonial Virginia 67, 89 (1965).

[36] See, *e. g., id.*, at 89–90.

[37] See, *e. g.*, the Massachusetts Body of Liberties, Art. 26 (1641), *supra*, n. 32.

Similarly, the Concessions and Agreements of West New Jersey, in 1677, provided, for all cases, civil and criminal, "that no person or persons shall be compelled to fee any attorney or councillor to plead his cause, but that all persons have free liberty to plead his own cause, if he please."

The Pennsylvania Frame of Government of 1682, perhaps "the most influential of the Colonial documents protecting individual rights," 1 B. Schwartz, The Bill of Rights: A Documentary History 130 (1971) (hereinafter Schwartz), provided:

"That, in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner, and there

Declaration of Independence, the right of self-representation, along with other rights basic to the making of a defense, entered the new state constitutions in wholesale fashion.[38] The right to counsel was clearly thought to

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personally plead their own cause themselves; or, if unable, by their friends . . . ."

That provision was no doubt inspired by William Penn's belief that an accused should go free if he could personally persuade a jury that it would be unjust to convict him. In England, 12 years earlier, Penn, after preaching a sermon in the street, had been indicted and tried for disturbing the peace. Penn conceded that he was "unacquainted with the formality of the law," but requested that he be given a fair hearing and the "liberty of making my defence." The request was granted, Penn represented himself, and although the judges jailed him for contempt, the jury acquitted him of the charge. "The People's Ancient and Just Liberties Asserted, in the Trial of William Penn and William Mead, 1670," reproduced in 1 Schwartz 144, 147. See The Trial of William Penn, 6 How. St. Tr. 951 (1670), cited in *Illinois* v. *Allen,* 397 U. S. 337, 353 (opinion of DOUGLAS, J.).

[38] Article IX of the Pennsylvania Declaration of Rights in 1776 guaranteed "[t]hat in all prosecutions for criminal offences, a man hath a right to be heard by himself and his council . . . ." The Vermont Declaration of Rights (Art. X) in 1777 protected the right of self-representation with virtually identical language. The Georgia Constitution (Art. LVIII) in 1777 declared that its provisions barring the unauthorized practice of law were "not intended to exclude any person from that inherent privilege of every *freeman,* the liberty to plead his own cause." In 1780 the Massachusetts Declaration of Rights, Art. XII, provided that the accused had a right to be heard "by himself, or his counsel at his election." The New Hampshire Bill of Rights (Art. XV) in 1783 affirmed the right of the accused "to be fully heard in his defence by himself, and counsel." In 1792 the Delaware Constitution (Art. I, § 7) preserved the right in language modeled after Art. IX of the Pennsylvania Declaration of Rights. Similarly, in 1798 Georgia included in its Constitution (Art. III, § 8) a provision that protected the right of the accused to defend "by himself or counsel, or both." Other state constitutions did not express in literal terms a right of self-representation, but those documents granted all defense rights to the accused personally and phrased

supplement the primary right of the accused to defend himself,[39] utilizing his personal rights to notice, confrontation, and compulsory process. And when the Colonies or newly independent States provided by statute rather than by constitution for court appointment of counsel in criminal cases, they also meticulously preserved the right of the accused to defend himself personally.[40]

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the right of counsel in such fashion as to imply the existence of the antecedent liberty. See Del. Declaration of Rights, § 14 (1776) (right "to be allowed counsel"); Md. Declaration of Rights, Art. XIX (1776) (right "to be allowed counsel"); N. J. Const., Art. XVI (1776) (criminals to have "same privileges of . . . counsel, as their prosecutors"); N. Y. Const., Art. XXXIV (1777) ("shall be allowed counsel").

[39] The Founders believed that self-representation was a basic right of a free people. Underlying this belief was not only the anti-lawyer sentiment of the populace, but also the "natural law" thinking that characterized the Revolution's spokesmen. See P. Kauper, The Higher Law and the Rights of Man in a Revolutionary Society, a lecture in the American Enterprise Institute for Public Policy Research series on the American Revolution, Nov. 7, 1973, extracted in 18 U. of Mich. Law School Law Quadrangle Notes, No. 2, p. 9 (1974). For example, Thomas Paine, arguing in support of the 1776 Pennsylvania Declaration of Rights, said:

"Either party . . . has a natural right to plead his own cause; this right is consistent with safety, therefore it is retained; but the parties may not be able, . . . therefore the civil right of pleading by proxy, that is, by a council, is an appendage to the natural right [of self-representation] . . . ." Thomas Paine on a Bill of Rights, 1777, reprinted in 1 Schwartz 316.

[40] Statutes providing for appointment of counsel on request of the accused were enacted by Delaware in 1719, 1 Laws of the State of Delaware, 1700–1797, p. 66 (Adams 1797); by Pennsylvania in 1718, 3 Stats. at Large of Pennsylvania 199 (Busch 1896); and by South Carolina in 1731, Laws of the Province of South Carolina 518–519 (Trott 1736). Appointment was also the practice in Connecticut in the latter part of the 18th century; appointment apparently was sometimes made even when the accused failed to request counsel, if he appeared in need of a lawyer, but there is no indication ap-

The recognition of the right of self-representation was not limited to the state lawmakers. As we have noted, § 35 of the Judiciary Act of 1789, signed one day before the Sixth Amendment was proposed, guaranteed in the federal courts the right of all parties to "plead and manage their own causes personally or by the assistance of . . . counsel." 1 Stat. 92. See 28 U. S. C. § 1654. At the time James Madison drafted the Sixth Amendment, some state constitutions guaranteed an accused the right to be heard "by himself" and by counsel; others provided that an accused was to be "allowed" counsel.[41] The various state proposals for the Bill of Rights had similar variations in terminology.[42]

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pointment was ever made over the objection of the accused. See Swift, *supra,* n. 35, at 392. Free-choice appointment remained the rule as the new Republic emerged. See the 1791 statute of New Hampshire, Laws of New Hampshire 247 (Melcher 1792), and the 1795 statute of New Jersey, § 2, Acts of the Nineteenth General Assembly of the State of New Jersey 1012.

[41] See counsel provisions in n. 38, *supra.*

[42] In ratifying the Constitution, three States urged that a right-to-counsel provision be added by way of amendment. Virginia and North Carolina proposed virtually identical packages of a defendant's rights, each including the provision that an accused be "allowed" counsel. 2 Schwartz 841, 967. The package proposed by New York provided that the accused "ought to . . . have . . . the assistance of Council for his defense." *Id.,* at 913. The idea of proposing amendments upon ratification had begun with the Pennsylvania dissenters from ratification, whose proposed package of a defendant's rights provided for the accused's "right . . . to be heard by himself and his counsel." *Id.,* at 664–665. It can be seen that Madison's precise formulation—"the right . . . to have the Assistance of Counsel for his defence"—varied in phrasing from each of the proposals. "The available debates on the various proposals throw no light on the significance or the interpretation which Congress attributed to the right to counsel." W. Beaney, The Right to Counsel in American Courts 23 (1955).

In each case, however, the counsel provision was embedded in a package of defense rights granted personally to the accused. There is no indication that the differences in phrasing about "counsel" reflected any differences of principle about self-representation. No State or Colony had ever forced counsel upon an accused; no spokesman had ever suggested that such a practice would be tolerable, much less advisable. If anyone had thought that the Sixth Amendment, as drafted, failed to protect the long-respected right of self-representation, there would undoubtedly have been some debate or comment on the issue. But there was none.

In sum, there is no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel. To the contrary, the colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an "assistance" for the accused, to be used at his option, in defending himself. The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation. That conclusion is supported by centuries of consistent history.

IV

There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. See *Powell* v. *Alabama,* 287 U. S. 45; *Johnson* v. *Zerbst,* 304 U. S. 458; *Gideon* v. *Wainwright,* 372 U. S. 335; *Argersinger* v. *Hamlin,* 407 U. S. 25. For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure

the defendant a fair trial.[43] And a strong argument can surely be made that the whole thrust of those decisions must inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant.

But it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want. The value of state-appointed counsel was not unappreciated by the Founders,[44] yet the notion of compulsory counsel was utterly foreign to them. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no

[43] As stated by Mr. Justice Sutherland in *Powell* v. *Alabama,* 287 U. S. 45:

"Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Id.,* at 69.

[44] See n. 38, *supra,* for colonial appointment statutes that predate the Sixth Amendment. Federal law provided for appointment of counsel in capital cases at the request of the accused as early as 1790, 1 Stat. 118.

doubt that they understood the inestimable worth of free choice.[45]

It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law." *Illinois* v. *Allen,* 397 U. S. 337, 350-351 (BRENNAN, J., concurring).[46]

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[45] See, *e. g.,* U. S. Const., Amdt. 1. Freedom of choice is not a stranger to the constitutional design of procedural protections for a defendant in a criminal proceeding. For example, "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Harris* v. *New York,* 401 U. S. 222, 225. See *Brooks* v. *Tennessee,* 406 U. S. 605, 612; *Ferguson* v. *Georgia,* 365 U. S. 570. Cf. *Brown* v. *United States,* 356 U. S. 148.

[46] We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred. Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. See *Illinois* v. *Allen,*

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When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. *Johnson* v. *Zerbst,* 304 U. S., at 464–465. Cf. *Von Moltke* v. *Gillies,* 332 U. S. 708, 723–724 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." *Adams* v. *United States ex rel. McCann,* 317 U. S., at 279.

Here, weeks before trial, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not to accept

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397 U. S. 337. Of course, a State may—even over objection by the accused—appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. See *United States* v. *Dougherty,* 154 U. S. App. D. C. 76, 87–89, 473 F. 2d 1113, 1124–1126.

The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel."

the assistance of counsel, and that Faretta would be required to follow all the "ground rules" of trial procedure.[47] We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on *voir dire*.[48] For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.

In forcing Faretta, under these circumstances, to accept against his will a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense. Accordingly, the judgment before us is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, dissenting.

This case, like *Herring* v. *New York, post,* p. 853, announced today, is another example of the judicial tendency to constitutionalize what is thought "good." That effort fails on its own terms here, because there is nothing desirable or useful in permitting every accused person, even the most uneducated and inexperienced, to insist upon conducting his own defense to criminal charges.[1] Moreover, there is no constitutional basis for

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[47] See n. 2, *supra.*

[48] See n. 3, *supra.*

[1] Absent a statute giving a right to self-representation, I believe that trial courts should have discretion under the Constitution to insist upon representation by counsel if the interests of justice so require. However, I would note that the record does not support the Court's characterization of this case as one in which that occurred. Although he requested, and initially was granted, permission to proceed

the Court's holding, and it can only add to the problems of an already malfunctioning criminal justice system. I therefore dissent.

I

The most striking feature of the Court's opinion is that it devotes so little discussion to the matter which it concedes is the core of the decision, that is, discerning an independent basis in the Constitution for the supposed right to represent oneself in a criminal trial.[2] See *ante,* at 818–821, and n. 15. Its ultimate assertion that such a right is tucked between the lines of the Sixth Amendment is contradicted by the Amendment's language and its consistent judicial interpretation.

As the Court seems to recognize, *ante,* at 820, the conclusion that the rights guaranteed by the Sixth Amendment are "personal" to an accused reflects nothing more than the obvious fact that it is he who is on trial and therefore has need of a defense.[3] But neither that nearly

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pro se, petitioner has expressed no dissatisfaction with the lawyer who represented him and has not alleged that his defense was impaired or that his lawyer refused to honor his suggestions regarding how the trial should be conducted. In other words, to use the Court's phrase, petitioner has never contended that "*his* defense" was not fully presented. Instances of overbearing or ineffective counsel can be dealt with without contriving broad constitutional rules of dubious validity.

[2] The Court deliberately, and in my view properly, declines to characterize this case as one in which the defendant was denied a fair trial. See *Herring* v. *New York, post,* at 871 (REHNQUIST, J., dissenting).

[3] The Court's attempt to derive support for its position from the fact that the Sixth Amendment speaks in terms of the "Assistance of Counsel" requires little comment. It is most curious to suggest that an accused who exercises his right to "assistance" has thereby impliedly consented to subject himself to a "master." *Ante,* at 820. And counsel's responsibility to his client and role in the litigation do not vary depending upon whether the accused would have preferred to represent himself.

trivial proposition nor the language of the Amendment, which speaks in uniformly mandatory terms, leads to the further conclusion that the right to counsel is merely supplementary and may be dispensed with at the whim of the accused. Rather, this Court's decisions have consistently included the right to counsel as an integral part of the bundle making up the larger "right to a defense as we know it." For example, in *In re Oliver,* 333 U. S. 257 (1948), the Court reversed a summary contempt conviction at the hands of a "one-man grand jury," and had this to say:

> "We . . . hold that failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. 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." *Id.,* at 273.

See also *Argersinger* v. *Hamlin,* 407 U. S. 25, 27–33 (1972); *Gideon* v. *Wainwright,* 372 U. S. 335, 344 (1963).

The reason for this hardly requires explanation. The fact of the matter is that in all but an extraordinarily small number of cases an accused will lose whatever defense he may have if he undertakes to conduct the trial himself. The Court's opinion in *Powell* v. *Alabama,* 287 U. S. 45 (1932), puts the point eloquently:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may

> be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Id.,* at 69.

Obviously, these considerations do not vary depending upon whether the accused actively desires to be represented by counsel or wishes to proceed *pro se.* Nor is it accurate to suggest, as the Court seems to later in its opinion, that the quality of his representation at trial is a matter with which only the accused is legitimately concerned. See *ante,* at 834. Although we have adopted an adversary system of criminal justice, see *Gideon* v. *Wainwright, supra,* the prosecution is more than an ordinary litigant, and the trial judge is not simply an automaton who insures that technical rules are adhered to. Both are charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial. See *Brady* v. *Maryland,* 373 U. S. 83, 87, and n. 2 (1963); *Berger* v. *United States,* 295 U. S. 78, 88 (1935). That goal is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel. The damage thus inflicted is not mitigated by the lame explanation that the defendant simply availed himself of the "freedom" "to go to jail under his own banner . . . ." *United States ex rel.*

Maldonado v. *Denno,* 348 F. 2d 12, 15 (CA2 1965). The system of criminal justice should not be available as an instrument of self-destruction.

In short, both the "spirit and the logic" of the Sixth Amendment are that every person accused of crime shall receive the fullest possible defense; in the vast majority of cases this command can be honored only by means of the expressly guaranteed right to counsel, and the trial judge is in the best position to determine whether the accused is capable of conducting his defense. True freedom of choice and society's interest in seeing that justice is achieved can be vindicated only if the trial court retains discretion to reject any attempted waiver of counsel and insist that the accused be tried according to the Constitution. This discretion is as critical an element of basic fairness as a trial judge's discretion to decline to accept a plea of guilty. See *Santobello* v. *New York,* 404 U. S. 257, 262 (1971).

II

The Court's attempt to support its result by collecting dicta from prior decisions is no more persuasive than its analysis of the Sixth Amendment. Considered in context, the cases upon which the Court relies to "beat its path" either lead it nowhere or point in precisely the opposite direction.

In *Adams* v. *United States ex rel. McCann,* 317 U. S. 269 (1942), and *Carter* v. *Illinois,* 329 U. S. 173 (1946), the defendants had competently waived counsel but later sought to renounce actions taken by them while proceeding *pro se.* In both cases this Court upheld the convictions, holding that neither an uncounseled waiver of jury trial nor an uncounseled guilty plea is inherently defective under the Constitution. The language which the Court so carefully excises from those opinions relates, not to an affirmative right of self-representation, but to

the consequences of waiver.[4] In *Adams,* for example, Mr. Justice Frankfurter was careful to point out that his reference to a defendant's "correlative right to dispense with a lawyer's help" meant only that "[h]e may waive his Constitutional right to assistance of counsel . . . ," 317 U. S., at 279. See *United States* v. *Warner,* 428 F. 2d 730, 733 (CA8 1970). But, as the Court recognizes, the power to *waive* a constitutional right does not carry with it the right to insist upon its opposite. *Singer* v. *United States,* 380 U. S. 24, 34–35 (1965).

Similarly, in *Carter* the Court's opinion observed that the Constitution "does not require that *under all circumstances* counsel be forced upon a defendant," citing *Adams.* 329 U. S., at 174–175 (emphasis added). I, for one, find this statement impossible to square with the Court's present holding that an accused is absolutely entitled to *dispense* with a lawyer's help under all conditions. Thus, although *Adams* and *Carter* support the Court's conclusion that a defendant who represents himself may not thereafter disaffirm his deliberate trial decisions, see *ante,* at 834–835, n. 46, they provide it no comfort regarding the primary issue in this case.[5]

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[4] Indeed, the portion of the Court's quotation which warns against turning constitutional protections into "fetters" refers to the right to trial by jury, not the right to counsel. See *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 279 (1942). This Court has, of course, squarely held that there is no constitutional right to dispense with a jury. *Singer* v. *United States,* 380 U. S. 24 (1965).

[5] No more relevant is *Snyder* v. *Massachusetts,* 291 U. S. 97 (1934). The reference in that case to an accused's "power . . . to supersede his lawyers" simply helped explain why his defense might "be made easier" if he were "permitted to be present at the examination of jurors or the summing up of counsel . . . ." *Id.,* at 106. Mr. Justice Cardozo's opinion for the Court made plain that this right was rooted in considerations of fundamental fairness, and was to be distinguished from those conferred by the Confronta-

Far more nearly in point is *Price* v. *Johnston,* 334 U. S. 266 (1948), where this Court held that, although the courts of appeals possess the power to command that a prisoner be produced to argue his own appeal, the exercise of that power is a matter of sound judicial discretion. An examination of the whole of the Court's reasoning on this point is instructive:

> "The discretionary nature of the power in question grows out of the fact that a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court. The absence of that right is in sharp contrast to his constitutional prerogative of being present in person at each significant stage of a felony prosecution, and to his recognized privilege of conducting his own defense at the trial. Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. Among those so limited is the otherwise unqualified right given by § 272 of the Judicial Code, 28 U. S. C. § 394 [now § 1654], to parties in all the courts of the United States to 'plead and manage their own causes personally.'" *Id.,* at 285–286 (citations omitted).

It barely requires emphasis that this passage contrasts the "constitutional prerogative" to be present at trial with the "recognized privilege" of self-representation, and strongly implies that the latter arises only from the federal statute. It is difficult to imagine a position less consistent with *Price* v. *Johnston* than that taken by the Court today.

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tion Clause. See *id.,* at 107. The Court's present reliance on the *Snyder* dicta is therefore misplaced. See n. 2, *supra.*

The Court of Appeals cases relied upon by the Court are likewise dubious authority for its views. Only one of those cases, *United States* v. *Plattner,* 330 F. 2d 271 (CA2 1964), even attempted a reasoned analysis of the issue, and the decision in that case was largely based upon the misreading of *Adams* and *Price* which the Court perpetuates in its opinion today. See 330 F. 2d, at 275. In every other case cited *ante,* at 817, the Courts of Appeals assumed that the right of self-representation was constitutionally based but found that the right had not been violated and affirmed the conviction under review. It is highly questionable whether such holdings would even establish the law of the Circuits from which they came.

In short, what the Court represents as a well-traveled road is in reality a constitutional trail which it is blazing for the first time today, one that has not even been hinted at in our previous decisions. Far from an interpretation of the Sixth Amendment, it is a perversion of the provision to which we gave full meaning in *Gideon* v. *Wainwright* and *Argersinger* v. *Hamlin.*

III

Like MR. JUSTICE BLACKMUN, I hesitate to participate in the Court's attempt to use history to take it where legal analysis cannot. Piecing together shreds of English legal history and early state constitutional and statutory provisions, without a full elaboration of the context in which they occurred or any evidence that they were relied upon by the drafters of our Federal Constitution, creates more questions than it answers and hardly provides the firm foundation upon which the creation of new constitutional rights should rest. We are well reminded that this Court once employed an exhaustive analysis of English and colonial practices regarding the

right to counsel to justify the conclusion that it was fundamental to a fair trial and, less than 10 years later, used essentially the same material to conclude that it was not. Compare *Powell* v. *Alabama,* 287 U. S., at 60–65, with *Betts* v. *Brady,* 316 U. S. 455, 465–471 (1942).

As if to illustrate this point, the single historical fact cited by the Court which would appear truly relevant to ascertaining the meaning of the Sixth Amendment proves too much. As the Court points out, *ante,* at 831, § 35 of the Judiciary Act of 1789 provided a statutory right to self-representation in federal criminal trials. The text of the Sixth Amendment, which expressly provides only for a right to counsel, was proposed the day after the Judiciary Act was signed. It can hardly be suggested that the Members of the Congress of 1789, then few in number, were unfamiliar with the Amendment's carefully structured language, which had been under discussion since the 1787 Constitutional Convention. And it would be most remarkable to suggest, had the right to conduct one's own defense been considered so critical as to require constitutional protection, that it would have been left to implication. Rather, under traditional canons of construction, *inclusion* of the right in the Judiciary Act and its *omission* from the constitutional amendment drafted at the same time by many of the same men, supports the conclusion that the omission was intentional.

There is no way to reconcile the idea that the Sixth Amendment impliedly guaranteed the right of an accused to conduct his own defense with the contemporaneous action of the Congress in passing a statute explicitly giving that right. If the Sixth Amendment created a right to self-representation it was unnecessary for Congress to enact any statute on the subject at all.

In this case, therefore, history ought to lead judges to conclude that the Constitution leaves to the judgment of legislatures, and the flexible process of statutory amendment, the question whether criminal defendants should be permitted to conduct their trials *pro se*. See *Betts* v. *Brady, supra.* And the fact that we have not hinted at a contrary view for 185 years is surely entitled to some weight in the scales.[6] Cf. *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22, 31 (1922).

IV

Society has the right to expect that, when courts find new rights implied in the Constitution, their potential effect upon the resources of our criminal justice system will be considered. However, such considerations are conspicuously absent from the Court's opinion in this case.

It hardly needs repeating that courts at all levels are already handicapped by the unsupplied demand for competent advocates, with the result that it often takes far longer to complete a given case than experienced counsel would require. If we were to assume that there will be widespread exercise of the newly discovered constitutional right to self-representation, it would almost certainly follow that there will be added congestion in the courts and that the quality of justice will suffer. Moreover, the Court blandly assumes that once an accused has elected to defend himself he will be bound by his choice and not be heard to complain of it later. *Ante,* at 834–835, n. 46. This assumption ignores the role of appellate review, for the reported cases are replete with instances of a convicted defendant being relieved of a

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[6] The fact that Congress has retained a statutory right to self-representation suggests that it has also assumed that the Sixth Amendment does not guarantee such a right. See 28 U. S. C. § 1654.

deliberate decision even when made *with the advice of counsel.* See *Silber* v. *United States,* 370 U. S. 717 (1962). It is totally unrealistic, therefore, to suggest that an accused will always be held to the consequences of a decision to conduct his own defense. Unless, as may be the case, most persons accused of crime have more wit than to insist upon the dubious benefit that the Court confers today, we can expect that many expensive and good-faith prosecutions will be nullified on appeal for reasons that trial courts are now deprived of the power to prevent.[7]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

Today the Court holds that the Sixth Amendment guarantees to every defendant in a state criminal trial the right to proceed without counsel whenever he elects to do so. I find no textual support for this conclusion in the language of the Sixth Amendment. I find the historical evidence relied upon by the Court to be unpersuasive, especially in light of the recent history of criminal procedure. Finally, I fear that the right to self-representation constitutionalized today frequently will cause procedural confusion without advancing any significant strategic interest of the defendant. I therefore dissent.

I

The starting point, of course, is the language of the Sixth Amendment:

"In all criminal prosecutions, the accused shall en-

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[7] Some of the damage we can anticipate from a defendant's ill-advised insistence on conducting his own defense may be mitigated by appointing a qualified lawyer to sit in the case as the traditional "friend of the court." The Court does not foreclose this option. See *ante,* at 834–835, n. 46.

joy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

It is self-evident that the Amendment makes no direct reference to self-representation. Indeed, the Court concedes that the right to self-representation is "not stated in the Amendment in so many words." *Ante,* at 819.

It could be argued that the right to assistance of counsel necessarily carries with it the right to waive assistance of counsel. The Court recognizes, however, *ante,* at 819–820, n. 15, that it has squarely rejected any mechanical interpretation of the Bill of Rights. Mr. Chief Justice Warren, speaking for a unanimous Court in *Singer* v. *United States,* 380 U. S. 24, 34–35 (1965), stated: "The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."

Where then in the Sixth Amendment does one find this right to self-representation? According to the Court, it is "necessarily implied by the structure of the Amendment." *Ante,* at 819. The Court's chain of inferences is delicate and deserves scrutiny. The Court starts with the proposition that the Sixth Amendment is "a compact statement of the rights necessary to a full defense." *Ante,* at 818. From this proposition the Court concludes that the Sixth Amendment "constitutionalizes the right in an adversary criminal trial to make a defense as we know it." *Ibid.* Up to this point, at least as a general proposition, the Court's reasoning is unexception-

able. The Court, however, then concludes that because the specific rights in the Sixth Amendment are personal to the accused, the accused must have a right to exercise those rights personally. Stated somewhat more succinctly, the Court reasons that because the accused has a personal right to "a defense as we know it," he necessarily has a right to make that defense personally. I disagree. Although I believe the specific guarantees of the Sixth Amendment are personal to the accused, I do not agree that the Sixth Amendment guarantees any particular procedural method of asserting those rights. If an accused has enjoyed a speedy trial by an impartial jury in which he was informed of the nature of the accusation, confronted with the witnesses against him, afforded the power of compulsory process, and represented effectively by competent counsel, I do not see that the Sixth Amendment requires more.

The Court suggests that thrusting counsel upon the accused against his considered wish violates the logic of the Sixth Amendment because counsel is to be an assistant, not a master. The Court seeks to support its conclusion by historical analogy to the notorious procedures of the Star Chamber. The potential for exaggerated analogy, however, is markedly diminished when one recalls that petitioner is seeking an absolute right to self-representation. This is not a case where defense counsel, against the wishes of the defendant or with inadequate consultation, has adopted a trial strategy that significantly affects one of the accused's constitutional rights. For such overbearing conduct by counsel, there is a remedy. *Brookhart* v. *Janis,* 384 U. S. 1 (1966); *Fay* v. *Noia,* 372 U. S. 391, 439 (1963). Nor is this a case where distrust, animosity, or other personal differences between the accused and his would-be counsel have rendered effective representation unlikely or impossible.

See *Brown* v. *Craven,* 424 F. 2d 1166, 1169–1170 (CA9 1970). See also *Anders* v. *California,* 386 U. S. 738 (1967). Nor is this even a case where a defendant has been forced, against his wishes to expend his personal resources to pay for counsel for his defense. See generally *Fuller* v. *Oregon,* 417 U. S. 40 (1974); *James* v. *Strange,* 407 U. S. 128 (1972). Instead, the Court holds that any defendant in any criminal proceeding may insist on representing himself regardless of how complex the trial is likely to be and regardless of how frivolous the defendant's motivations may be. I cannot agree that there is anything in the Due Process Clause or the Sixth Amendment that requires the States to subordinate the solemn business of conducting a criminal prosecution to the whimsical—albeit voluntary—caprice of every accused who wishes to use his trial as a vehicle for personal or political self-gratification.

The Court seems to suggest that so long as the accused is willing to pay the consequences of his folly, there is no reason for not allowing a defendant the right to self-representation. *Ante,* at 834. See also *United States ex rel. Maldonado* v. *Denno,* 348 F. 2d 12, 15 (CA2 1965) ("[E]ven in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires . . ."). That view ignores the established principle that the interest of the State in a criminal prosecution "is not that it shall win a case, but that justice shall be done." *Berger* v. *United States,* 295 U. S. 78, 88 (1935). See also *Singer* v. *United States,* 380 U. S., at 37. For my part, I do not believe that any amount of *pro se* pleading can cure the injury to society of an unjust result, but I do believe that a just result should prove to be an effective balm for almost any frustrated *pro se* defendant.

II

The Court argues that its conclusion is supported by the historical evidence on self-representation. It is true that self-representation was common, if not required, in 18th century English and American prosecutions. The Court points with special emphasis to the guarantees of self-representation in colonial charters, early state constitutions, and § 35 of the first Judiciary Act as evidence contemporaneous with the Bill of Rights of widespread recognition of a right to self-representation.

I do not participate in the Court's reliance on the historical evidence. To begin with, the historical evidence seems to me to be inconclusive in revealing the original understanding of the language of the Sixth Amendment. At the time the Amendment was first proposed, both the right to self-representation and the right to assistance of counsel in federal prosecutions were guaranteed by statute. The Sixth Amendment expressly constitutionalized the right to assistance of counsel but remained conspicuously silent on any right of self-representation. The Court believes that this silence of the Sixth Amendment as to the latter right is evidence of the Framers' belief that the right was so obvious and fundamental that it did not need to be included "in so many words" in order to be protected by the Amendment. I believe it is at least equally plausible to conclude that the Amendment's silence as to the right of self-representation indicates that the Framers simply did not have the subject in mind when they drafted the language.

The paucity of historical support for the Court's position becomes far more profound when one examines it against the background of two developments in the more recent history of criminal procedure. First, until the middle of the 19th century, the defendant in a criminal proceeding in this country was almost always disqualified

from testifying as a witness because of his "interest" in the outcome. See generally *Ferguson* v. *Georgia,* 365 U. S. 570 (1961). Thus, the ability to defend "in person" was frequently the defendant's only chance to present his side of the case to the judge or jury. See, *e. g., Wilson* v. *State,* 50 Tenn. 232 (1871). Such Draconian rules of evidence, of course, are now a relic of the past because virtually every State has passed a statute abrogating the common-law rule of disqualification. See *Ferguson* v. *Georgia,* 365 U. S., at 575–577, 596. With the abolition of the common-law disqualification, the right to appear "in person" as well as by counsel lost most, if not all, of its original importance. See Grano, The Right to Counsel: Collateral Issues Affecting Due Process, 54 Minn. L. Rev. 1175, 1192–1194 (1970).

The second historical development is this Court's elaboration of the right to counsel. The road the Court has traveled from *Powell* v. *Alabama,* 287 U. S. 45 (1932), to *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972), need not be recounted here. For our purposes, it is sufficient to recall that from start to finish the development of the right to counsel has been based on the premise that representation by counsel is essential to ensure a fair trial. The Court concedes this and acknowledges that "a strong argument can surely be made that the whole thrust of those decisions must inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant." *Ante,* at 833. Nevertheless, the Court concludes that self-representation must be allowed despite the obvious dangers of unjust convictions in order to protect the individual defendant's right of free choice. As I have already indicated, I cannot agree to such a drastic curtailment of the interest of the State in seeing that justice is done in a real and objective sense.

III

In conclusion, I note briefly the procedural problems that, I suspect, today's decision will visit upon trial courts in the future. Although the Court indicates that a *pro se* defendant necessarily waives any claim he might otherwise make of ineffective assistance of counsel, *ante,* at 834–835, n. 46, the opinion leaves open a host of other procedural questions. Must every defendant be advised of his right to proceed *pro se?* If so, when must that notice be given? Since the right to assistance of counsel and the right to self-representation are mutually exclusive, how is the waiver of each right to be measured? If a defendant has elected to exercise his right to proceed *pro se,* does he still have a constitutional right to assistance of standby counsel? How soon in the criminal proceeding must a defendant decide between proceeding by counsel or *pro se?* Must he be allowed to switch in midtrial? May a violation of the right to self-representation ever be harmless error? Must the trial court treat the *pro se* defendant differently than it would professional counsel? I assume that many of these questions will be answered with finality in due course. Many of them, however, such as the standards of waiver and the treatment of the *pro se* defendant, will haunt the trial of every defendant who elects to exercise his right to self-representation. The procedural problems spawned by an absolute right to self-representation will far outweigh whatever tactical advantage the defendant may feel he has gained by electing to represent himself.

If there is any truth to the old proverb that "one who is his own lawyer has a fool for a client," the Court by its opinion today now bestows a *constitutional* right on one to make a fool of himself.

HERRING *v.* NEW YORK

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

No. 73–6587. Argued February 26, 1975—Decided June 30, 1975

A total denial of the opportunity for final summation in a nonjury criminal trial as well as in a jury trial deprives the accused of the basic right to make his defense, and a New York statute granting every judge in a nonjury criminal trial the power to deny such summation before rendition of judgment denies the accused the assistance of counsel guaranteed by the Sixth Amendment of the Constitution as applied against the States by the Fourteenth. Pp. 856–865.

43 App. Div. 2d 816, 351 N. Y. S. 2d 368, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, MARSHALL, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN, JJ., joined, *post*, p. 865.

Diana A. Steele argued the cause for appellant. With her on the briefs was *William E. Hellerstein.*

Gabriel I. Levy, Assistant Attorney General of New York, and *Norman C. Morse* argued the cause for appellee. *Mr. Morse* was on the brief.

Louis J. Lefkowitz, Attorney General of New York, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Joel Lewittes* and *Mr. Levy,* Assistant Attorneys General, filed a brief for the Attorney General of New York.

MR. JUSTICE STEWART delivered the opinion of the Court.

A New York law confers upon every judge in a nonjury criminal trial the power to deny counsel any opportunity to make a summation of the evidence before the rendition of judgment. N. Y. Crim. Proc. Law § 320.20

(3)(c) (1971).[1] In the case before us we are called upon to assess the constitutional validity of that law.

I

The appellant was brought to trial in the Supreme Court of Richmond County, N. Y., upon charges of attempted robbery in the first and third degrees and possession of a dangerous instrument.[2] He waived a jury.

The trial began on a Thursday, and, after certain preliminaries, the balance of that day and most of Friday were spent on the case for the prosecution. The complaining witness, Allen Braxton, testified that the appellant had approached him outside his home in a Staten Island housing project at about six o'clock on the evening of September 15, 1971, and asked for money. He said that when he refused this demand, the appellant had swung a knife at him. On cross-examination, the appellant's lawyer attempted to impeach the credibility of this evidence by demonstrating inconsistencies between Braxton's testimony and other sworn statements that Braxton had previously made.[3] The only other

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[1] Section 320.20 (3)(c) provides:

"The court may in its discretion permit the parties to deliver summations. If the court grants permission to one party, it must grant it to the other also. If both parties deliver summations, the defendant's summation must be delivered first."

By contrast, New York law explicitly grants a right to make a "closing statement" in every civil case. N. Y. Civ. Prac. Rule 4016 (1963).

[2] N. Y. Penal Law §§ 110.00/160.15, 110.00/160.05, 265.05 (1975).

[3] On cross-examination of Braxton, the appellant's lawyer demonstrated the following inconsistencies: First, Braxton testified at trial that, after running into his house to evade the appellant, he did not look back outside to see where the appellant had gone; but before the grand jury, Braxton had said that, after entering his house, he had looked outside and the appellant was gone. Second,

witness for the prosecution was the police officer who had arrested the appellant upon the complaint of Braxton. The officer testified that Braxton had reported the alleged incident to him, and that the appellant, when confronted by the officer later in the evening, had denied Braxton's story and said that he had been working for a Mr. Taylor at the time of the alleged offense. The officer testified that he had then arrested the appellant and found a small knife in his pocket.[4]

At the close of the case for the prosecution, the court granted a defense motion to dismiss the charge of possession of a dangerous instrument on the ground that the knife in evidence was too small to qualify as a dangerous instrument under state law. The trial was then adjourned for the two-day weekend.

Proceedings did not actually resume until the following Monday afternoon. The first witness for the defense

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Braxton testified at trial that the knifeblade was shiny; but in his grand jury testimony he had said that he could not remember if it was shiny or not. Third, Braxton testified at trial that the appellant had asked him for money in a "soft" voice; but before the grand jury he had stated that the request for money was "kind of loud." Fourth, Braxton testified at trial that the appellant had swung a blade at him once; but in the felony complaint filed the day after the alleged crime, he had stated that the appellant had swung a knife at him "a couple of times."

[4] There was a major inconsistency between the police officer's testimony and that of Braxton. Braxton testified that he was walking down the street with the officer at about 6:45 p. m. when they came across the appellant. But the officer testified that he had searched for the appellant with Braxton until only about 6:30 p. m., when they had separated, and that about an hour later he had seen the appellant and Braxton on opposite sides of Broadway. Thus Braxton testified that he and the officer were together when they found the appellant about 6:45 p. m., while the officer's testimony was that he had separated from Braxton about 6:30 p. m., and that he next saw Braxton and the appellant on opposite sides of a street at about 7:30 p. m.

was Donald Taylor, who was the appellant's employer. He testified that he recalled seeing the appellant on the job premises at about 5:30 p. m. on the day of the alleged offense. The appellant then took the stand and denied Braxton's story. He said that he had been working on a refrigerator at his place of employment during the time of the alleged offense, and further testified that Braxton, a former neighbor, had threatened on several occasions to "fix" him for refusing to give Braxton money for wine and drugs.

At the conclusion of the case for the defense, counsel made a motion to dismiss the robbery charges. This motion was denied. The appellant's lawyer then requested to "be heard somewhat on the facts." The trial judge replied: "Under the new statute, summation is discretionary, and I choose not to hear summations." The judge thereupon found the appellant guilty of attempted robbery in the third degree, and subsequently sentenced him to serve an indeterminate term of imprisonment with a maximum of four years. The conviction was affirmed without opinion by an intermediate appellate court.[5] Leave to appeal to the New York Court of Appeals was denied. An appeal was then brought here, and we noted probable jurisdiction. 419 U. S. 893.

II

The Sixth Amendment guarantees to the accused in all criminal prosecutions the rights to a "speedy and

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[5] The court subsequently certified that in affirming the judgment, it had rejected the appellant's constitutional claims:

"Upon the appeal herein, there was presented and passed upon the following constitutional question, namely, whether relator's rights under the Fourth, Sixth and Fourteenth Amendments were denied by the trial court's application of paragraph (c) of subdivision 3 of CPL 320.20 to refuse appellant permission to deliver a summation. This court considered appellant's said conviction and determined that none of his constitutional rights were violated."

public trial," to an "impartial jury," to notice of the "nature and cause of the accusation," to be "confronted" with opposing witnesses, to "compulsory process" for defense witnesses, and to the "Assistance of Counsel." [6] These fundamental rights are extended to a defendant in a state criminal prosecution through the Fourteenth Amendment.[7]

The decisions of this Court have not given to these constitutional provisions a narrowly literalistic construction. More specifically, the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments. For example, in *Ferguson* v. *Georgia,* 365 U. S. 570, the Court held constitutionally invalid a state statute that, while permitting the defendant to make an unsworn statement to the court and jury, prevented defense counsel from eliciting the defendant's testimony through direct examination. Similarly, in *Brooks* v. *Tennessee,* 406 U. S. 605, the Court found unconstitutional a state law

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[6] The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [,] to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

[7] See *Klopfer* v. *North Carolina,* 386 U. S. 213 (speedy trial); *In re Oliver,* 333 U. S. 257 (public trial); *Duncan* v. *Louisiana,* 391 U. S. 145 (jury trial); *Cole* v. *Arkansas,* 333 U. S. 196 (notice of nature and cause of accusation); *Pointer* v. *Texas,* 380 U. S. 400 (confrontation); *Washington* v. *Texas,* 388 U. S. 14 (compulsory process); *Gideon* v. *Wainwright,* 372 U. S. 335, and *Argersinger* v. *Hamlin,* 407 U. S. 25 (assistance of counsel).

that restricted the right of counsel to decide "whether, and when in the course of presenting his defense, the accused should take the stand." *Id.*, at 613. The right to the assistance of counsel has thus been given a meaning that ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process.

There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial. Accordingly, it has universally been held that counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge.[8] The issue has been considered less often

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[8] See, *e. g., Jackson* v. *State,* 239 Ala. 38, 193 So. 417 (1940); *Yeldell* v. *State,* 100 Ala. 26, 14 So. 570 (1894); *People* v. *Green,* 99 Cal. 564, 34 P. 231 (1893); *State* v. *Hoyt,* 47 Conn. 518 (1880); *Hall* v. *State,* 119 Fla. 38, 160 So. 511 (1935); *Williams* v. *State,* 60 Ga. 367 (1878); *Porter* v. *State,* 6 Ga. App. 770, 65 S. E. 814 (1909); *State* v. *Gilbert,* 65 Idaho 210, 142 P. 2d 584 (1943); *People* v. *McMullen,* 300 Ill. 383, 133 N. E. 328 (1921); *Lynch* v. *State,* 9 Ind. 541 (1857); *State* v. *Verry,* 36 Kan. 416, 13 P. 838 (1887); *Sizemore* v. *Commonwealth,* 240 Ky. 279, 42 S. W. 2d 328 (1931); *State* v. *Cancienne,* 50 La. Ann. 1324, 24 So. 321 (1898); *Wingo* v. *State,* 62 Miss. 311 (1884); *State* v. *Page,* 21 Mo. 257 (1855); *State* v. *Tighe,* 27 Mont. 327, 71 P. 3 (1903); *State* v. *Shedoudy,* 45 N. M. 516, 118 P. 2d 280 (1941); *People* v. *Marcelin,* 23 App. Div. 2d 368, 260 N. Y. S. 2d 560 (1965); *State* v. *Hardy,* 189 N. C. 799, 128 S. E. 152 (1925); *Weaver* v. *State,* 24 Ohio St. 584 (1874); *State* v. *Rogoway,* 45 Ore. 601, 78 P. 987 (1904), rehearing, 45 Ore. 611, 81 P. 234 (1905); *Stewart* v. *Commonwealth,* 117 Pa. 378, 11 A. 370 (1887); *State* v. *Ballenger,* 202 S. C. 155, 24 S. E. 2d 175 (1943); *Word* v. *Commonwealth,* 30 Va. 743 (1831); *State* v. *Mayo,* 42 Wash. 540, 85 P. 251 (1906); *Seattle* v. *Erickson,* 55 Wash. 675, 104 P. 1128 (1909).

One treatise states the general rule as follows: "The presentation of his defense by argument to the jury, by himself or his counsel, is a constitutional right of the defendant which may not be denied

in the context of a so-called bench trial. But the overwhelming weight of authority, in both federal and state courts, holds that a total denial of the opportunity for final argument in a nonjury criminal trial is a denial of the basic right of the accused to make his defense.[9]

One of many cases so holding was *Yopps* v. *State,* 228 Md. 204, 178 A. 2d 879 (1962). The defendant in that case, indicted for burglary, was tried by the court without a jury. The defendant in his testimony admitted being in the vicinity of the offense, but denied any involvement in the crime. At the conclusion of the testimony, the trial judge announced a judgment of guilty. Defense counsel objected, stating that he wished to present argument on the facts. But the trial judge refused to hear any argument on the ground that only a question of cred-

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him, however clear the evidence may seem to the trial court." 5 R. Anderson, Wharton's Criminal Law and Procedure § 2077 (1957).

[9] See *United States* v. *Walls,* 443 F. 2d 1220 (CA6 1971); *Thomas* v. *District of Columbia,* 67 App. D. C. 179, 90 F. 2d 424 (1937); *United States ex rel. Spears* v. *Johnson,* 327 F. Supp. 1021 (ED Pa. 1971), rev'd on other grounds, 463 F. 2d 1024 (CA3 1972); *United States ex rel. Wilcox* v. *Pennsylvania,* 273 F. Supp. 923 (ED Pa. 1967); *Floyd* v. *State,* 90 So. 2d 105 (Fla. 1956); *Olds* v. *Commonwealth,* 10 Ky. 465 (1821); *Yopps* v. *State,* 228 Md. 204, 178 A. 2d 879 (1962); *People* v. *Thomas,* 390 Mich. 93, 210 N. W. 2d 776 (1973); *Decker* v. *State,* 113 Ohio St. 512, 150 N. E. 74 (1925); *Commonwealth* v. *McNair,* 208 Pa. Super. 369, 222 A. 2d 599 (1966); *Commonwealth* v. *Gambrell,* 450 Pa. 290, 301 A. 2d 596 (1973); *Anselin* v. *State,* 72 Tex. Cr. R. 17, 160 S. W. 713 (1913); *Walker* v. *State,* 133 Tex. Cr. R. 300, 110 S. W. 2d 578 (1937); *Ferguson* v. *State,* 133 Tex. Cr. R. 250, 110 S. W. 2d 61 (1937). Cf. *Collingsworth* v. *Mayo,* 173 F. 2d 695, 697 (CA5 1949); *State* v. *Hollingsworth,* 160 La. 26, 106 So. 662 (1925). But see *People* v. *Manske,* 399 Ill. 176, 77 N. E. 2d 164 (1948). Cf. *People* v. *Berger,* 288 Ill. 47, 119 N. E. 975 (1918); *Casterlow* v. *State,* 256 Ind. 214, 267 N. E. 2d 552 (1971); *Reed* v. *State,* 232 Ind. 68, 111 N. E. 2d 661 (1953); *Lewis* v. *State,* 11 Ga. App. 14, 74 S. E. 442 (1912).

ibility was involved, and that therefore counsel's argument would not change his mind. The Maryland Court of Appeals held that the trial court's refusal to permit defense counsel to make a final summation violated the defendant's right to the assistance of counsel under the State and Federal Constitutions:

> "The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem, unless he has waived his right to such argument, or unless the argument is not within the issues in the case, and the trial court has no discretion to deny the accused such right." *Id.*, at 207, 178 A. 2d, at 881.

The widespread recognition of the right of the defense to make a closing summary of the evidence to the trier of the facts, whether judge or jury, finds solid support in history. In the 16th and 17th centuries, when notions of compulsory process, confrontation, and counsel were in their infancy, the essence of the English criminal trial was argument between the defendant and counsel for the Crown. Whatever other procedural protections may have been lacking, there was no absence of debate on the factual and legal issues raised in a criminal case.[10] As the rights to compulsory process, to confrontation, and to counsel developed,[11] the adversary system's commit-

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[10] Stephen has described the trial procedure in this period as a "long argument between the prisoner and the counsel for the Crown." 1 J. Stephen, History of the Criminal Law of England 326 (1883). For a fuller description of the trial process in that period, see *id.*, at 325–326, 350.

[11] See 7 Will. 3, c. 3, § 1 (1695); 1 Anne, Stat. 2, c. 9, § 3 (1701); 6 & 7 Will. 4, c. 114, § 1 (1836).

ment to argument was neither discarded nor diluted. Rather, the reform in procedure had the effect of shifting the primary function of argument to summation of the evidence at the close of trial, in contrast to the "fragmented" factual argument that had been typical of the earlier common law.[12]

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[12] Cf. Stephen, *supra,* n. 10, at 349.

In the Colonies, where a similar reform in criminal defendants' rights occurred, common practice, if not right, apparently gave to the accused the opportunity to sum up his case in closing argument. For example, Zephaniah Swift, in an early colonial treatise on the law in Connecticut, wrote:

"When the exhibition of evidence is closed, the attorney for the state opens the argument, the counsel for the prisoner follow[s], the attorney for the state then closes the argument, and the chief justice then sums up the evidence in his charge delivered to the jury, in which he states in the most candid and impartial manner, the evidence and the law, and the arguments of the counsel for the state, as well as the prisoner. . . ." 2 Z. Swift, A System of the Laws of the State of Connecticut 401 (1796).

With a lesser degree of certainty, a modern scholar concludes that in the trial of capital offenses in colonial Virginia, it was likely, but not certain, that the accused would be given an opportunity to make a closing argument in summation at the end of the trial. See H. Rankin, Criminal Trial Proceedings in the General Court of Colonial Virginia 101 (1965).

In England, in 1865, the right of the defendant in a criminal trial to make a closing argument, either by himself or by counsel if he was represented, was given express statutory recognition: "[U]pon every Trial . . . whether the Prisoners . . . or any of them, shall be defended by Counsel or not . . . such Prisoner . . . shall be entitled . . . when all the Evidence is concluded to sum up the Evidence respectively." Criminal Procedure Act of 1865, 28 Vict., c. 18, § 2. This remains the rule in England. 10 Halsbury's Laws of England § 777, pp. 422–423 (3d ed. 1955). See also T. Butler & M. Garsia, Archibold's Pleading, Evidence and Practice in Criminal Cases, § 558 (37th ed. 1969). Cf. *R.* v. *Wainwright,* 13 Cox Cr. Cas. 171 (1875); *R.* v. *Wickham,* 55 Cr. App. R. 199 (1971) (noted at 1971 Crim. L. Rev. 233).

It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. See *In re Winship*, 397 U. S. 358.

The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

This is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion. See generally 5 R. Anderson, Wharton's Criminal Law and Procedure § 2077 (1957). Cf. American Bar Association Project on Standards for Criminal Justice, The Prosecution Function § 5.8, pp. 126–129, and the Defense Function § 7.8, pp. 277–282 (App. Draft 1971).

But there can be no justification for a statute that empowers a trial judge to deny absolutely the opportunity for any closing summation at all. The only conceivable interest served by such a statute is expediency. Yet the difference in any case between total denial of final argument and a concise but persuasive summation could spell the difference, for the defendant, between liberty and unjust imprisonment.[13]

Some cases may appear to the trial judge to be simple—open and shut—at the close of the evidence. And surely in many such cases a closing argument will, in the words of Mr. Justice Jackson, be "likely to leave [a] judge just where it found him." [14] But just as surely, there will be cases where closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict. And there is no certain way for a trial judge to identify accurately which cases these will be, until the judge has heard the closing summation of counsel.[15]

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[13] We deal in this case only with final argument or summation at the conclusion of the evidence in a criminal trial. Nothing said in this opinion is to be understood as implying the existence of a constitutional right to oral argument at any other stage of the trial or appellate process.

[14] R. Jackson, The Struggle for Judicial Supremacy 301 (1941).

[15] The contention has been made that, while a right to make closing argument should be recognized in a jury trial, there is insufficient justification for such a right in the context of a bench trial. This view rests on the premise that a judge, with legal training and experience, will be likely to see the case clearly, rendering argument superfluous, or to recognize that further illumination of the issues would be helpful, in which case he would permit closing argument.

We find this contention unpersuasive. Judicial training and expertise, however it may enhance judgment, does not render memory or reasoning infallible. Moreover, in one important respect, closing argument may be even more important in a bench trial than in a trial by jury. As MR. JUSTICE POWELL has observed, the "collective

The present case is illustrative. This three-day trial was interrupted by an interval of more than two days—a period during which the judge's memory may well have dimmed, however conscientious a note-taker he may have been. At the conclusion of the evidence on the trial's final day, the appellant's lawyer might usefully have pointed to the direct conflict in the trial testimony of the only two prosecution witnesses concerning how and when the appellant was found on the evening of the alleged offense.[16] He might also have stressed the many inconsistencies, elicited on cross-examination, between the trial testimony of the complaining witness and his earlier sworn statements.[17] He might reasonably have argued that the testimony of the appellant's employer was entitled to greater credibility than that of the complaining witness, who, according to the appellant, had threatened to "fix" him because of personal differences in the past. There is no way to know whether these or any other appropriate arguments in summation might have affected the ultimate judgment in this case. The credibility assessment was solely for the trier of fact. But before that determination was made, the appellant, through counsel, had a right to be heard in summation of the evidence from the point of view most favorable to him.[18]

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judgment" of the jury "tends to compensate for individual shortcomings and furnishes some assurance of a reliable decision." Powell, Jury Trial of Crimes, 23 Wash. & Lee L. Rev. 1, 4 (1966). In contrast, the judge who tries a case presumably will reach his verdict with deliberation and contemplation, but must reach it without the stimulation of opposing viewpoints inherent in the collegial decision-making process of a jury.

[16] See n. 4, *supra.*

[17] See n. 3, *supra.*

[18] A defendant who has exercised the right to conduct his own defense has, of course, the same right to make a closing argument. See *Faretta* v. *California*, *ante*, p. 806.

In denying the appellant this right under the authority of its statute, New York denied him the assistance of counsel that the Constitution guarantees. Accordingly, the judgment before us is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice Rehnquist, with whom The Chief Justice and Mr. Justice Blackmun join, dissenting.

I

The Court has made of this a very curious case. What began as a constitutional challenge to a statute which gives trial courts discretion as to whether "parties" may deliver summations, has been transformed into an exploration of the right to counsel—although no one doubts that appellant was competently represented throughout the proceedings which resulted in his conviction. Today's opinion, in deriving from the right to counsel further rights relating to the conduct of a trial, expands the earlier holdings in *Ferguson* v. *Georgia,* 365 U. S. 570 (1961), and *Brooks* v. *Tennessee,* 406 U. S. 605 (1972). In each of these three instances one must presume, in view of the Court's analytical approach, that regardless of the intrinsic importance of the rights involved, they are enforced only because the accused has a prior right to the assistance of a third party in the preparation and presentation of his defense.

I think that in each instance a statement from Mr. Justice Frankfurter's separate opinion in *Ferguson* is apropos: "This is not a right-to-counsel case." 365 U. S., at 599. In the present case, the crucial fact is not that *counsel* wishes to present a summation of the evidence, but that the *defendant*—whether through counsel or otherwise—wishes to make such a summation. Of course

I do not suggest that the rights enforced in these cases are without basis, at least in particular cases, in the Due Process Clause of the Fourteenth Amendment. Cf. *id.,* at 598–601 (opinion of Frankfurter, J.); *Brooks* v. *Tennessee, supra,* at 618 (REHNQUIST, J., dissenting). But I do suggest that the Court's analytical framework, and its resulting prophylactic rule, are wrongly employed to decide this case.

I would have thought that in *Faretta* v. *California, ante,* p. 806, the Court had recanted its approach in *Ferguson* and *Brooks.* In *Faretta* the Court concluded that it is the Sixth Amendment, and not the Right-to-Counsel Clause of that Amendment, which "constitutionalizes the right in an adversary criminal trial to make a defense as we know it." *Ante,* at 818. Yet in the present case we are informed that it is the Right-to-Counsel Clause which constitutionalizes the right to present a defense "in accord with the traditions of the adversary factfinding process." *Ante,* at 857. Not being content merely to contradict *Faretta* by holding that entitlement to the traditions of our judicial system depends upon the right to retain counsel, the Court also states that, "of course, the same right to make a closing argument" is available to those who choose not to exercise their right to counsel. *Ante,* at 864 n. 18. To complete the confusion, the Court does not explain the latter *ipse dixit,* but does cite one case—*Faretta.*

II

The Due Process Clause of the Fourteenth Amendment has long been recognized as assuring "fundamental fairness" in state criminal proceedings. See, *e. g., Lisenba* v. *California,* 314 U. S. 219, 236 (1941); *Moore* v. *Dempsey,* 261 U. S. 86, 90–91 (1923). Throughout the history of the Clause we have generally considered the question of

fairness on a case-by-case basis, reflecting the fact that the elements of fairness vary with the circumstances of particular proceedings. As the Court observed in *Snyder* v. *Massachusetts,* 291 U. S. 97, 116–117 (1934):

> "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. . . . What is fair in one set of circumstances may be an act of tyranny in others."

See, *e. g., Sheppard* v. *Maxwell,* 384 U. S. 333 (1966); *Spencer* v. *Texas,* 385 U. S. 554 (1967); *Chambers* v. *Mississippi,* 410 U. S. 284 (1973); *Cupp* v. *Naughten,* 414 U. S. 141 (1973).

However in some instances the Court has engaged in a process of "specific incorporation," whereby certain provisions of the Bill of Rights have been applied against the States. See the cases cited *ante,* at 857 n. 7. In making the decision whether or not a particular provision relating to the conduct of a trial should be incorporated, we have been guided by whether the right in question may be deemed essential to fundamental fairness—an analytical approach which is compelled if we are to remain true to the basic orientation of the Due Process Clause. See, *e. g., In re Oliver,* 333 U. S. 257, 270–271 (1948) (public trial); *Duncan* v. *Louisiana,* 391 U. S. 145, 155–158 (1968) (jury trial); *Pointer* v. *Texas,* 380 U. S. 400, 403–404 (1965) (confrontation); *Washington* v. *Texas,* 388 U. S. 14, 17–19 (1967) (compulsory process); *Gideon* v. *Wainwright,* 372 U. S. 335, 342 (1963) (appointed counsel). But once we have determined that a particular right should be incorporated against the States, we have abandoned case-by-case considerations of fairness. Incorporation, in effect, results in the establishment of a strict prophylactic rule, one which is to be generally observed in every case regardless of its particular circumstances. It is a judgment on the part of

this Court that the probability of unfairness in the absence of a particular right is so great that denigration of the right will not be countenanced under any circumstances. These judgments by this Court reflect similar judgments made by the Constitution's Framers with regard to the Federal Government.

Beyond certain of the specified rights in the Bill of Rights, however, I do not understand the basis for abandoning the case-by-case approach to fundamental fairness. There are a myriad of rules and practices governing the conduct of criminal proceedings which may or may not in particular circumstances be necessary to assure fundamental fairness. Obvious examples are the rules governing the introduction and testing of evidence, as well as, I think, the New York rule governing summations in nonjury trials. Such matters are not specifically dealt with in the text of the Constitution, nor are they subject to the judgment that uniform application of a particular rule is necessary because the likelihood of unfairness is too great when that rule is not observed. As to such matters it is appropriate, and frequently necessary, that trial judges be accorded considerable discretion, subject of course to both appellate review on an abuse-of-discretion standard and, ultimately, to the fundamental fairness inquiry under the Fourteenth Amendment.

The present case is a prime example of why a prophylactic rule with regard to summations in nonjury trials is thoroughly inappropriate. The case was tried before a judge who, unlike a jury, may take notes on testimony, and who is experienced in both judging the credibility of witnesses and testing the relevance of their testimony to the elements which must be proved to obtain a conviction. The case was conceptually and factually a simple one, involving no more than whether one was

to believe the victim, despite the inconsistencies in his testimony, or the defendant.[1] The judge had previously permitted appellant's counsel to summarize the evidence, on the occasion of the motion to dismiss at the close of the State's case. That appellant's counsel had considerable faith in the judge's familiarity with, and ability to organize, the evidence is shown by the transcript of that earlier summation:

> "[MR. ADAMS:] Do you want to hear me extensively on that, Judge? Or I have a witness here, I can go on, or would you rather hear me on some lengthy argument subsequently, Judge?
>
> "THE COURT: I will hear anything you have to say.
>
> "MR. ADAMS: All right. Judge, I believe here that as a matter of law we have a doubt here. Firstly, on this first witness of the prosecution here, Judge. There were numerous inconsistencies, and *I will not bore the Court reading that. Of course the Court has copious notes on it, and I am sure it is very fresh in the Court's mind.* But on top of that, Judge, we have a questionable complainant, with a questionable way of how it happened, no witness other than this complainant.
>
> "An officer who checked out this particular matter testified here and said that the man was working at that time. A definite denial by the defendant. And I believe that as a matter of law, Judge, there is a reasonable doubt here." App. 66 (emphasis added).

Similarly, when the opportunity to summarize was

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[1] The employer's credibility was not at issue. Not only was he vague as to the times at which he had seen appellant at his garage, but that garage was located only 3½ blocks from the scene of the crime. App. 76, 86.

denied, appellant's counsel did not so much as suggest that he thought it necessary to refresh the judge's memory as to certain matters.[2] It should also be noted that in his earlier argument counsel had referred to most of the matters which the Court today suggests might have usefully been brought to the judge's attention in a final summation. See *ante,* at 864. Finally, the fact that the judge conducted this trial in a fairminded fashion, and would not arbitrarily prevent a summation which could be expected to clarify his understanding of the case, is evidenced by his dismissal of one count over the vigorous protests of the prosecution.

Whatever theoretical effect the denial of argument may have had on the judgment of conviction, its practical effect on the outcome must have been close to nothing. The trial judge was not conducting a moot court; he was sitting as the finder of fact in a trial in which he had been present during the testimony of every single witness. No experienced advocate would insist on presenting argument to such a judge after he had indicated his belief that argument would not be of assistance. Trial counsel here did not insist, and the claim which

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[2] The colloquy at the end of the trial was as follows:

"MR. ADAMS: Judge, at this time I respectfully move to— make two motions, Judge. Firstly, that the Court dismiss the two counts, first count and the second count of the indictment on the grounds the People have failed to make out a prima facie case; and on the further grounds the People have failed to prove the defendant guilty of each and every part and parcel of the crimes charged in count one and count two beyond a reasonable doubt as a matter of law, and as a matter of fact.

"THE COURT: Motion denied. I will take a short recess to deliberate, and I will give you a verdict.

"MR. ADAMS: Well, can I be heard somewhat on the facts?

"THE COURT: Under the new statute, summation is discretionary, and I choose not to hear summations.

"THE CLERK: Remand." App. 92.

is today sustained by this Court is urged by other counsel.

The truth of the matter is that appellant received a fair trial, and I do not read the Court's opinion to claim otherwise. The opinion instead establishes a right to summation in criminal trials regardless of circumstances, by tagging that right onto one of the specifically incorporated rights. It thereby conveniently avoids the difficulties of being unable to characterize appellant's trial as fundamentally unfair, but only at the expense of ignoring the logical difficulty of adorning the specifically incorporated rights with characteristics which are not themselves necessary for fundamental fairness.[3]

The nature of the right which the Court today creates is as curious as its genesis. Apparently it requires nothing more than *pro forma* observance, since the trial judge "must be and is given great latitude" in controlling the duration and limiting the scope of closing summations. He may determine what is a "reasonable" time for argument, and at what point the argument becomes repetitive or redundant, or strays "unduly" from the mark. "In all these respects he must have broad discretion." *Ante,* at 862. That is, after 30 seconds, or some other minimal period of argument, the judge is free to exercise his discretion. It is not clear why this should be so. If it is

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[3] While the Court, *ante,* at 862, presents a variety of arguments supporting the wisdom and desirability of generally permitting closing arguments in nonjury trials, none of them impress me as rising to the level of fundamental fairness. They would be of substantial merit if presented to the New York Legislature, but are hardly relevant to the constitutional inquiry which it is our duty to perform. As for the Court's final flourish ("no aspect of such advocacy could be more important"), it is obvious hyperbole which can only be uttered in complete disregard of such matters as cross-examination, the selection of trial strategy and witnesses, and attempts to exclude unconstitutionally obtained evidence.

true that "there is no certain way for a trial judge to identify accurately [those cases in which closing argument may be beneficial], until the judge has heard the closing summation of counsel," *ante,* at 863, it is equally true that he cannot determine whether continued argument will be repetitive, redundant, or otherwise useless until he has heard the continued argument. But in any event, the constitutional issue does rather quickly become framed once again according to the standards which should have governed all along—whether or not the judge's actions in the particular case deprived the defendant of a trial which was fundamentally fair.[4]

By propagating a right to summation—despite such a right's lack of textual basis, and despite the inability reasonably to conclude that the right is so basic that we cannot chance trial court discretion in the matter—the Court has furthered the practice of reviewing state criminal trials in a piecemeal fashion. The incident upon which this reversal is based was but one stage in a carefully conducted trial, and cannot be claimed to have permeated the entire proceeding as would trial without a jury, or without counsel. The Court is thus disregarding the basic question of whether the proceeding by which a defendant is deprived of his liberty is fundamentally fair.

The Court's decision derives no support either from logic or from the Amendment it professes to apply. Since it reverses a criminal conviction which was fairly obtained, I dissent.

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[4] I would also think it not unlikely under the Court's holding that post-trial briefing would be an adequate substitute for oral summation, since it meets the concerns which the Court expresses as the basis for its newly found constitutional right. See *ante,* at 862.

Syllabus

UNITED STATES *v.* BRIGNONI-PONCE

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

No. 74–114. Argued February 18, 1975—Decided June 30, 1975

The Fourth Amendment *held* not to allow a roving patrol of the Border Patrol to stop a vehicle near the Mexican border and question its occupants about their citizenship and immigration status, when the only ground for suspicion is that the occupants appear to be of Mexican ancestry. Except at the border and its functional equivalents, patrolling officers may stop vehicles only if they are aware of specific articulable facts, together with rational inferences therefrom, reasonably warranting suspicion that the vehicles contain aliens who may be illegally in the country. Pp. 878–887.

(a) Because of the important governmental interest in preventing the illegal entry of aliens at the border, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, an officer, whose observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, may stop the car briefly, question the driver and passengers about their citizenship and immigration status, and ask them to explain suspicious circumstances; but any further detention or search must be based on consent or probable cause. Pp. 878–882.

(b) To allow roving patrols the broad and unlimited discretion urged by the Government to stop all vehicles in the border area without any reason to suspect that they have violated any law, would not be "reasonable" under the Fourth Amendment. Pp. 882–883.

(c) Assuming that Congress has the power to admit aliens on condition that they submit to reasonable questioning about their right to be in the country, such power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. The Fourth Amendment therefore forbids stopping persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens. Pp. 883–884.

499 F. 2d 1109, affirmed.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, and REHNQUIST, JJ., joined. REHNQUIST, J., filed a concurring opinion, *post*, p. 887. BURGER, C. J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post*, p. 899. DOUGLAS, J., filed an opinion concurring in the judgment, *post*, p. 888. WHITE, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post*, p. 914.

Deputy Solicitor General Frey argued the cause for the United States. On the briefs were *Solicitor General Bork, Assistant Attorney General Petersen, Acting Assistant Attorney General Keeney, Mark L. Evans, Peter M. Shannon, Jr.,* and *Jerome M. Feit.*

John J. Cleary, by appointment of the Court, 419 U. S. 1017, argued the cause for respondent. With him on the brief was *Charles M. Sevilla.**

MR. JUSTICE POWELL delivered the opinion of the Court.

This case raises questions as to the United States Border Patrol's authority to stop automobiles in areas near the Mexican border. It differs from our decision in *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973), in that the Border Patrol does not claim authority to search cars, but only to question the occupants about their citizenship and immigration status.

I

As part of its regular traffic-checking operations in southern California, the Border Patrol operates a fixed checkpoint on Interstate Highway 5 south of San Clemente. On the evening of March 11, 1973, the checkpoint was closed because of inclement weather, but two officers were observing northbound traffic from a patrol

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**Sanford Jay Rosen* filed a brief for the Mexican American Legal Defense and Educational Fund as *amicus curiae* urging affirmance.

car parked at the side of the highway. The road was dark, and they were using the patrol car's headlights to illuminate passing cars. They pursued respondent's car and stopped it, saying later that their only reason for doing so was that its three occupants appeared to be of Mexican descent. The officers questioned respondent and his two passengers about their citizenship and learned that the passengers were aliens who had entered the country illegally. All three were then arrested, and respondent was charged with two counts of knowingly transporting illegal immigrants, a violation of § 274 (a)(2) of the Immigration and Nationality Act, 66 Stat. 228, 8 U. S. C. § 1324 (a)(2). At trial respondent moved to suppress the testimony of and about the two passengers, claiming that this evidence was the fruit of an illegal seizure. The trial court denied the motion, the aliens testified at trial, and respondent was convicted on both counts.

Respondent's appeal was pending in the Court of Appeals for the Ninth Circuit when we announced our decision in *Almeida-Sanchez* v. *United States, supra,* holding that the Fourth Amendment prohibits the use of roving patrols to search vehicles, without a warrant or probable cause, at points removed from the border and its functional equivalents. The Court of Appeals, sitting en banc, held that the stop in this case more closely resembled a roving-patrol stop than a stop at a traffic checkpoint, and applied the principles of *Almeida-Sanchez.*[1]

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[1] For the Court of Appeals' purposes, the distinction between a roving patrol and a fixed checkpoint was controlling. The court previously had held that the principles of *Almeida-Sanchez* v. *United States* applied retrospectively to the activities of roving patrols but not to those of fixed checkpoints. See *United States* v. *Peltier,* 500 F. 2d 985 (CA9 1974), rev'd, *ante,* p. 531; *United States* v. *Bowen,* 500 F. 2d 960 (CA9 1974), aff'd, *post,* p. 916.

The court held that the Fourth Amendment, as interpreted in *Almeida-Sanchez,* forbids stopping a vehicle, even for the limited purpose of questioning its occupants, unless the officers have a "founded suspicion" that the occupants are aliens illegally in the country. The court refused to find that Mexican ancestry alone supported such a "founded suspicion" and held that respondent's motion to suppress should have been granted.[2] 499 F. 2d 1109 (1974). We granted certiorari and set the case for oral argument with No. 73–2050, *United States* v. *Ortiz, post,* p. 891, and No. 73–6848, *Bowen* v. *United States, post,* p. 916. 419 U. S. 824 (1974).

The Government does not challenge the Court of Appeals' factual conclusion that the stop of respondent's car was a roving-patrol stop rather than a checkpoint stop. Brief for United States 8. Nor does it challenge the retroactive application of *Almeida-Sanchez, supra,* Brief for United States 9, or contend that the San Clemente checkpoint is the functional equivalent of the border. The only issue presented for decision is whether a roving patrol may stop a vehicle in an area near the border and question its occupants when the only ground for suspicion is that the occupants appear to be of Mexican ancestry. For the reasons that follow, we affirm the decision of the Court of Appeals.

II

The Government claims two sources of statutory au-

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[2] There may be room to question whether voluntary testimony of a witness at trial, as opposed to a Government agent's testimony about objects seized or statements overheard, is subject to suppression as the fruit of an illegal search or seizure. See *United States* v. *Guana-Sanchez,* 484 F. 2d 590 (CA7 1973), cert. dismissed as improvidently granted, 420 U. S. 513 (1975). But since the question was not raised in the petition for certiorari, we do not address it.

thority for stopping cars without warrants in the border areas. Section 287 (a)(1) of the Immigration and Nationality Act, 8 U. S. C. § 1357 (a)(1), authorizes any officer or employee of the Immigration and Naturalization Service (INS) without a warrant, "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." There is no geographical limitation on this authority. The Government contends that, at least in the areas adjacent to the Mexican border, a person's apparent Mexican ancestry alone justifies belief that he or she is an alien and satisfies the requirement of this statute. Section 287 (a)(3) of the Act, 8 U. S. C. § 1357 (a)(3), authorizes agents, without a warrant,

> "within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle . . . ."

Under current regulations, this authority may be exercised anywhere within 100 miles of the border. 8 CFR § 287.1 (a) (1975). The Border Patrol interprets the statute as granting authority to stop moving vehicles and question the occupants about their citizenship, even when its officers have no reason to believe that the occupants are aliens or that other aliens may be concealed in the vehicle.[3] But "no Act of Congress can authorize a violation of the Constitution," *Almeida-Sanchez, supra,* at 272,

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[3] We cannot accept respondent's contention that, even though § 287 (a)(3) does not mention probable cause, its legislative history establishes that Congress meant to condition immigration officers' authority to board and search vehicles on probable cause to believe that they contained aliens. The legislative history simply does not support this contention.

and we must decide whether the Fourth Amendment allows such random vehicle stops in the border areas.

III

The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *Davis* v. *Mississippi,* 394 U. S. 721 (1969); *Terry* v. *Ohio,* 392 U. S. 1, 16–19 (1968). "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person," *id.,* at 16, and the Fourth Amendment requires that the seizure be "reasonable." As with other categories of police action subject to Fourth Amendment constraints, the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers. *Id.,* at 20–21; *Camara* v. *Municipal Court,* 387 U. S. 523, 536–537 (1967).

The Government makes a convincing demonstration that the public interest demands effective measures to prevent the illegal entry of aliens at the Mexican border. Estimates of the number of illegal immigrants in the United States vary widely. A conservative estimate in 1972 produced a figure of about one million, but the INS now suggests there may be as many as 10 or 12 million aliens illegally in the country.[4] Whatever the number, these aliens create significant economic and social problems, competing with citizens and legal resident

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[4] The estimate of one million was produced by the Commissioner of the INS for the Immigration and Nationality Subcommittee of the House Judiciary Committee. Hearings on Illegal Aliens before Subcommittee No. 1 of the House Committee on the Judiciary, 92d Cong., 2d Sess., ser. 13, pt. 5, pp. 1323–1325 (1972). The higher estimate appears in the INS Ann. Rep. iii (1974).

aliens for jobs, and generating extra demand for social services. The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation. See generally Hearings on Illegal Aliens before Subcommittee No. 1 of the House Committee on the Judiciary, 92d Cong., 1st and 2d Sess., ser. 13, pts. 1–5 (1971–1972).

The Government has estimated that 85% of the aliens illegally in the country are from Mexico. *United States* v. *Baca,* 368 F. Supp. 398, 402 (SD Cal. 1973).[5] The Mexican border is almost 2,000 miles long, and even a vastly reinforced Border Patrol would find it impossible to prevent illegal border crossings. Many aliens cross the Mexican border on foot, miles away from patrolled areas, and then purchase transportation from the border area to inland cities, where they find jobs and elude the immigration authorities. Others gain entry on valid temporary border-crossing permits, but then violate the conditions of their entry. Most of these aliens leave the border area in private vehicles, often assisted by professional "alien smugglers." The Border Patrol's traffic-checking operations are designed to prevent this inland movement. They succeed in apprehending some illegal entrants and smugglers, and they deter the movement of others by threatening apprehension and increasing the cost of illegal transportation.

Against this valid public interest we must weigh the interference with individual liberty that results when an officer stops an automobile and questions its occupants.

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[5] This estimate tends to be confirmed by the consistently high proportion of Mexican nationals in the number of deportable aliens arrested each year. In 1970, for example, 80% of the deportable aliens arrested were from Mexico. See INS Ann. Rep. 95 (1970). In 1974, the figure was 92%. INS Ann. Rep. 94 (1974).

The intrusion is modest. The Government tells us that a stop by a roving patrol "usually consumes no more than a minute." Brief for United States 25. There is no search of the vehicle or its occupants, and the visual inspection is limited to those parts of the vehicle that can be seen by anyone standing alongside.[6] According to the Government, "[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States." *Ibid.*

Because of the limited nature of the intrusion, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest. In *Terry* v. *Ohio, supra,* the Court declined expressly to decide whether facts not amounting to probable cause could justify an "investigative 'seizure'" short of an arrest, 392 U. S., at 19 n. 16, but it approved a limited search—a pat-down for weapons—for the protection of an officer investigating suspicious behavior of persons he reasonably believed to be armed and dangerous. The Court approved such a search on facts that did not constitute probable cause to believe the suspects guilty of a crime, requiring only that "the police officer . . . be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" a belief that his safety or that of others is in danger. *Id.*, at 21; see *id.*, at 27.

We elaborated on *Terry* in *Adams* v. *Williams,* 407 U. S. 143 (1972), holding that a policeman was justified

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[6] In this case the officers did search respondent's car, but because they found no other incriminating evidence the validity of the search is not in issue. *Almeida-Sanchez* changed the Border Patrol's practice of searching cars on routine stops, and the Government informs us that roving patrols now search vehicles only when they have probable cause to believe they will find illegally present aliens or contraband. Brief for United States 25.

in approaching the respondent to investigate a tip that he was carrying narcotics and a gun.

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.*, at 145–146.

These cases together establish that in appropriate circumstances the Fourth Amendment allows a properly limited "search" or "seizure" on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime. In both *Terry* and *Adams* v. *Williams* the investigating officers had reasonable grounds to believe that the suspects were armed and that they might be dangerous. The limited searches and seizures in those cases were a valid method of protecting the public and preventing crime. In this case as well, because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, we hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion. As in *Terry*, the stop and inquiry must be "reasonably related in scope to the justification for their initiation." 392 U. S., at 29. The officer may question the driver and passengers about their citizenship and

immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.

We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops.[7] In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.4 million, is located on the border. Texas has two fairly large metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that substantially all of the traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. The only formal limitation on that discretion appears to be the administrative regulation defining the term "reasonable distance" in § 287 (a)(3) to mean within 100

[7] Because the stop in this case was made without a warrant and the officers made no effort to obtain one, we have no occasion to decide whether a warrant could be issued to stop cars in a designated area on the basis of conditions in the area as a whole and in the absence of reason to suspect that any particular car is carrying aliens. See *Almeida-Sanchez*, 413 U. S., at 275 (POWELL, J., concurring); *Camara* v. *Municipal Court*, 387 U. S. 523 (1967).

air miles from the border. 8 CFR § 287.1 (a) (1975). Thus, if we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law.

We are not convinced that the legitimate needs of law enforcement require this degree of interference with lawful traffic. As we discuss in Part IV, *infra,* the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators. Consequently, a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference. Under the circumstances, and even though the intrusion incident to a stop is modest, we conclude that it is not "reasonable" under the Fourth Amendment to make such stops on a random basis.[8]

The Government also contends that the public interest in enforcing conditions on legal alien entry justifies stopping persons who may be aliens for questioning about their citizenship and immigration status. Although we

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[8] Our decision in this case takes into account the special function of the Border Patrol, the importance of the governmental interests in policing the border area, the character of roving-patrol stops, and the availability of alternatives to random stops unsupported by reasonable suspicion. Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters.

may assume for purposes of this case that the broad congressional power over immigration, see *Kleindienst* v. *Mandel,* 408 U. S. 753, 765–767 (1972), authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.

IV

The effect of our decision is to limit exercise of the authority granted by both § 287 (a)(1) and § 287 (a)(3). Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.[9]

Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual pat-

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[9] As noted above, we reserve the question whether Border Patrol officers also may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country. See *Cheung Tin Wong* v. *INS,* 152 U. S. App. D. C. 66, 468 F. 2d 1123 (1972); *Au Yi Lau* v. *INS,* 144 U. S. App. D. C. 147, 445 F. 2d 217, cert. denied, 404 U. S. 864 (1971). The facts of this case do not require decision on the point.

terns of traffic on the particular road, and previous experience with alien traffic are all relevant. See *Carroll* v. *United States,* 267 U. S. 132, 159–161 (1925); *United States* v. *Jaime-Barrios,* 494 F. 2d 455 (CA9), cert. denied, 417 U. S. 972 (1974).[10] They also may consider information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion. See *United States* v. *Larios-Montes,* 500 F. 2d 941 (CA9 1974); *Duprez* v. *United States,* 435 F. 2d 1276 (CA9 1970). Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain station wagons, with large compartments for fold-down seats or spare tires, are frequently used for transporting concealed aliens. See *United States* v. *Bugarin-Casas,* 484 F. 2d 853 (CA9 1973), cert. denied, 414 U. S. 1136 (1974); *United States* v. *Wright,* 476 F. 2d 1027 (CA5 1973). The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide. See *United States* v. *Larios-Montes, supra.* The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. Reply Brief for United States 12–13, in *United States* v. *Ortiz, post,* p. 891. In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling. *Terry* v. *Ohio,* 392 U. S., at 27.

In this case the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican an-

[10] The Courts of Appeals decisions cited throughout this part are merely illustrative. Our citation of them does not imply a view of the merits of particular decisions. Each case must turn on the totality of the particular circumstances.

cestry of the occupants.[11] We cannot conclude that this furnished reasonable grounds to believe that the three occupants were aliens. At best the officers had only a fleeting glimpse of the persons in the moving car, illuminated by headlights. Even if they saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens.[12] The likelihood that any given

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[11] The Government also argues that the location of this stop should be considered in deciding whether the officers had adequate reason to stop respondent's car. This appears, however, to be an after-the-fact justification. At trial the officers gave no reason for the stop except the apparent Mexican ancestry of the car's occupants. It is not even clear that the Government presented the broader justification to the Court of Appeals. We therefore decline at this stage of the case to give any weight to the location of the stop.

[12] The 1970 census and the INS figures for alien registration in 1970 provide the following information about the Mexican-American population in the border States. There were 1,619,064 persons of Mexican origin in Texas, and 200,004 (or 12.4%) of them registered as aliens from Mexico. In New Mexico there were 119,049 persons of Mexican origin, and 10,171 (or 8.5%) registered as aliens. In Arizona there were 239,811 persons of Mexican origin, and 34,075 (or 14.2%) registered as aliens. In California there were 1,857,267 persons of Mexican origin, and 379,951 (or 20.4%) registered as aliens. Bureau of the Census, Subject Report PC (2)–1C: Persons of Spanish Origin 2 (1970); INS Ann. Rep. 105 (1970). These figures, of course, do not present the entire picture. The number of registered aliens from Mexico has increased since 1970, INS Ann. Rep. 105 (1974), and we assume that very few illegal immigrants appear in the registration figures. On the other hand, many of the 950,000 other persons of Spanish origin living in these border States, see

person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.

The judgment of the Court of Appeals is

Affirmed.

[For opinion of THE CHIEF JUSTICE concurring in the judgment, see *post,* p. 899.]

[For opinion of MR. JUSTICE WHITE concurring in the judgment, see *post,* p. 914.]

MR. JUSTICE REHNQUIST, concurring.

I join in the opinion of the Court. I think it quite important to point out, however, that that opinion, which is joined by a somewhat different majority than that which comprised the *Almeida-Sanchez* Court, is both by its terms and by its reasoning concerned only with the type of stop involved in this case. I think that just as travelers entering the country may be stopped and searched without probable cause and without founded suspicion, because of "national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in," *Carroll* v. *United States,* 267 U. S. 132, 154 (1925), a strong case may be made for those charged with the enforcement of laws conditioning the right of vehicular use of a highway to likewise stop motorists using highways in order to determine whether they have met the qualifications prescribed by applicable law for such use. See *Cady* v. *Dombrowski,* 413 U. S. 433, 440–441 (1973); *United States* v. *Biswell,* 406 U. S. 311 (1972). I regard these and similar situations, such

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Bureau of the Census, *supra,* at 1, may have a physical appearance similar to persons of Mexican origin.

as agricultural inspections and highway roadblocks to apprehend known fugitives, as not in any way constitutionally suspect by reason of today's decision.

MR. JUSTICE DOUGLAS, concurring in the judgment.

I join in the affirmance of the judgment. The stopping of respondent's automobile solely because its occupants appeared to be of Mexican ancestry was a patent violation of the Fourth Amendment. I cannot agree, however, with the standard the Court adopts to measure the lawfulness of the officers' action. The Court extends the "suspicion" test of *Terry* v. *Ohio,* 392 U. S. 1 (1968), to the stop of a moving automobile. I dissented from the adoption of the suspicion test in *Terry,* believing it an unjustified weakening of the Fourth Amendment's protection of citizens from arbitrary interference by the police. I remarked then:

> "The infringement on personal liberty of any 'seizure' of a person can only be 'reasonable' under the Fourth Amendment if we require the police to possess 'probable cause' before they seize him. Only that line draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime." *Id.,* at 38.

The fears I voiced in *Terry* about the weakening of the Fourth Amendment have regrettably been borne out by subsequent events. Hopes that the suspicion test might be employed only in the pursuit of violent crime—a limitation endorsed by some of its proponents*—have now been dashed, as it has been applied

*See LaFave, "Street Encounters" and the Constitution, 67 Mich. L. Rev. 39, 65–66 (1968).

in narcotics investigations, in apprehension of "illegal" aliens, and indeed has come to be viewed as a legal construct for the regulation of a general investigatory police power. The suspicion test has been warmly embraced by law enforcement forces and vigorously employed in the cause of crime detection. In criminal cases we see those for whom the initial intrusion led to the discovery of some wrongdoing. But the nature of the test permits the police to interfere as well with a multitude of law-abiding citizens, whose only transgression may be a nonconformist appearance or attitude. As one commentator has remarked:

> " 'Police power exercised without probable cause *is* arbitrary. To say that the police may accost citizens at their whim and may detain them upon reasonable suspicion is to say, in reality, that the police may both accost and detain citizens at their whim.' " Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 395 (1974).

The uses to which the suspicion test has been put are illustrated in some of the cases cited in the Court's opinion. In *United States* v. *Wright,* 476 F. 2d 1027 (CA5 1973), for example, immigration officers stopped a station wagon near the border because there was a spare tire in the back seat. The court held that the officers reasonably suspected that the spare wheel well had been freed in order to facilitate the concealment of aliens. In *United States* v. *Bugarin-Casas,* 484 F. 2d 853 (CA9 1973), the Border Patrol officers encountered a man driving alone in a station wagon which was "riding low"; stopping the car was held reasonable because the officers suspected that aliens might have been hidden beneath the floorboards. The vacationer whose car is weighted down with luggage will find no comfort in these decisions; nor will the many law-abiding citi-

zens who drive older vehicles that ride low because their suspension systems are old or in disrepair. The suspicion test has indeed brought a state of affairs where the police may stop citizens on the highway on the flimsiest of justifications.

The Court does, to be sure, disclaim approval of the particular decisions it cites applying the suspicion test. But by specifying factors to be considered without attempting to explain what combination is necessary to satisfy the test, the Court may actually induce the police to push its language beyond intended limits and to advance as a justification any of the enumerated factors even where its probative significance is negligible.

Ultimately the degree to which the suspicion test actually restrains the police will depend more upon what the Court does henceforth than upon what it says today. If my Brethren mean to give the suspicion test a new bite, I applaud the intention. But in view of the developments since the test was launched in *Terry*, I am not optimistic. This is the first decision to invalidate a stop on the basis of the suspicion standard. In fact, since *Terry* we have granted review of a case applying the test only once, in *Adams* v. *Williams*, 407 U. S. 143 (1972), where the Court found the standard satisfied by the tip from an informant whose credibility was not established and whose information was not shown to be based upon personal knowledge. If in the future the suspicion test is to provide any meaningful restraint of the police, its force must come from vigorous review of its applications, and not alone from the qualifying language of today's opinion. For now, I remain unconvinced that the suspicion test offers significant protection of the "comprehensive right of personal liberty in the face of governmental intrusion," *Lopez* v. *United States*, 373 U. S. 427, 455 (1963) (dissenting opinion), that is embodied in the Fourth Amendment.

UNITED STATES v. ORTIZ

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

No. 73-2050. Argued February 18, 1975—Decided June 30, 1975

The Fourth Amendment *held* to forbid Border Patrol officers, in the absence of consent or probable cause, to search private vehicles at traffic checkpoints removed from the border and its functional equivalents, and for this purpose there is no difference between a checkpoint and a roving patrol. *Almeida-Sanchez* v. *United States,* 413 U. S. 266, followed. Pp. 892-898.

Affirmed.

POWELL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, MARSHALL, and REHNQUIST, JJ., joined. REHNQUIST, J., filed a concurring opinion, *post,* p. 898. BURGER, C. J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post,* p. 899. WHITE, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post,* p. 914.

Mark L. Evans argued the cause for the United States. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Petersen, Acting Assistant Attorney General Keeney, Sidney M. Glazer,* and *Jerome M. Feit.*

Charles M. Sevilla, by appointment of the Court, 420 U. S. 905, argued the cause for respondent. With him on the brief was *John J. Cleary.**

MR. JUSTICE POWELL delivered the opinion of the Court.

Border Patrol officers stopped respondent's car for a routine immigration search at the traffic checkpoint

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**Sanford Jay Rosen* filed a brief for the Mexican American Legal Defense and Educational Fund as *amicus curiae* urging affirmance.

on Interstate Highway 5 at San Clemente, Cal., on November 12, 1973. They found three aliens concealed in the trunk, and respondent was convicted on three counts of knowingly transporting aliens who were in the country illegally. The Court of Appeals for the Ninth Circuit reversed the conviction in an unreported opinion, relying on dictum in its opinion in *United States* v. *Bowen,* 500 F. 2d 960 (CA9 1974), aff'd, *post,* p. 916, to the effect that our decision in *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973), required probable cause for all vehicle searches in the border area, whether conducted by roving patrols or at traffic checkpoints. We granted certiorari. 419 U. S. 824 (1974).

Nothing in this record suggests that the Border Patrol officers had any special reason to suspect that respondent's car was carrying concealed aliens. Nor does the Government contend that the San Clemente checkpoint is a functional equivalent of the border. Brief for United States 16. The only question for decision is whether vehicle searches at traffic checkpoints, like the roving-patrol search in *Almeida-Sanchez,* must be based on probable cause.

I

In *Almeida-Sanchez* we rejected the Government's contention that the Nation's strong interest in controlling immigration and the practical difficulties of policing the Mexican border combined to justify dispensing with both warrant and probable cause for vehicle searches by roving patrols near the border. The facts did not require us to decide whether the same rule would apply to traffic checkpoints, which differ from roving patrols in several important respects. 413 U. S., at 273; *id.,* at 276 (POWELL, J., concurring).

A consolidated proceeding on motions to suppress in this and similar cases produced an extensive factual

record on the operation of traffic checkpoints in southern California. *United States* v. *Baca,* 368 F. Supp. 398 (SD Cal. 1973). The San Clemente checkpoint is 62 air miles and 66 road miles north of the Mexican border. It is on the principal highway between San Diego and Los Angeles, and over 10 million vehicles pass the checkpoint in a year. *United States* v. *Martinez-Fuerte,* 514 F. 2d 308, 312 (CA9 1975). The District Court in *Baca* described the checkpoint as follows:

> "Approximately one mile south of the checkpoint is a large black on yellow sign with flashing yellow lights over the highway stating 'ALL VEHICLES, STOP AHEAD, 1 MILE.' Three-quarters of a mile further north are two black on yellow signs suspended over the highway with flashing lights stating 'WATCH FOR BRAKE LIGHTS.' At the checkpoint, which is also the location of a State of California weighing station, are two large signs with flashing red lights suspended over the highway. These signs each state 'STOP HERE—U. S. OFFICERS.' Placed on the highway are a number of orange traffic cones funneling traffic into two lanes where a Border Patrol agent in full dress uniform, standing behind a white on red 'STOP' sign checks traffic. Blocking traffic in the unused lanes are official U. S. Border Patrol vehicles with flashing red lights. In addition, there is a permanent building which houses the Border Patrol office and temporary detention facilities. There are also floodlights for nighttime operation." 368 F. Supp., at 410–411.

The Border Patrol would prefer to keep this checkpoint in operation continuously, but bad weather, heavy traffic, and personnel shortages keep it closed about one-third of the time. When it is open, officers screen all northbound traffic. If anything about a vehicle or its

occupants leads an officer to suspect that it may be carrying aliens, he will stop the car and ask the occupants about their citizenship. If the officer's suspicion persists, or if the questioning enhances it, he will "inspect" portions of the car in which an alien might hide.[1] Operations at other checkpoints are similar, although the traffic at some is light enough that officers can stop all vehicles for questioning and routinely inspect more of them.

The Government maintains that these characteristics justify dispensing with probable cause at traffic checkpoints despite the Court's holding in *Almeida-Sanchez.* It gives essentially two reasons for distinguishing that case. First, a checkpoint officer's discretion in deciding which cars to search is limited by the location of the checkpoint. That location is determined by high-level Border Patrol officials, using criteria that include the degree of inconvenience to the public and the potential for safe operation, as well as the potential for detecting and deterring the illegal movement of aliens. By contrast, officers on roving patrol were theoretically free before *Almeida-Sanchez* to stop and search any car within 100 miles of the border. Second, the circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At

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[1] Such places typically include the trunk, under the hood, and beneath the chassis. If the vehicle is a truck, a camper, or the like, the officer inspects the enclosed portion as well. But an immigration inspection is not always so confined. In *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973), the officer removed the back seat cushion because there were reports that aliens had been found seated upright behind seats from which the springs had been removed. *Id.,* at 286 (WHITE, J., dissenting).

traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.

These differences are relevant to the constitutional issue, since the central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials. *Camara* v. *Municipal Court,* 387 U. S. 523, 528 (1967); *Schmerber* v. *California,* 384 U. S. 757, 767 (1966). The Fourth Amendment's requirement that searches and seizures be reasonable also may limit police use of unnecessarily frightening or offensive methods of surveillance and investigation. See, *e. g., Terry* v. *Ohio,* 392 U. S. 1, 16–17 (1968); *Camara, supra,* at 531; *Schmerber, supra,* at 771–772. While the differences between a roving patrol and a checkpoint would be significant in determining the propriety of the stop, which is considerably less intrusive than a search, *Terry* v. *Ohio, supra,* they do not appear to make any difference in the search itself. The greater regularity attending the stop does not mitigate the invasion of privacy that a search entails. Nor do checkpoint procedures significantly reduce the likelihood of embarrassment. Motorists whose cars are searched, unlike those who are only questioned, may not be reassured by seeing that the Border Patrol searches other cars as well. Where only a few are singled out for a search, as at San Clemente, motorists may find the searches especially offensive. See Note, Border Searches and the Fourth Amendment, 77 Yale L. J. 1007, 1012–1013 (1968).

Moreover, we are not persuaded that the checkpoint limits to any meaningful extent the officer's discretion to select cars for search. The record in the consolidated proceeding indicates that only about 3% of the cars that

pass the San Clemente checkpoint are stopped for either questioning or a search, 368 F. Supp., at 411. Throughout the system, fewer than 3% of the vehicles that passed through checkpoints in 1974 were searched, Brief for United States 29, and no checkpoint involved in *Baca* reported a search rate of more than 10% or 15%. 368 F. Supp., at 412–415. It is apparent from these figures that checkpoint officers exercise a substantial degree of discretion in deciding which cars to search. The Government maintains that they voluntarily exercise that discretion with restraint and search only vehicles that arouse their suspicion, and it insists the officers should be free of judicial oversight of any kind. Viewed realistically, this position would authorize the Border Patrol to search vehicles at random, for no officer ever would have to justify his decision to search a particular car.

This degree of discretion to search private automobiles is not consistent with the Fourth Amendment. A search, even of an automobile, is a substantial invasion of privacy.[2] To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search. *Almeida-Sanchez,* 413 U. S., at 269–270; *Chambers* v. *Maroney,* 399 U. S. 42, 51 (1970). We are not persuaded that the differences between roving patrols and traffic checkpoints justify dispensing in this case with the safeguards we required in *Almeida-Sanchez.* We therefore follow that decision and hold that at traffic checkpoints removed from the border and its functional equivalents,

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[2] The degree of the invasion of privacy in an automobile search may vary with the circumstances, as there are significant differences between "an automobile and a home or office." *Chambers* v. *Maroney,* 399 U. S. 42, 48 (1970); *Almeida-Sanchez* v. *United States,* 413 U. S., at 279 (POWELL, J., concurring).

officers may not search private vehicles without consent or probable cause.[3]

The Government lists in its reply brief some of the factors on which officers have relied in deciding which cars to search. They include the number of persons in a vehicle, the appearance and behavior of the driver and passengers, their inability to speak English, the responses they give to officers' questions, the nature of the vehicle, and indications that it may be heavily loaded. All of these factors properly may be taken into account in deciding whether there is probable cause to search a particular vehicle. In addition, as we note today in *United States* v. *Brignoni-Ponce, ante,* at 884–885, the officers are entitled to draw reasonable inferences from these facts in light of their knowledge of the area and their prior experience with aliens and smugglers. In this case, however, the officers advanced no special reasons for believing respondent's vehicle contained

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[3] Not every aspect of a routine automobile "inspection," as described in n. 1, *supra,* necessarily constitutes a "search" for purposes of the Fourth Amendment. There is no occasion in this case to define the exact limits of an automobile "search."

Nor do we have occasion to decide whether a warrant could issue approving checkpoint searches based on information about the area as a whole, in the absence of cause to believe that a particular car is carrying concealed aliens, because the officers had no such warrant in this case and had not tried to obtain one. See *Almeida-Sanchez* v. *United States, supra,* at 275 (POWELL, J., concurring); *Camara* v. *Municipal Court,* 387 U. S. 523 (1967). We also need not decide whether checkpoints and roving patrols must be treated the same for all purposes, or whether Border Patrol officers may lawfully stop motorists for questioning at an established checkpoint without reason to believe that a particular vehicle is carrying aliens. Cf. *United States* v. *Brignoni-Ponce, ante,* p. 873. Nor do we suggest that probable cause would be required for all inspections of private motor vehicles. It is quite possible, for example, that different considerations would apply to routine safety inspections required as a condition of road use.

aliens. The absence of probable cause makes the search invalid.

II

The Government also contends that even if *Almeida-Sanchez* applies to checkpoint searches, the Court of Appeals erred in voiding this search because it occurred after the date of decision in *Almeida-Sanchez* but before the Court of Appeals stated in *United States* v. *Bowen, supra,* that it would require probable cause for checkpoint searches. Examination of the Government's brief in the Ninth Circuit indicates that it did not raise this question below. On the contrary, it represented to the court that the decision in *Bowen* would be "determinative of the issues in this case." We therefore decline to consider this issue, which was raised for the first time in the petition for certiorari.

Affirmed.

MR. JUSTICE REHNQUIST, concurring.

I joined the dissent of my Brother WHITE in *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973), and recognize that the present decision is an extension of the unsound rule announced in that case. I nonetheless join the opinion of the Court, because a majority of the Court still adheres to *Almeida-Sanchez* and because I agree with the Court's analysis of the significance of the Government's proffered distinctions between roving and fixed-checkpoint searches.

I wish to stress, however, that the Court's opinion is confined to full searches, and does not extend to fixed-checkpoint stops for the purpose of inquiring about citizenship. Such stops involve only a modest intrusion, are not likely to be frightening or significantly annoying, are regularized by the fixed situs, and effectively serve the important national interest in controlling illegal

entry. I do not regard such stops as unreasonable under the Fourth Amendment, whether or not accompanied by "reasonable suspicion" that a particular vehicle is involved in immigration violations, cf. *United States* v. *Brignoni-Ponce, ante,* p. 873, and I do not understand today's opinion to cast doubt upon their constitutionality.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN joins, concurring in the judgment.*

Like MR. JUSTICE WHITE I can, at most, do no more than concur in the judgment. As the Fourth Amendment now has been interpreted by the Court it seems that the Immigration and Naturalization Service is powerless to stop the tide of illegal aliens—and dangerous drugs—that daily and freely crosses our 2,000-mile southern boundary.[1] Perhaps these decisions will be seen in perspective as but another example of a society seemingly impotent to deal with massive lawlessness. In that sense history may view us as prisoners of our own traditional and appropriate concern for individual rights, unable—or unwilling—to apply the concept of reasonableness explicit in the Fourth Amendment in order to develop a rational accommodation between those rights and the literal safety of the country.

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*[This opinion applies also to No. 74–114, *United States* v. *Brignoni-Ponce, ante,* p. 873.]

[1] The Court today recognizes that as many as 12 million illegal aliens are now present in this country. *United States* v. *Brignoni–Ponce, ante,* at 878, and n. 4. See also U. S. News & World Report, July 22, 1974, p. 27; *id.,* Dec. 9, 1974, p. 77. By all indications the problem will increase in the future, not abate. *United States* v. *Baca,* 368 F. Supp. 398, 402–403 (SD Cal. 1973). In the *Baca* case Judge Turrentine conducted a thorough review of the entire problem and the present Government response. Appended to this opinion is an excerpt from Judge Turrentine's *Baca* opinion describing the illegal alien problem and the law enforcement response.

Given today's decisions it would appear that, absent legislative action, nothing less than a massive force of guards could adequately protect our southern border.[2] To establish hundreds of checkpoints with enlarged border forces so as to stop literally every car and pedestrian at every border checkpoint, however, would doubtless impede the flow of commerce and travel between this country and Mexico. Moreover, it is uncertain whether stringent penalties for employment of illegal aliens, and rigid requirements for proof of legal entry before employment, would help solve the problems, but those remedies have not been tried.

I would hope that when we next deal with this problem we give greater weight to the reality that the Fourth Amendment prohibits only "*unreasonable* searches and seizures" and to the frequent admonition that reasonableness must take into account all the circumstances and balance the rights of the individual with the needs of society. See, *e. g., Terry* v. *Ohio,* 392 U. S. 1 (1968); *Elkins* v. *United States,* 364 U. S. 206 (1960); *United States* v. *Biswell,* 406 U. S. 311 (1972).

APPENDIX TO OPINION OF BURGER, C. J., CONCURRING IN THE JUDGMENT

Excerpt from Judge Turrentine's opinion in *United States* v. *Baca,* 368 F. Supp. 398, 402–408 (SD Cal. 1973)

THE ILLEGAL ALIEN PROBLEM

The United States through legislative action has determined that it is in the best interest of the nation to limit the number of persons who can legally immigrate into the country in any given year. These controls

[2] For example, testimony in the *Baca* hearings revealed that a complement of 21,000 officers would be needed to control adequately the 75 miles of border in the El Centro sector alone.

reflect in part a Congressional intent to protect the American labor market from an influx of foreign labor. Karnuth v. United States, 279 U. S. 231 . . . (1929); § 201 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 163, as amended by the Act of October 3, 1965, 79 Stat. 911, 8 U. S. C. § 1151 (a).

Under this policy of limited admission, 385,685 new immigrants entered the United States legally during fiscal year 1972. Since July 1, 1968, the law has established an annual quota of 120,000 persons for the independent countries of the Western Hemisphere. Included within this quota are immigrants from the Republic of Mexico who in fiscal year 1972 totalled 64,040. 1972 Annual Report, Immigration and Naturalization Service, p. 2, 28.

Currently illegal aliens are in residence within the United States in numbers which, while not susceptible of exact measurement, are estimated to be in the vicinity of 800,000 to over one million. Department of Justice, Special Study Group on Illegal Immigrants from Mexico, A Program for Effective And Humane Action on Illegal Mexican Immigrants, 6 (1973), [hereinafter cited as *Cramton Rpt.*].

Of these illegal aliens, approximately 85 percent are citizens of Mexico. *Cramton Rpt.* at 6. They are industrious, proud and hard-working people who enter this country for the purpose of earning wages, accumulating savings, and returning or sending their savings home to Mexico.

Since 1970, the number of illegal Mexican aliens in the United States who have been apprehended has been growing at a rate in excess of 20 percent per year. *Cramton Rpt.* at 6.

The increasingly large numbers of Mexican nationals seeking to illegally enter this country reflects the sub-

stantial unemployment and underemployment in Mexico—fueled by one of the highest birth rates in the world. Moreover, Mexican employment statistics are not likely to improve dramatically since fully 45 percent of Mexico's population is under 15 years of age and, therefore, will soon be attempting to enter the labor market.

Further prompting Mexican nationals to seek employment in the United States is the fact that there is a significant disparity in wage rates between this country and Mexico. In Mexicali and Tijuana, both Mexican cities bordering the Southern District and each with a population in excess of 400,000, the average daily wage is about $3.40 per day. The minimum wage is even lower for workers in the interior of Mexico. The average worker in Mexico, assuming he can find work, earns in a day as much as he can make in only a few hours in the United States.

In addition, it is estimated that the per capita income of the poorest 40 percent of the Mexican population, the strata most likely to leave their homeland in search of employment in the United States, is less than $150 per year.

The manpower needs of the United States generated by World War II resulted in many Mexicans being imported into this country and becoming familiar with employment opportunities and practices in the United States. See Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 88 Cal. Rptr. 443 (1970).

The opportunities available to Mexican aliens have traditionally been in agriculture. While still true in many parts of the United States Southwest, in recent years the pattern has changed and more and more illegal aliens are obtaining employment in the service and manufacturing sectors of our economy. These aliens are increasingly found in virtually all regions of the country

and in all segments of the economy. State Social Welfare Board, Issue: Aliens in California, 12 (1973) [Hereinafter cited as *Aliens in California*].

The nature of the change in employment opportunities available is demonstrated by one estimate that 250,000 illegal aliens are employed in Los Angeles County where agricultural opportunities are known to be limited. Hearings on Illegal Aliens Before Subcom. No. 1 of the House Comm. on the Judiciary, 92d Cong., 1st Sess., pt. 1, at 208 (1971) [Hereinafter cited as *Hearings on Illegal Aliens*].

Other estimates of the impact of illegal aliens in California suggest that in 1971, when 595,000 Californians were unemployed (7.4 percent of the State's labor force), there were between 200,000 and 300,000 illegal aliens employed in California earning approximately $100 million in wages. *Hearings on Illegal Aliens* at 150.

Since the majority of Mexicans are unskilled or low skilled workers they tend to compete with Mexican-Americans, blacks, Indians, and other minority groups who, due to the declining percentage of jobs requiring low or no skills, are finding it increasingly difficult to obtain gainful employment. *Cramton Rpt.* at 12.

Illegal aliens compete for jobs with persons legally residing in the United States who are unskilled and uneducated and who form that very group which our society is trying to provide with a fair share of America's prosperity.

In addition, illegal aliens tend to perpetuate poor economic conditions by frustrating unionization, especially in such occupations as farm work.

Illegal aliens pose a potential health hazard to the community since many seek work as nursemaids, food handlers, cooks, housekeepers, waiters, dishwashers, and grocery workers. Immigration and medical officials in

Los Angeles, for example, have discovered that the illegal alien population in Los Angeles' barrio is infected with a high incidence of typhoid, dysentery, tuberculosis, tapeworms, venereal disease and hepatitis. *L. A. Times,* Sept. 16, 1973, pt. II, at 1.

In some states illegal aliens abuse public assistance programs. In some instances entire families who entered the country illegally have been admitted to the welfare rolls. *Aliens in California* at 35, 43.

Another aspect of the problem created by illegal aliens is that employed aliens tend to send a substantial portion of their earnings to relatives or friends in Mexico. This outflow of United States dollars exacerbates our balance of payments problem to the extent of $1 billion a year. *Hearings on Illegal Aliens,* pt. 3 at 683.

The net effect of this silent invasion of illegal aliens from Mexico is suffering by the aliens who are frequently victims of extortion, violence and sharp practices, displacement of American citizens and legally residing aliens from the labor market, and irritation between two neighboring countries.

THE LAW ENFORCEMENT PROBLEM

Given that illegal aliens are a significant problem in American life, especially for those minority groups who are described as economically deprived, and that Congress has decreed that all but a relatively few aliens are to be permanently excluded, then we must analyze what law enforcement problems exist. In this regard, the following findings of fact are made:

The illegal alien problem is one found primarily in the Southwestern Region of the United States.

This problem along the Mexican-American border has existed for some time with the original responsibility for securing the integrity of the border being assigned to

the U. S. Army, along with the Departments of Treasury and Labor, who had about 20,000 men assigned to the border between Brownsville, Texas, and San Diego, California, in 1920. National Geographic Magazine, "Along Our Side of the Mexican Border." (July 1920).

Currently the burden of controlling the entry of aliens and stemming the flow of illegal aliens along the Mexican-American border is assigned to the INS.[1]

The border extends for almost 2,000 miles from the Gulf of Mexico to the Pacific Coast.

Along this border there were over 152 million legal entries at authorized ports of entry during fiscal 1972, of which over 91 million were made by aliens. Over 39 million of the legal entries were made at the three ports of entry in Southern California (Calexico, San Ysidro and Tecate) of which over 24 million were made by aliens. Immigration and Naturalization Service, 1972 Annual Report, 25.

Of these entries made by aliens, the large portion were made by visitors with official permission to enter the country who had been issued temporary "border passes" such as I–186 cards (issued to residents of Mexico), which authorize the holder to travel within an area no further than 25 miles from the border and for a period of time not to exceed 72 hours. See 8 C. F. R. § 212.6.

These temporary border passes (I–186) are issued to simplify procedures needed for entry, and the issuing process recognizes the inter-relationship of contiguous communities along both sides of the border. *Hearings on Illegal Aliens*, pt. 1, 192.

In fiscal 1973 approximately 208,000 I–186 cards were issued and it is estimated that over two million such

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[1] The notation "INS" when used herein has reference to the Immigration and Naturalization Service.

cards are currently in circulation. *Hearings on Illegal Aliens,* pt. 1, 173.

Within the INS, the U. S. Border Patrol, which was first established in 1924, has the primary function of preventing the illegal entry of aliens and the apprehension of those who have entered illegally and those who smuggle these illegal entrants.

The Border Patrol has approximately 1,700 agents, who are well-trained law enforcement officers, and of these about 80 percent are assigned along our southern border with Mexico.

A "deportable alien" is a person who has been found to be deportable by an immigration judge, or who admits his deportability upon questioning by official agents.

The number of deportable aliens apprehended by the Border Patrol (which makes the great majority of apprehensions) nationally has grown from 38,861 during fiscal 1963 to 498,123 in fiscal 1973; of this number 128,889 were found by Border Patrol agents working in the Chula Vista sector which includes 70 miles of the border in San Diego County, and 23,125 were located by agents in the El Centro sector which includes the Imperial County of California and 75 miles of the Mexican-American border.

The Border Patrol agents have the power to apprehend illegal aliens since by regulation the Attorney General has designated Border Patrol agents to be immigration officers and authorized them to exercise powers and duties as such officers [8 C. F. R. § 103.1 (i)]; immigration officers by statute § 101 (a)(17) of the Immigration and Nationality Act of 1952, 66 Stat. 163; as amended by the Act of October 3, 1973, 79 Stat. 911, 8 U. S. C. § 1101 (a)(17), are empowered, without a warrant, to stop and interrogate any alien or person believed to be an alien as to his right to remain or to be in the United

States. See Au Yi Lau v. I. N. S., 144 U. S. App. D. C. 147, 445 F. 2d 217 (1971), cert. denied, 404 U. S. 864 . . . .

Sec. 287 (a)(3) of the 1952 Immigration Act provides authority for an immigration officer within a reasonable distance from the border of the United States to board and search any conveyance or vehicle; "reasonable distance" as used in that section of the Act means within 100 air miles from any external boundary of the United States, 8 C. F. R. § 287.1 (b).

Immigration officers also are authorized to conduct inspection of aliens seeking admission or readmission to, or the privilege of passing through, the United States, and also are authorized and empowered to board and search any vehicle or like conveyance in which they believe aliens are being brought into the United States. Sec. 235 (a) of the 1952 Immigration Act, 8 U. S. C. § 1225 (a).

The deployment of Border Patrol agents along the border is intended to maximize the effectiveness of the limited number of personnel, with the first line of defense being called the "line watch." The line watch consists of agents being placed immediately upon the physical boundary where experience has shown that large numbers of illegal aliens can be detected attempting entry. A large number of agents so assigned are primarily concerned with responding to sensor alarms (electronic detection equipment) which are located at strategic positions. These agents also respond to citizen complaints concerning the suspected presence of deportable aliens.

In fiscal 1973, there were 175,511 deportable aliens apprehended throughout the nation by agents assigned to the line watch, with 69,147 being apprehended in the Chula Vista sector and 5,908 in the El Centro sector.

While the Border Patrol would like to apprehend all

deportable aliens right on the border by agents on the line watch, inspections at regular points of entry are not infallible and illegal crossings at other than legal ports of entry are numerous and recurring. The maintenance of continuous patrol over the vast stretches of the border in Southern California is physically impossible, since the approximately 145 miles of boundary creates geographic barriers to effective patrol and man-made devices such as fences and electronic devices are in large part ineffective.

Increased manpower on line watch would not make that activity appreciably more effective as was demonstrated in 1969 during "Operation Intercept" when many more agents were stationed immediately on the border, and yet, the number of illegal aliens apprehended by agents operating inland was not significantly different from like periods when such additional manpower was not located at the boundary.

Once the aliens negotiate their way through the port of entry or, as is most common, walk across the border at a place other than an official port of entry, they find transportation inland either in public conveyances, or private vehicles with increasing numbers being transported by professional smugglers. A few have been known to walk some distance inland and have been apprehended after having walked as far north as Julian, California, which is over 60 miles from the border.

After crossing the line watch some illegal aliens seek employment in the Southern District, but the vast majority attempt to proceed to Los Angeles County and points north.

Once the illegal alien gets settled in a big city far away from the border it becomes very difficult to apprehend him, and therefore, the Border Patrol attempts to contain the illegal entrant within this district. *Aliens in*

California at 7. With this objective in mind, they have (pursuant to their statutory authority discussed above) established, since at least 1927, strategically located traffic inspection facilities, commonly referred to as checkpoints, on highways and roads, for the purpose of questioning vehicle occupants believed to be aliens, as to their right to be, or to remain, in the United States, and also to search such vehicles for illegal aliens. Immigration and Naturalization Service Border Patrol Handbook 9-1 (1972) [hereinafter cited as *Handbook*].

The primary objective of the checkpoints is to intercept vehicles or conveyances transporting illegal aliens, or nonresident aliens admitted with temporary border passing cards (I-186), with particular attention being paid to vehicles operated by smugglers or transporters destined for inland cities in violation of 8 U. S. C. § 1324.

The selection of the location of a checkpoint is determined by factors relevant to the interdiction or interception of deportable aliens who have succeeded in gaining entry in an unlawful manner or are proceeding beyond the immediate border area in violation of conditions of their admission as border crossers, 8 C. F. R. § 212.60. The primary factors in selecting a checkpoint site are:

1. A location on a highway just beyond the confluence of two or more roads from the border, in order to permit the checking of a large volume of traffic with a minimum number of officers. This also avoids the inconvenience of repeated checking of commuter or urban traffic which would occur if the sites were operated on the network of roads leading from and through the more populated areas near the border.

2. Terrain and topography that restrict passage of vehicles around the checkpoint, such as mountains, desert, and, as in the case of the San Clemente checkpoint, the Camp Pendleton Marine Base.

3. Safety factors: an unobstructed view of oncoming traffic, to provide a safe distance for slowing and stopping; parking space off the highway; power source to illuminate control signs and inspection area, and bypass capability for vehicles *not* requiring examination.

4. Due to the travel restrictions of the I–186 non-resident border crosser to an area 25 miles from the border (unless issued additional documentation) the checkpoints, as a general rule, are located at a point beyond the 25 mile zone in order to control the unlawful movement inland of such visitors.

Strategic sites that meet the foregoing enumerated criteria are selected for "permanent checkpoints." These are sites equipped to handle a large volume of traffic on what would be a 24-hour basis except in case of manpower shortage, poor weather, or where traffic becomes excessive causing a potential safety hazard. *Handbook* at 9–3.

Other traffic checkpoints, known as "temporary checkpoints" are maintained on roads where traffic is less frequent. The placement of these sites will be governed by the same safety factors as involved in permanent site placement and are usually located where the terrain allows an element of surprise. Operations at these temporary checkpoints are set up at irregular intervals and intermittently so as to confuse the potential violator. *Handbook* at 9–3.

When the checkpoints, whether permanent or temporary, are in operation, an officer standing at the "point" in full dress uniform on the highway will view the decelerating oncoming vehicles and their passengers, and will visually determine whether he has reason to believe the occupants of the vehicle are aliens (i. e., "breaks the pattern" of usual traffic). If so, the vehicle will be stopped (if the traffic at the checkpoint is heavy, as at

the San Clemente checkpoint, the vehicle will be actually directed off the highway) for inquiries to be made by the agent. If the agent does not have reason to believe that the vehicle approaching the checkpoint is carrying aliens, he may exchange salutations, or merely wave the vehicle through the checkpoint.

If, after questioning the occupants, the agent then believes that illegal aliens may be secreted in the vehicle (because of a break in the "pattern" indicating the possibility of smuggling) he will inspect the vehicle by giving a cursory visual inspection of those areas of the vehicle not visible from the outside (i. e. trunk, interior portion of camper, etc.).

At the point of location of the sites now in regular use few aliens have reached the locale on foot, with 99 percent having entered a vehicle of one type or another. Approximately 12 percent of all apprehensions of deportable aliens throughout the nation are made at checkpoints.

In the United States, during fiscal 1973, approximately 55,300 deportable aliens were apprehended by Border Patrol agents working traffic checking operations. In the Chula Vista sector the number for that period was 21,232, while in the El Centro sector the total was 3,825.[2] During fiscal 1973, a total of 4,975 of the above were visitors apprehended at the checkpoints and a majority of these were those who were in violation of the terms of temporary border passes (Form I–186).

The placement of the checkpoints and their operations are coordinated between the two sectors located in this

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[2] Apparently apprehensions other than those actually made at the checkpoint are included in these figures, but they are a representation of the total activity at these checkpoints and the majority of apprehensions included therein are made at the checkpoints [R. T. 274, 396].

district and with Border Patrol activities to the east in Arizona. In actual operation the checkpoints, be they "permanent" or "temporary," have the same basic accouterments. Typically, about one-half mile to one mile south of the checkpoint is the first notification that the checkpoint is ahead. The notice is in the form of a black on yellow sign indicated "STOP AHEAD" which has floodlights for nighttime illumination, *Handbook* at 9–9. Next, about 200 yards from the checkpoint is another sign cautioning the traffic to slow down or to be careful; this sign usually has flashing yellow lights attached. For the fifty yards directly south of the checkpoint there are placed traffic cones evenly spaced along each side of the highway. The actual checkpoint has a sign indicating to the traffic to stop, with official Border Patrol vehicles parked on each side of the stop zone showing the official Border Patrol emblem and/or the designation U. S. OFFICERS. At this point the agents assigned at the "point," in their official uniform, conduct checking and inspection operations. Beyond the checkpoint is usually a sign indicating "THANK YOU."

While a large number of apprehensions are made at the checkpoints each year, as related above, the primary reason for their operation is that they effectively deter large numbers of aliens from illegally entering the country or violating the terms of any temporary crossing card they may have, because they form an effective obstacle and are located on all major routes north out of the border region.

The deterrence aspect of these traffic checkpoint operations is amply demonstrated by the fact that the illegal alien has to resort to the employment of professional smugglers to provide transportation around or through these checkpoints.

Some of these smuggling operations have developed

into sophisticated and involved operations with the following general *modus operandi*:

1. Contact is made between the smuggler and the alien prior to the latter's leaving Mexico.

2. The aliens then make entry on foot, with possibly the aid of a "guide," or by use of temporary border passes. Then they enter vehicles approximately 2 or 20 miles inland after having passed through the Border Patrol's line watch activities.

3. To get through the traffic checkpoint they might use a "drop house," which acts as a staging area to keep the aliens awaiting inclement weather, or any event that might cause the checkpoint to close down temporarily. Or, they may use a "decoy" vehicle, which is a vehicle loaded with illegal aliens which it is anticipated will be stopped at the checkpoint and would therefore occupy the agents so that other vehicles could pass through without inspection. They even use "scout cars" to probe those roads where temporary checkpoints are maintained, so as to advise other vehicles whether it is safe to proceed.

4. The "load" vehicles themselves can be of any type of conveyance and the methods used to secrete aliens inside them are varied and often show some originality. Unfortunately, sometimes these are very dangerous to the aliens themselves. It has been reported, for example, that it is not at all unusual for an alien to die from asphyxiation while concealed in an automobile trunk or a tank car.

5. The cost of the transportation provided to the aliens is approximately $225 to $250 for each alien for the trip through the checkpoint on to the Los Angeles area. Since smuggling operations are almost exclusively "cash and carry" businesses and the average income among Mexican nationals who may wish to seek resi-

dence here illegally is quite small, this cost tends to act as a very significant deterrent in and of itself. The checkpoints are the major reason for such a high price and if they were discontinued for any length of time it would be one more encouragement to illegal immigration.

The deterrent impact of these checkpoints has been noted on several occasions when they resumed operation unexpectedly and a great number of aliens were apprehended.

The evidence presented before this court clearly established that there is no reasonable or effective alternative method of detection and apprehension available to the Border Patrol in the absence of the checkpoints, for even a geometric increase in its personnel or line watch would not leave any control over those admitted as temporary visitors from Mexico.

Of the approximately half million illegal aliens apprehended in fiscal 1973, virtually none were prosecuted, unless they presented counterfeit or altered documents or aided in smuggling endeavors.

This district has only 3 percent of the total length of land borders, and yet fully 30 percent of all apprehensions of deportable aliens made in the United States are made within this district.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN joins, concurring in the judgment.*

Given *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973), with which I disagreed but which is now authoritative, the results reached in these cases were largely foreordained. The Court purports to leave the question open, but it seems to me, my Brother REHNQUIST

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*[This opinion applies also to No. 74-114, *United States* v. *Brignoni-Ponce, ante,* p. 873.]

notwithstanding, that under the Court's opinions checkpoint investigative stops, without search, will be difficult to justify under the Fourth Amendment absent probable cause or reasonable suspicion. In any event, the Court has thus dismantled major parts of the apparatus by which the Nation has attempted to intercept millions of aliens who enter and remain illegally in this country.

The entire system, however, has been notably unsuccessful in deterring or stemming this heavy flow; and its costs, including added burdens on the courts, have been substantial. Perhaps the Judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country. This problem, which ordinary law enforcement has not been able to solve, essentially poses questions of national policy and is chiefly the business of Congress and the Executive Branch rather than the courts.

I concur in the judgment in these two cases.

BOWEN *v.* UNITED STATES

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

No. 73-6848. Argued February 18, 1975—Decided June 30, 1975

The principles of *Almeida-Sanchez* v. *United States,* 413 U. S. 266, that the Fourth Amendment prohibits the Border Patrol from using roving patrols to search vehicles, without a warrant or probable cause, at points removed from the border and its functional equivalents, will not be applied retroactively to invalidate searches that occurred prior to the date of that decision. *United States* v. *Peltier, ante,* p. 531. As the Court of Appeals in this case correctly decided that *Almeida-Sanchez* did not apply retroactively, petitioner is not entitled to the benefit of that court's further but unnecessary ruling that *Almeida-Sanchez* extended to searches at traffic checkpoints. Pp. 918-921.

500 F. 2d 960, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., *post,* p. 921, and BRENNAN and MARSHALL, JJ., *post,* p. 921, filed dissenting statements. STEWART, J., dissented.

Michael D. Nasatir, by appointment of the Court, 419 U. S. 1017, argued the cause for petitioner. With him on the briefs was *Jerald W. Newton.*

Mark L. Evans argued the cause for the United States. With him on the brief were *Solicitor General Bork, Acting Assistant Attorney General Keeney,* and *Sidney M. Glazer.**

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*Briefs of *amici curiae* urging reversal were filed by *Sanford Jay Rosen* for the Mexican American Legal Defense and Educational Fund, and by *Arthur Wells, Jr.,* for Gilbert Bryant Foerster.

MR. JUSTICE POWELL delivered the opinion of the Court.

Petitioner was convicted of federal drug offenses based on evidence seized in January 1971 when Border Patrol officers stopped his camper pickup at a traffic checkpoint on California Highway 86, about 36 air miles from the Mexican border. The officers first determined that petitioner was a United States citizen, then asked him to open the camper so that they could search for concealed aliens. When petitioner opened the door, one officer noticed a strong odor of marihuana. He entered the camper and discovered approximately 356 pounds of the drug. A subsequent search of the passenger compartment produced a number of benzedrine tablets.

The Court of Appeals for the Ninth Circuit affirmed petitioner's conviction, rejecting his argument that the search was unlawful. 462 F. 2d 347 (1972). A petition for certiorari was pending when we announced our decision in *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973), holding that the Fourth Amendment prohibits the use of roving patrols to search vehicles, with neither a warrant nor probable cause, at points removed from the border and its functional equivalents. We vacated the judgment in petitioner's case and remanded for reconsideration in light of *Almeida-Sanchez.* 413 U. S. 915 (1973).

The Court of Appeals reheard the case en banc and held, in a sharply divided opinion, that the principles of *Almeida-Sanchez* applied to searches conducted at traffic checkpoints as well as searches conducted by roving patrols. The Court nevertheless affirmed petitioner's conviction, holding that *Almeida-Sanchez* would not be applied to invalidate searches that occurred prior to the date of that decision. 500 F. 2d 960 (1974). We

granted certiorari to resolve an apparent conflict with the Court of Appeals for the Tenth Circuit in *United States* v. *King,* 485 F. 2d 353 (1973), and *United States* v. *Maddox,* 485 F. 2d 361 (1973).

We hold today in *United States* v. *Ortiz, ante,* p. 891, that the Fourth Amendment, as interpreted in *Almeida-Sanchez,* forbids searching cars at traffic checkpoints in the absence of consent or probable cause. In this case the Government does not contend that the Highway 86 checkpoint is a functional equivalent of the border, that the officers had probable cause to open the camper, or that petitioner consented to the search. The primary question for decision is whether the principles of *Almeida-Sanchez* should have been applied retroactively.

In *United States* v. *Peltier, ante,* p. 531, we refused to apply *Almeida-Sanchez* to a roving-patrol search conducted before June 21, 1973, even though a direct appeal was pending on that date. We think the decision in *Peltier* is controlling here, as the reasons that dictated a holding of nonretroactivity in that case are equally applicable. At the time of our decision in *Almeida-Sanchez,* all the Courts of Appeals in Circuits adjacent to the Mexican border had held that immigration officers at traffic checkpoints could search automobiles for concealed aliens. *E. g., United States* v. *McCormick,* 468 F. 2d 68 (CA10 1972); *United States* v. *De Leon,* 462 F. 2d 170 (CA5 1972); *Fumagalli* v. *United States,* 429 F. 2d 1011 (CA9 1970).[1] This Court had

[1] While approving checkpoint searches for aliens, the Court of Appeals for the Ninth Circuit had limited the Border Patrol's authority to search for *contraband* at points away from the border. *E. g., Cervantes* v. *United States,* 263 F. 2d 800 (1959); see *Fumagalli* v. *United States,* 429 F. 2d 1011 (1970). The search of petitioner's camper was not invalid under these cases because the agent was engaged in a search for aliens, legal under the Ninth

not ruled on the question, and no contrary precedent was reported in other Courts of Appeals. The Border Patrol reasonably relied on the decisions of the Court of Appeals in performing the search in this case and others like it, and in these circumstances the purposes of the Fourth Amendment exclusionary rule would not be served by applying the principles of *Almeida-Sanchez* retroactively.

Petitioner further argues that even if *Almeida-Sanchez*

Circuit's decisions, when he developed probable cause to believe that the camper contained marihuana.

There was some ground for confusion about the state of the law in the Fifth Circuit at the time *Almeida-Sanchez* was decided. Early cases had affirmed immigration officers' authority to search for aliens at traffic checkpoints. *E. g., Ramirez* v. *United States,* 263 F. 2d 385 (1959); *Kelly* v. *United States,* 197 F. 2d 162 (1952). Later cases took the same view, *e. g., United States* v. *De Leon,* 462 F. 2d 170 (1972), although one opinion seemed to hold that the authority to search at checkpoints was qualified by a requirement that the location and operation of the checkpoint be reasonable. *United States* v. *McDaniel,* 463 F. 2d 129, 133 (1972). Two decisions by other panels of the court ambiguously suggested that a search at a checkpoint must be supported by "reasonable suspicion." *United States* v. *Wright,* 476 F. 2d 1027 (1973); *United States* v. *Maggard,* 451 F. 2d 502 (1971). But a later opinion seemed to adopt the Ninth Circuit's distinction between searches for aliens and searches for contraband, suggesting that immigration searches could be made without suspicion while customs searches required a foundation for believing that the particular car contained contraband. *United States* v. *Thompson,* 475 F. 2d 1359, 1362 (1973).

Neither of the cases suggesting that "reasonable suspicion" was required for immigration searches resulted in a decision invalidating a search, and none of the court's opinions indicated disagreement with the earlier cases establishing an unqualified right to search for aliens at checkpoints whose location and operation were reasonable. Under these circumstances, we conclude that the Government reasonably relied on the earlier cases in continuing to make immigration searches at checkpoints.

is not to be applied retroactively he is entitled to the benefit of the Court of Appeals' decision that *Almeida-Sanchez* extended to checkpoint searches. He invokes this Court's practice of applying new constitutional doctrine in the case that establishes the point,[2] and maintains that the Court of Appeals' refusal to apply its extension of *Almeida-Sanchez* in his case made its discussion of that point mere dictum. We conclude, however, that the only error of the Court of Appeals was its reaching out to decide that *Almeida-Sanchez* applied to checkpoint searches in a case that did not require decision of the issue.

The Government raised two questions in the Court of Appeals: whether *Almeida-Sanchez* applied retroactively, and if it did, whether it would require probable cause for checkpoint searches. This Court consistently has declined to address unsettled questions regarding the scope of decisions establishing new constitutional doctrine in cases in which it holds those decisions nonretroactive. *E. g., Michigan* v. *Payne,* 412 U. S. 47, 49–50 (1973); *DeStefano* v. *Woods,* 392 U. S. 631 (1968). This practice is rooted in our reluctance to decide constitutional questions unnecessarily. See *United States* v. *Raines,* 362 U. S. 17, 21 (1960); *Ashwander* v. *TVA,* 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring). Because this reluctance in turn is grounded in the constitutional role of the federal courts, *United States* v. *Raines, supra,* the district courts and courts of appeals should follow our practice, when issues of both retroactivity and application of constitutional doctrine are raised, of deciding the retroactivity issue first. As the

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[2] See *Stovall* v. *Denno,* 388 U. S. 293, 301 (1967); compare *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), with *DeStefano* v. *Woods,* 392 U. S. 631 (1968); compare *North Carolina* v. *Pearce,* 395 U. S. 711 (1969), with *Michigan* v. *Payne,* 412 U. S. 47 (1973).

Court of Appeals correctly decided in this case that *Almeida-Sanchez* did not apply to a 1971 search, it should have refrained from considering whether our decision in that case applied to searches at checkpoints.

Petitioner contends, nevertheless, that once the Court of Appeals addressed the unnecessary issue it was bound to apply that ruling in his case. Because it refused to do so, petitioner says the court rendered a hypothetical decision forbidden by Art. III of the Constitution. It is true that this Court has suggested that Art. III is the primary impetus for applying new constitutional doctrines in cases that establish them for the first time. *Stovall* v. *Denno,* 388 U. S. 293, 301 (1967). But petitioner's case is altogether different. *Almeida-Sanchez* already had established the principle, and there was a genuine controversy between petitioner and the United States over its retroactive application. Contrary to petitioner's assertion, the court's jurisdiction to resolve that controversy could not be dislodged by its discussion of an unnecessary issue.

The judgment of the Court of Appeals is

Affirmed.

Mr. Justice Douglas dissents for the reasons stated in his dissent in *United States* v. *Peltier, ante,* p. 543.

Mr. Justice Brennan and Mr. Justice Marshall dissent and would reverse substantially for the reasons expressed in Mr. Justice Brennan's dissent in *United States* v. *Peltier, ante,* p. 544.

Mr. Justice Stewart dissents.

DORAN *v.* SALEM INN, INC., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 74-337. Argued April 21-22, 1975—Decided June 30, 1975

Three corporations (M & L, Salem, and Tim-Rob), on August 9, 1973, filed a complaint in District Court, seeking a temporary restraining order, preliminary injunction, and declaratory relief, against Doran, a law enforcement official, claiming that a North Hempstead, N. Y., ordinance proscribing topless dancing, which the corporations had provided as entertainment in their bars, violated their First and Fourteenth Amendment rights. The District Court denied the prayer for a temporary restraining order *instanter* and set the motion for a preliminary injunction for hearing on August 22. On August 10, M & L, alone of the three corporations, which had theretofore complied with the ordinance, resumed topless dancing, whereupon it was served with criminal summonses. Thereafter, the District Court issued a preliminary injunction against enforcement of the ordinance against the corporations "pending the final determination of this action." The Court of Appeals affirmed, holding that the "ordinance would have to fall" and rejecting Doran's claim that the District Court should have dismissed the complaint on the authority of *Younger* v. *Harris,* 401 U. S. 37, and companion cases, which it concluded did not bar relief as to Salem and Tim-Rob, because there had been no prosecution against them under the ordinance. A different result for M & L was not deemed warranted in view of the interests of avoiding contradictory outcomes, of conserving judicial energy, and of having a clearcut method for determining when federal courts should defer to state prosecutions. Doran appealed under 28 U. S. C. § 1254 (2), which gives this Court appellate jurisdiction at the behest of a party relying on a state statute held unconstitutional by a court of appeals. *Held:*

1. The issues, which were neither briefed nor argued, whether § 1254 (2) applies to a review of the affirmance of a preliminary injunction or is confined to review of a final judgment, and whether the Court of Appeals in fact held the ordinance unconstitutional, need not be resolved, since this Court has certiorari jurisdiction under 28 U. S. C. § 2103, under which this matter can be reviewed. P. 927.

2. The question of entitlement to relief in the light of *Younger* v. *Harris, supra,* and companion cases, should be considered as to each corporation separately and not in the light of contradictory outcomes and other factors relied upon by the Court of Appeals when it lumped the three plaintiffs together. Pp. 927–929.

3. *Younger* squarely bars injunctive relief and *Samuels* v. *Mackell,* 401 U. S. 66, bars declaratory relief for M & L in view of the fact that when the criminal summonses were issued on the days immediately following the filing of the federal complaint, the federal litigation was in an embryonic stage and no contested matter had been decided. P. 929.

4. Salem and Tim-Rob, against whom no criminal proceedings were pending, were not subject to *Younger*'s restrictions in seeking declaratory relief. *Steffel* v. *Thompson,* 415 U. S. 452. Those two corporations could also seek preliminary injunctive relief without regard to *Younger*'s restrictions, since prior to a final judgment a declaratory remedy cannot afford relief comparable to a preliminary injunction. Pp. 930–931.

5. In the circumstances of this case and in the light of existing case law, the District Court did not abuse its discretion in granting preliminary injunctive relief to Salem and Tim-Rob. Pp. 931–934.

(a) The District Court was entitled to conclude that Salem and Tim-Rob satisfied one of the two traditional requirements for securing a preliminary injunction, *viz.,* showing irreparable injury, because they made uncontested allegations that absent such relief they would suffer a substantial business loss and perhaps even bankruptcy. Pp. 931–932.

(b) The District Court was also entitled to conclude that those corporations satisfied the other traditional requirement for interim relief by showing a likelihood that they would prevail on the merits, since they were, *inter alia,* challenging (and had standing to challenge, *Grayned* v. *City of Rockford,* 408 U. S. 104, 115) a "topless" ordinance as being unconstitutionally overbroad in its application to protected activities at places that do not serve liquor as well as to places that do. See *California* v. *LaRue,* 409 U. S. 109, 118. Pp. 932–934.

Appeal dismissed and certiorari granted; 501 F. 2d 18, reversed as to M & L, and affirmed as to Salem and Tim-Rob.

Rehnquist, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, Stewart, White, Marshall, Blackmun,

and Powell, JJ., joined. Douglas, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 934.

Joseph H. Darago argued the cause for appellant. With him on the brief was *Francis F. Doran, pro se.*

Herbert S. Kassner argued the cause for appellees. With him on the brief was *Ralph J. Schwarz, Jr.*

Mr. Justice Rehnquist delivered the opinion of the Court.

Appellant is a town attorney in Nassau County, N. Y., who, along with other local law enforcement officials, was preliminarily enjoined by the United States District Court for the Eastern District of New York from enforcing a local ordinance of the town of North Hempstead. *Salem Inn, Inc.* v. *Frank,* 364 F. Supp. 478 (1973), aff'd, 501 F. 2d 18 (CA2 1974). In addition to defending the ordinance on the merits, he contends that the complaint should have been dismissed on the authority of *Younger* v. *Harris,* 401 U. S. 37 (1971), and its companion cases.

Appellees are three corporations which operate bars at various locations within the town. Prior to enactment of the ordinance in question, each provided topless dancing as entertainment for its customers. On July 17, 1973, the town enacted Local Law No. 1–1973, an ordinance making it unlawful for bar owners and others to permit waitresses, barmaids, and entertainers to appear in their establishments with breasts uncovered or so thinly draped as to appear uncovered. Appellees complied with the ordinance by clothing their dancers in bikini tops, but on August 9, 1973, brought this action in the District Court under 42 U. S. C. § 1983. They alleged that the ordinance violated their rights under the First and Fourteenth Amendments to the United States Constitution. Their pleadings sought a temporary re-

straining order, a preliminary injunction, and declaratory relief. The prayer for a temporary restraining order was denied *instanter,* but the motion for a preliminary injunction was set for a hearing on August 22, 1973.

On August 10, the day after the appellees' complaint was filed, and their application for a temporary restraining order denied, one of them, M & L Restaurant, Inc., resumed its briefly suspended presentation of topless dancing. On that day, and each of the three succeeding days, M & L and its topless dancers were served with criminal summonses based on violation of the ordinance.[1] These summonses were returnable before the Nassau County Court on September 13, 1973. The other two appellees, Salem Inn, Inc., and Tim-Rob Bar, Inc., did not resume the presentation of topless entertainment in their bars until after the District Court issued its preliminary injunction.

On September 5, 1973, appellant filed an answer which alleged that a criminal prosecution had been instituted against at least one of the appellees; the District Court was urged to "refuse to exercise jurisdiction" and to dismiss the complaint. App. 33.

On September 6, 1973, on the basis of oral argument and memoranda of law, the District Court entered an opinion and order in which it "[found] that (1) Local Law No. 1–1973 of the Town of North Hempstead is on its face violative of plaintiffs' First Amendment rights in that it prohibits across the board nonobscene conduct in the form of topless dancing, and (2) that the daily penalty of $500 for each violation of the ordinance, the prior state-court decision validating a similar ordinance,

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[1] The ordinance provides that each day's violation constitutes a separate offense.

the overbreadth of the ordinance, and the potential harm to plaintiffs' business by its enforcement justify federal intervention and injunctive relief." 364 F. Supp., at 483. The court concluded by enjoining appellant "pending the final determination of this action . . . from prosecuting the plaintiffs for any violation of Local Law No. 1–1973 . . . or in any way interfering with their activities which may be prohibited by the text of said Local Law." *Ibid.* The court did address appellant's *Younger* contention, but held that the pending prosecution against M & L did not affect the availability of injunctive relief to Salem and Tim-Rob. As for M & L, it concluded that if federal relief were granted to two of the appellees, "it would be anomalous" not to extend it to M & L as well. *Id.*, at 482.

The Court of Appeals for the Second Circuit affirmed by a divided vote. It held that the "ordinance would have to fall," 501 F. 2d, at 21, and that the claim of deprivation of constitutional rights and diminution of business warranted the issuance of a preliminary injunction. The Court of Appeals rejected appellant's claim that the District Court ought to have dismissed appellees' complaint on the authority of *Younger* v. *Harris, supra,* and its companion cases. As to Salem and Tim-Rob, *Younger* did not present a bar because there had at no time been a pending prosecution against them under the ordinance. As for M & L, the court thought that it posed "a slightly different problem," 501 F. 2d, at 22, since the state prosecution was begun only one day after the filing of appellees' complaint in the District Court. The court recognized that this situation was not squarely covered by either *Younger* or *Steffel* v. *Thompson,* 415 U. S. 452 (1974), but concluded that the interests of avoiding contradictory outcomes, of conservation of judicial energy, and of a clearcut method for determining when federal

courts should defer to state prosecutions, all militated in favor of granting relief to all three appellees.

We deal first with a preliminary jurisdictional matter. This appeal was taken under 28 U. S. C. § 1254 (2), which provides this Court with appellate jurisdiction at the behest of a party relying on a state statute held unconstitutional by a court of appeals.[2] There is authority, questioned but never put to rest, that § 1254 (2) is available only when review is sought of a final judgment. *Slaker* v. *O'Connor*, 278 U. S. 188 (1929); *South Carolina Electric & Gas Co.* v. *Flemming*, 351 U. S. 901 (1956). But see *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 82–83 (1958). The present appeal, however, seeks review of the affirmance of a preliminary injunction. We also are less than completely certain that the Court of Appeals did in fact hold Local Law 1–1973 to be unconstitutional, since it considered the merits only for the purpose of ruling on the propriety of preliminary injunctive relief. We need not resolve these issues, which have neither been briefed nor argued, because we in any event have certiorari jurisdiction under 28 U. S. C. § 2103. As we have previously done in an identical situation, *El Paso* v. *Simmons*, 379 U. S. 497, 502–503 (1965), we dismiss the appeal and, treating the papers as a petition for certiorari, grant the writ of certiorari.

Turning to the *Younger* issues raised by petitioner, we are faced with the necessity of determining whether the holdings of *Younger*, *supra*, *Steffel*, *supra*, and *Samuels* v. *Mackell*, 401 U. S. 66 (1971), must give way before such interests in efficient judicial administration as were relied upon by the Court of Appeals. We think

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[2] For the purposes of § 1254 (2), local ordinances are treated as state statutes. See, *e. g.*, *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77 (1958).

that the interest of avoiding conflicting outcomes in the litigation of similar issues, while entitled to substantial deference in a unitary system, must of necessity be subordinated to the claims of federalism in this particular area of the law. The classic example is the petitioner in *Steffel* and his companion. Both were warned that failure to cease pamphleteering would result in their arrest, but while the petitioner in *Steffel* ceased and brought an action in the federal court, his companion did not cease and was prosecuted on a charge of criminal trespass in the state court. 415 U. S., at 455–456. The same may be said of the interest in conservation of judicial manpower. As worthy a value as this is in a unitary system, the very existence of one system of federal courts and 50 systems of state courts, all charged with the responsibility for interpreting the United States Constitution, suggests that on occasion there will be duplicating and overlapping adjudication of cases which are sufficiently similar in content, time, and location to justify being heard before a single judge had they arisen within a unitary system.

We do not agree with the Court of Appeals, therefore, that all three plaintiffs should automatically be thrown into the same hopper for *Younger* purposes, and should thereby each be entitled to injunctive relief. We cannot accept that view, any more than we can accept petitioner's equally Procrustean view that because M & L would have been barred from injunctive relief had it been the sole plaintiff, Salem and Tim-Rob should likewise be barred not only from injunctive relief but from declaratory relief as well. While there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of them, this is not such a case—while respondents are represented

by common counsel, and have similar business activities and problems, they are apparently unrelated in terms of ownership, control, and management. We thus think that each of the respondents should be placed in the position required by our cases as if that respondent stood alone.

Respondent M & L could have pursued the course taken by the other respondents after the denial of their request for a temporary restraining order. Had it done so, it would not have subjected itself to prosecution for violation of the ordinance in the state court. When the criminal summonses issued against M & L on the days immediately following the filing of the federal complaint, the federal litigation was in an embryonic stage and no contested matter had been decided. In this posture, M & L's prayer for injunction is squarely governed by *Younger*.

We likewise believe that for the same reasons *Samuels* v. *Mackell* bars M & L from obtaining declaratory relief, absent a showing of *Younger*'s special circumstances, even though the state prosecution was commenced the day following the filing of the federal complaint. Having violated the ordinance, rather than awaiting the normal development of its federal lawsuit, M & L cannot now be heard to complain that its constitutional contentions are being resolved in a state court. Thus M & L's prayers for both injunctive and declaratory relief are subject to *Younger*'s restrictions.[3]

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[3] Respondent M & L urges in defense of its judgment that even if the case is controlled by the principles of *Younger* and *Samuels* v. *Mackell*, 401 U. S. 66 (1971), it may obtain injunctive and declaratory relief because of the presence of the requisite special circumstances. See *Younger*, 401 U. S., at 53–54. In particular, M & L claims that it was the subject of "repetitive harassing criminal prosecutions aimed at suppressing the expressive activity carried on"

The rule with regard to the coplaintiffs, Salem and Tim-Rob, is equally clear, insofar as they seek declaratory relief. Salem and Tim-Rob were not subject to state criminal prosecution at any time prior to the issuance of a preliminary injunction by the District Court. Under *Steffel* they thus could at least have obtained a declaratory judgment upon an ordinary showing of entitlement to that relief. The District Court, however, did not grant declaratory relief to Salem and Tim-Rob, but instead granted them preliminary injunctive relief. Whether injunctions of future criminal prosecutions are governed by *Younger* standards is a question which we reserved in both *Steffel,* 415 U. S., at 463, and *Younger* v. *Harris,* 401 U. S., at 41. We now hold that on the facts of this case the issuance of a preliminary injunction is not subject to the restrictions of *Younger*. The principle underlying *Younger* and *Samuels* is that state courts are fully competent to adjudicate constitutional claims, and therefore a federal court should, in all but the most exceptional circumstances, refuse to interfere with an ongoing state criminal proceeding. In the absence of such a proceeding, however, as we recognized in *Steffel,* a plaintiff may challenge the constitutionality of the state statute in federal court, assuming he can satisfy the requirements for federal jurisdiction. See also *Lake Carriers' Assn.* v. *MacMullan,* 406 U. S. 498, 509 (1972).

No state proceedings were pending against either Salem or Tim-Rob at the time the District Court issued its preliminary injunction. Nor was there any question that they satisfied the requirements for federal jurisdiction. As we have already stated, they were assuredly entitled to declaratory relief, and since we have previously

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at its bar. Brief for Appellees 35. The District Court did not have occasion to consider this issue, and we decline to do so on the basis of the spare record before us.

recognized that "[o]rdinarily . . . the practical effect of [injunctive and declaratory] relief will be virtually identical," *Samuels,* 401 U. S., at 73, we think that Salem and Tim-Rob were entitled to have their claims for preliminary injunctive relief considered without regard to *Younger*'s restrictions. At the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary. But prior to final judgment there is no established declaratory remedy comparable to a preliminary injunction; unless preliminary relief is available upon a proper showing, plaintiffs in some situations may suffer unnecessary and substantial irreparable harm. Moreover, neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute.

The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits. It is recognized, however, that a district court must weigh carefully the interests on both sides. Although only temporary, the injunction does prohibit state and local enforcement activities against the federal plaintiff pending final resolution of his case in the federal court. Such a result seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of *Younger.*

But while the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate

review is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion. *Brown* v. *Chote,* 411 U. S. 452, 457 (1973). While we regard the question as a close one, we believe that the issuance of a preliminary injunction in behalf of respondents Salem and Tim-Rob was not an abuse of the District Court's discretion. As required to support such relief, these respondents alleged (and petitioner did not deny) that absent preliminary relief they would suffer a substantial loss of business and perhaps even bankruptcy. Certainly the latter type of injury sufficiently meets the standards for granting interim relief, for otherwise a favorable final judgment might well be useless.

The other inquiry relevant to preliminary relief is whether respondents made a sufficient showing of the likelihood of ultimate success on the merits. Both the District Court and the Court of Appeals found such a likelihood. The order of the District Court spoke in terms of actually holding the ordinance unconstitutional, but in the context of a preliminary injunction the court must have intended to refer only to the likelihood that respondents ultimately would prevail. The Court of Appeals properly clarified this point. 501 F. 2d, at 20–21.

Although the customary "barroom" type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California* v. *LaRue,* 409 U. S. 109, 118 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In *LaRue,* however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could

therefore ban such dancing as a part of its liquor license program.

In the present case, the challenged ordinance applies not merely to places which serve liquor, but to many other establishments as well. The District Court observed, we believe correctly:

> "The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in 'any public place' with uncovered breasts. There is no limit to the interpretation of the term 'any public place.' It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the 'Ballet Africains' and a number of other works of unquestionable artistic and socially redeeming significance." 364 F. Supp., at 483.

We have previously held that even though a statute or ordinance may be constitutionally applied to the activities of a particular defendant, that defendant may challenge it on the basis of overbreadth if it is so drawn as to sweep within its ambit protected speech or expression of other persons not before the Court. As we said in *Grayned* v. *City of Rockford,* 408 U. S. 104, 114 (1972):

> "Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge."

Even if we may assume that the State of New York has delegated its authority under the Twenty-first Amendment to towns such as North Hempstead, and that the ordinance would therefore be constitutionally valid under *LaRue, supra,* if limited to places dispensing alcoholic beverages, the ordinance in this case is not so

limited. Nor does petitioner raise any other legitimate state interest that would counterbalance the constitutional protection presumptively afforded to activities which are plainly within the reach of Local Law 1-1973. See *United States* v. *O'Brien,* 391 U. S. 367, 377 (1968).

In these circumstances, and in the light of existing case law, we cannot conclude that the District Court abused its discretion by granting preliminary injunctive relief. This is the extent of our appellate inquiry, and we therefore "intimate no view as to the ultimate merits of [respondents'] contentions." *Brown* v. *Chote, supra,* at 457. The judgment of the Court of Appeals is reversed as to respondent M & L, and affirmed as to respondents Salem and Tim-Rob.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring in the judgment in part and dissenting in part.

While adhering to my position in *Younger* v. *Harris,* 401 U. S. 37, 58 (1971) (dissenting opinion), I join the judgment of the Court insofar as it holds that Salem Inn and Tim-Rob were entitled to a preliminary injunction pending disposition of their request for declaratory relief. I do not condone the conduct of M & L in violating the challenged ordinance without awaiting judicial action on its federal complaint, but like the Court of Appeals, I find no compelling reason to distinguish M & L from the other respondents in terms of the relief which is appropriate. I would therefore affirm the judgment below in all respects.

WHITE, SECRETARY OF STATE OF TEXAS, ET AL. v. REGESTER ET AL.

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

No. 73-1462. Argued February 19, 1975—Decided June 30, 1975

In light of recent Texas apportionment legislation substituting single-member election districts for the multimember districts at issue, the District Court's judgment is vacated, and the case is remanded to that court for reconsideration and for dismissal if the case is or becomes moot.

378 F. Supp. 640, vacated and remanded.

Elizabeth B. Levatino, Special Assistant Attorney General of Texas, argued the cause for appellants. With her on the briefs were *John L. Hill,* Attorney General, *Larry F. York,* former First Assistant Attorney General, and *David M. Kendall*, First Assistant Attorney General.

David R. Richards argued the cause for appellees Regester et al. With him on the brief were *Jack Greenberg, James M. Nabrit III, J. Phillip Crawford, Oscar H. Mauzy, Wm. Terry Bray, Sanford Jay Rosen,* and *George J. Korbel. Don Gladden* argued the cause for appellees Escalante et al. With him on the briefs was *Marvin Collins.*

PER CURIAM.

We are informed that the State of Texas has adopted new apportionment legislation providing single-member districts to replace the multimember districts which are at issue before us in this case. That statute by its terms does not become effective until the 1976 elections, and intervening special elections to fill vacancies, if any, will be held in the districts involved as constituted on January 1, 1975. Rather than render an unnecessary judg-

ment on the validity of the constitutional views expressed by the District Court in this case, which we do not undertake to do at this time, we vacate the judgment of the District Court and remand the case to that court for reconsideration in light of the recent Texas reapportionment legislation and for dismissal if the case is or becomes moot.

So ordered.

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

HILL, ATTORNEY GENERAL OF TEXAS, ET AL. v. PRINTING INDUSTRIES OF THE GULF COAST ET AL.

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

No. 74–456. Argued April 15, 1975—Decided June 30, 1975

In light of recent amendments to the Texas Election Code provision whose constitutionality is at issue, the District Court's judgment is vacated, and the case is remanded to that court for reconsideration and for dismissal if the case is or becomes moot.

382 F. Supp. 801, vacated and remanded.

John W. Odam, Executive Assistant Attorney General of Texas, argued the cause for appellants. On the briefs were *John L. Hill,* Attorney General, *pro se, David M. Kendall,* First Assistant Attorney General, and *Elizabeth B. Levatino,* First Special Assistant Attorney General.

Gerald M. Birnberg argued the cause for appellees. With him on the brief were *James T. Evans* and *Michael Anthony Maness.**

PER CURIAM.

The parties to this case have informed us that the State of Texas has enacted the Political Funds Reporting and Disclosure Act of 1975, which will become effective on September 1, 1975.† Section 11 of that Act substantially amends Art. 14.10 (b) (Supp. 1974–1975) of the Texas Election Code, the constitutionality of which is at issue in this appeal. Although the parties take the position that these amendments do not affect this case,

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**David Crump* filed a brief for Common Cause as *amicus curiae* urging reversal.

†Tex. Const., Art. 3, § 39.

we prefer to remand the case to the District Court for reconsideration in light of the recent amendments, rather "than render an unnecessary judgment on the validity of the constitutional views expressed by the District Court." *White* v. *Regester, ante,* p. 935.

The judgment of the District Court is vacated. The case is remanded to that court for reconsideration in light of the new legislation and for dismissal if the case is or becomes moot.

So ordered.

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

REPORTER'S NOTE

The next page is purposely numbered 1001. The numbers between 938 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

we prefer to remand the case to the District Court for reconsideration in light of the recent amendments, rather "than render an unnecessary judgment on the validity of the constitutional [illegible] approved by the District Court." [illegible] v. [illegible], ante, p. [illegible].

The judgment of the District Court is vacated. The case is remanded to that court for reconsideration in light of the new legislation and for dismissal if the case is or becomes moot.

[illegible]

MR. JUSTICE [illegible] in the consideration or decision of this case.

ORDERS FROM JUNE 16 THROUGH JUNE 30, 1975

June 16, 1975*

Appeals Dismissed

No. 74–1209. Westinghouse Electric Corp. et al. *v.* County of Los Angeles et al. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. Reported below: 42 Cal. App. 3d 32, 116 Cal. Rptr. 742.

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*Mr. Justice Douglas took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date, with the exception of the following:

No. 69–1, *Augenblick* v. *United States, infra,* p. 1007; No. 73–1288, *Alfred Dunhill of London, Inc.* v. *Republic of Cuba, infra,* p. 1005; No. 74–294, *Watson* v. *Kenlick Coal Co., Inc., infra,* p. 1012; No. 74–883, *Federal Power Commission* v. *Moss, infra,* p. 1006; No. 74–1045, *Moss* v. *Federal Power Commission, infra,* p. 1020; No. 74–1063, *Carter* v. *United States, infra,* p. 1020; No. 74–1094, *Womack* v. *United States, infra,* p. 1022; No. 74–1096, *Conk* v. *Clegg, infra,* p. 1007; No. 74–1103, *Estelle* v. *Johnson, infra,* p. 1024; No. 74–1115, *Miller* v. *United States, infra,* p. 1024; No. 74–1144, *Lawrence* v. *South Carolina, infra,* p. 1025; No. 74–1161, *Clements* v. *Faraca, infra,* p. 1006; No. 74–1180, *Pinell* v. *California, infra,* p. 1007; No. 74–1192, *Karp* v. *United States, infra,* p. 1007; No. 74–1207, *American Chemical Corp.* v. *County of Los Angeles, infra,* p. 1007; No. 74–1209, *Westinghouse Electric Corp.* v. *County of Los Angeles, infra,* this page; No. 74–1228, *Miller* v. *United States, infra,* p. 1025; No. 74–1276, *Cotten* v. *Schlesinger, infra,* p. 1027; No. 74–1327, *Democratic Executive Committee of Columbiana County, infra,* p. 1002; No. 74–1342, *Teschner* v. *Chicago Title & Trust Co., infra,* p. 1002; No. 74–1345, *U. S. Merchandise Mart, Inc.* v. *D&H Distributing Co., infra,* p. 1007; No. 74–1362, *Waddell* v. *Fleming, infra,* p. 1007; No. 74–1365, *Joyner* v. *North Carolina, infra,* p. 1002; No. 74–1379, *Poulson* v. *Walsh-Groves, infra,* p. 1002; No. 74–1460, *Augenblick* v. *United States, infra,* p. 1007; and No. 74–6195, *Waugh* v. *Gray, infra,* p. 1027.

No. 74–1365. JOYNER *v.* NORTH CAROLINA. Appeal from Sup. Ct. N. C. dismissed for want of substantial federal question. Reported below: 286 N. C. 366, 211 S. E. 2d 320.

No. 74–1379. POULSON *v.* WALSH-GROVES ET AL. Appeal from Sup. Ct. Mont. dismissed for want of substantial federal question. Reported below: 166 Mont. 163, 531 P. 2d 1335.

No. 74–1342. TESCHNER *v.* CHICAGO TITLE & TRUST CO. ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 59 Ill. 2d 452, 322 N. E. 2d 54.

No. 74–1347. THOMPSON ET UX. *v.* PROPERTY TAX APPEAL BOARD OF ILLINOIS ET AL. Appeal from App. Ct. Ill., 2d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 22 Ill. App. 3d 316, 317 N. E. 2d 121.

No. 74–6215. WOODS *v.* GEORGIA. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 233 Ga. 347, 211 S. E. 2d 300.

Vacated and Remanded on Appeal

No. 74–1327. DEMOCRATIC EXECUTIVE COMMITTEE OF COLUMBIANA COUNTY, OHIO, ET AL. *v.* BROWN, SECRETARY OF STATE OF OHIO. Appeal from D. C. N. D. Ohio. Judgment vacated and case remanded so that a fresh order or decree may be entered from which a timely appeal may be taken to the United States Court of Appeals

for the Sixth Circuit. *MTM, Inc.* v. *Baxley,* 420 U. S. 799 (1975).

Certiorari Granted—Vacated and Remanded

No. 73-6761. BURKO *v.* MARYLAND. Ct. App. Md. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Mullaney* v. *Wilbur,* 421 U. S. 684 (1975).

No. 74-5632. CASTRO *v.* REGAN, PRISON SUPERINTENDENT. C. A. 3d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Mullaney* v. *Wilbur,* 421 U. S. 684 (1975). Reported below: 505 F. 2d 731.

Miscellaneous Orders

No. A-933. ED. PHILLIPS & SONS CO. ET AL. *v.* NOVAK, LIQUOR CONTROL COMMISSIONER OF MINNESOTA, ET AL.; and

No. A-994. GRIGGS, COOPER & CO., INC., *v.* NOVAK, LIQUOR CONTROL COMMISSIONER OF MINNESOTA, ET AL. Sup. Ct. Minn. Applications for stay of enforcement of Minnesota Laws 1973, c. 664, § 2 (Minn. Stat. § 340.114 (1974)), presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. THE CHIEF JUSTICE took no part in the consideration or decision of these applications.*

No. A-996 (74-1222). WOLFF, WARDEN *v.* RICE. C. A. 8th Cir. Application of respondent for bail pending disposition of petition for writ of certiorari, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied.

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*See also note, *supra*, p. 1001.

No. D-41. In re Disbarment of Siegel. It having been reported to this Court that George J. Siegel, of New York, N. Y., has been disbarred from the practice of law in all of the courts of the State of New York, and this Court by order of February 24, 1975 [420 U. S. 941], having suspended the said George J. Siegel 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;

It is ordered that the said George J. Siegel, 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-44. In re Disbarment of Morgan. It having been reported to this Court that Edward LeRoy Morgan, of Phoenix, Ariz., has been disbarred from the practice of law in the United States District Court for the District of Columbia, and this Court by order of March 24, 1975 [420 U. S. 988], having suspended the said Edward LeRoy Morgan 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 Edward LeRoy Morgan, 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.

Mr. Justice Rehnquist took no part in the consideration or decision of this matter.*

No. 73-62. Wheeler et al. *v.* Barrera et al., 417 U. S. 402. Motion of petitioners for modification of

*See also note, *supra*, p. 1001.

judgment granted, and the last paragraph of this Court's judgment, dated June 10, 1974, is hereby modified to read: "On consideration whereof, it is ordered and adjudged by this Court that the judgment of the United States Court of Appeals for the Eighth Circuit in this cause be, and the same is hereby, affirmed, with directions that the case be remanded to the United States District Court for the Western District of Missouri for further action consistent with the opinion and judgment of this Court."

No. 73-1288. ALFRED DUNHILL OF LONDON, INC. *v.* REPUBLIC OF CUBA ET AL. C. A. 2d Cir. [Certiorari granted, 416 U. S. 981.] Case restored to calendar for reargument. In addition to other questions presented by this case, counsel are requested to brief and discuss during oral argument: Should this Court's holding in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398 (1964), be reconsidered?

No. 74-773. HUDGENS *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 5th Cir. [Certiorari granted, 420 U. S. 971.] Motion of respondents for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Petitioner also allotted 15 additional minutes for oral argument.

No. 74-1141. UNITED STATES *v.* GADDIS ET AL. C. A. 5th Cir. [Certiorari granted, 421 U. S. 987.] Motion for appointment of counsel is granted, and Tommy Day Wilcox, Esquire, of Macon, Ga., is appointed to serve as counsel for respondents in this case.

No. 74-6384. WILLIAMS *v.* UNITED STATES; and
No. 74-6436. STEWART *v.* GRIFFIN, JUDGE, ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 74-6592. Tubbs *v.* Henderson, Warden; and No. 74-6609. Ford *v.* Rees, Warden. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted

No. 74-883. Federal Power Commission *v.* Moss et al. C. A. D. C. Cir. Certiorari granted. Mr. Justice Stewart and Mr. Justice Powell took no part in the consideration or decision of this petition. Reported below: 164 U. S. App. D. C. 1, 502 F. 2d 461.

No. 74-1243. Beckwith *v.* United States. C. A. D. C. Cir. Certiorari granted. Reported below: 166 U. S. App. D. C. 361, 510 F. 2d 741.

No. 74-6293. Goldberg *v.* United States. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 8 presented by the petition which reads as follows: "Whether 18 U. S. C. § 3500, the Jencks Act, contains an 'attorney's work product exception'; and whether a Government attorney's notes of conversations with the key Government witness, to whom the prosecutors read back their notes from time to time where the witness corrected same, which notes were prepared 'only after lengthy conversations had occurred and a mutual understanding of the factual situation' had been reached, if not compellable under the Jencks Act, are compellable under the doctrine of *Brady* vs. *Maryland*."

Certiorari Denied. (See also No. 74-1347, *supra*.)

No. 74-1161. Clements, Director, Mental Retardation Center of Georgia *v.* Faraca. C. A. 5th Cir. Certiorari denied. Reported below: 506 F. 2d 956.

No. 74–1207. American Chemical Corp. et al. *v.* County of Los Angeles et al. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 42 Cal. App. 3d 45, 57, 59, 63; 116 Cal. Rptr. 751, 758, 759, 761.

No. 69–1. Augenblick *v.* United States; and

No. 74–1460. Augenblick *v.* United States. Ct. Cl. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 206 Ct. Cl. 74, 509 F. 2d 1157.

No. 74–1096. Conk *v.* Clegg et al. C. A. 10th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 507 F. 2d 1351.

No. 74–1180. Pinell et al. *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 43 Cal. App. 3d 627, 117 Cal. Rptr. 913.

No. 74–1192. Karp *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 508 F. 2d 1122.

No. 74–1345. U. S. Merchandise Mart, Inc. *v.* D&H Distributing Co. C. A. D. C. Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 166 U. S. App. D. C. 205, 509 F. 2d 538.

No. 74–1362. Waddell *v.* Fleming. C. A. 10th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 510 F. 2d 4.

No. 74–142. H. B. Gregory Co. et al. *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 502 F. 2d 700.

No. 74–1214. Thomas *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 511 F. 2d 1404.

No. 74-1224. Mayes et al. *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 512 F. 2d 637.

No. 74-1231. Owens *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 511 F. 2d 1205.

No. 74-1256. Bowness *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 2d 391.

No. 74-1259. Mandel et al. *v.* Nouse et al. C. A. 6th Cir. Certiorari denied. Reported below: 509 F. 2d 1031.

No. 74-1273. Shamy *v.* Goldstein, U. S. Attorney, et al. C. A. 3d Cir. Certiorari denied. Reported below: 510 F. 2d 970.

No. 74-1309. Boren *v.* Iowa. Sup. Ct. Iowa. Certiorari denied. Reported below: 224 N. W. 2d 14.

No. 74-1330. National Right to Work Legal Defense & Education Foundation, Inc., et al. *v.* Richey, U. S. District Judge. C. A. D. C. Cir. Certiorari denied. Reported below: 167 U. S. App. D. C. 18, 510 F. 2d 1239.

No. 74-1344. House of Vision, Inc. *v.* Watson, Director, Department of Registration and Education of Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 59 Ill. 2d 508, 322 N. E. 2d 15.

No. 74-1354. Wideman, Administrator *v.* Mississippi Valley Gas Co. C. A. 5th Cir. Certiorari denied. Reported below: 507 F. 2d 658.

No. 74-1358. May et al. *v.* Supreme Court of Colorado et al. C. A. 10th Cir. Certiorari denied. Reported below: 508 F. 2d 136.

No. 74–1359. Bennett *v.* New York. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 46 App. Div. 2d 804, 361 N. Y. S. 2d 37.

No. 74–1364. Rhone-Poulenc, S. A., et al. *v.* Dann, Commissioner of Patents. C. A. 4th Cir. Certiorari denied. Reported below: 507 F. 2d 261.

No. 74–1368. Denti *v.* New York. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 47 App. Div. 2d 513, 365 N. Y. S. 2d 987.

No. 74–1382. Vanderhide *v.* Brown & Sharpe Manufacturing Co., Inc. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 845.

No. 74–1425. Steinman *v.* Nadjari, Deputy Attorney General of New York. C. A. 2d Cir. Certiorari denied. Reported below: 515 F. 2d 505.

No. 74–1432. Rubens et ux. *v.* New York Stock Exchange, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 510 F. 2d 968.

No. 74–5986. Johnson *v.* Comstock, Men's Colony Superintendent. C. A. 9th Cir. Certiorari denied.

No. 74–6202. Hill *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 345.

No. 74–6248. Williams *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 507 F. 2d 1279.

No. 74–6264. Bush *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 74–6271. Westover *v.* United States; and

No. 74–6283. Roberts *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 511 F. 2d 1154.

No. 74-6272. Acosta de Evans *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 74-6278. Weems *v.* Henderson, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 506 F. 2d 1055.

No. 74-6287. Duemmel *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 513 F. 2d 634.

No. 74-6297. Montoya *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 574.

No. 74-6307. McIntyre *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 508 F. 2d 403.

No. 74-6340. Holland *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 510 F. 2d 453.

No. 74-6369. Poitra *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 74-6397. Foster *v.* Michigan. Cir. Ct., Oakland County, Mich. Certiorari denied.

No. 74-6399. Richards *v.* Kentucky. Ct. App. Ky. Certiorari denied. Reported below: 517 S. W. 2d 237.

No. 74-6405. Lasky *v.* LaVallee, Correctional Superintendent. C. A. 2d Cir. Certiorari denied.

No. 74-6406. Plouf *v.* Connors, Director, Veterans Administration Regional Office, et al. C. A. 1st Cir. Certiorari denied. Reported below: 515 F. 2d 502.

No. 74-6412. Casper *v.* Blackledge, Warden, et al. C. A. 4th Cir. Certiorari denied.

No. 74-6448. Denman *v.* Russell et al. C. A. 3d Cir. Certiorari denied. Reported below: 505 F. 2d 729.

No. 74–6413. CHAVEZ *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 87 N. M. 180, 531 P. 2d 603.

No. 74–6414. DORNAU *v.* FLORIDA. Dist. Ct. App. Fla., 2d App. Dist. Certiorari denied. Reported below: 306 So. 2d 167.

No. 74–6415. BYRD *v.* RICKETTS, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 233 Ga. 779, 213 S. E. 2d 610.

No. 74–6419. FITZGERALD *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 1334.

No. 74–6421. HEWLETT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 517 S. W. 2d 760.

No. 74–6433. STRATTON *v.* DIETERS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 2d 632.

No. 74–6439. HAYWARD *v.* JOHNSON, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 508 F. 2d 322.

No. 74–6449. SKINNER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 74–6450. NAVEDO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 47 App. Div. 2d 773, 365 N. Y. S. 2d 566.

No. 74–6451. MIKELL *v.* GILCHRIST COUNTY, FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 2d 758.

No. 74–6453. BARKSDALE *v.* RYAN, JUDGE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 511 F. 2d 1405.

No. 74–6459. Ainsworth *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 304 So. 2d 656.

No. 74–6470. Hemstreet *v.* State Personnel Board. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–6481. Hirsch *v.* Maryland State Bar Assn., Inc. Ct. App. Md. Certiorari denied. Reported below: 274 Md. 368, 335 A. 2d 108.

No. 74–6517. Chambler *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 574.

No. 74–6560. Wheeler *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied.

No. 74–294. Watson et al. *v.* Kenlick Coal Co., Inc., et al. C. A. 6th Cir. Certiorari denied. Reported below: 498 F. 2d 1183.

Mr. Justice Douglas, dissenting.

Petitioners are landowners in Magoffin County, Ky. Seventy years ago, their predecessors in ownership deeded away all rights to the minerals in and under their land, retaining only the surface rights; respondents are the present holders of the mineral rights, and have strip-mined much of the coal which underlies the land. Petitioners brought this action under 42 U. S. C. § 1983, seeking injunctive relief [1] and damages for the destruction of the land surface through respondents' strip-

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[1] The prayer for injunctive relief is now mooted, for all practical purposes, by the recent revision of Ky. Rev. Stat. Ann. § 350.060. See Ky. Acts 1974, c. 373, p. 719. Effective January 1, 1975, that statute prohibits strip mining without the written consent of the owner of any freehold interest in the surface land. This statutory change clearly would not moot petitioners' claim for damages based upon respondents' past conduct.

mining operations. The Court of Appeals affirmed the dismissal of the complaint, holding that there was no state action involved and that petitioners had not been deprived of any federal constitutional right. 498 F. 2d 1183 (CA6 1974).

This case is unfortunately no more than a mere footnote in a continuing tragedy of environmental and human despoliation. The rape of Appalachia for its precious coal has been a dark and dismal chapter in our Nation's history, moving one observer to lament:

> "Coal has always cursed the land in which it lies. When men begin to wrest it from the earth it leaves a legacy of foul streams, hideous slag heaps and polluted air. It peoples this transformed land with blind and crippled men and with widows and orphans. It is an extractive industry which takes all away and restores nothing. It mars but never beautifies. It corrupts but never purifies." [2]

One of the hardest hit areas has been the Cumberland Plateau in eastern Kentucky. In the late 19th century, the hill country was swept by a virtual wave of coal buyers seeking to acquire precious mineral rights from the often naive and illiterate mountaineers. The contest was hardly an equal one,[3] and most coal buyers

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[2] H. Caudill, Night Comes to the Cumberlands *x* (1963).

[3] Harry Caudill, a Kentucky attorney with a long history of involvement in strip-mining litigation, has painted a vivid picture of these encounters:

"In the summer of 1885 gentlemen arrived in the county-seat towns for the purpose of buying tracts of minerals, leaving the surface of the land in the ownership of the mountaineers who resided on it. The Eastern and Northern capitalists selected for this mission men of great guile and charm. They were courteous, pleasant and wonderful storytellers. Their goal was to buy the minerals on a grand scale as cheaply as possible and on terms so favorable to the purchasers as to grant them every desirable exploitive privilege,

escaped with a stack of "broad-form" deeds which left nominal title to the land surface in the landowner, but which conveyed to the grantee the right to excavate and remove all minerals and, in the course of such removal, to divert and pollute the water and to dump mining refuse on the surface. Against the backdrop of then-current mining technology, the prospects and hazards of such actions must have seemed remote and insignificant.[4]

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while simultaneously leaving to the mountaineer an illusion of ownership and the continuing responsibility for practically all the taxes which might be thereafter levied against the land.

. . . . .

"When the highland couple sat down at the kitchen table to sign the deed their guest had brought to them they were at an astounding disadvantage. On one side of the rude table sat an astute trader, more often than not a graduate of a fine college and a man experienced in the larger business world. He was thoroughly aware of the implications of the transaction and of the immense wealth which he was in the process of acquiring. Across the table on a puncheon bench sat a man and woman out of a different age. Still remarkably close to the frontier of a century before, neither of them possessed more than the rudiments of an education. Hardly more than 25 per cent of such mineral deeds were signed by grantors who could so much as scrawl their names. Most of them 'touched the pen and made their mark,' in the form of a spidery X, in the presence of witnesses whom the agent had thoughtfully brought along. Usually the agent was the notary public, but sometimes he brought one from the county seat. Unable to read the instrument or able to read it only with much uncertainty, the sellers relied upon the agent for an explanation of its contents—contents which were to prove deadly to the welfare of generations of the mountaineer's descendants." *Id.*, at 72–74.

[4] See *Martin* v. *Kentucky Oak Mining Co.*, 429 S. W. 2d 395, 401 (Ky. 1968) (Hill, J., dissenting):

"Strip mining was neither heard of nor dreamed of in 1905 in Knott County, the locality of the coal land in question. There was no railroad in Knott County until long thereafter. Neither was there a navigable stream in that county. About the only coal mined in those days was from the outcroppings in creek beds, where a small

With the advance of technology, however, the stakes increased; each successive innovation was visited upon the mountaineers with the approval of the courts, which found these new and unforeseen techniques to fall within the scope of the aged and yellowing deeds. Judicial decisions gave virtually untrammeled powers to the coal companies, so long as they acted without malice:

> "With impunity [the companies] could kill the fish in the streams, render the water in the farmer's well unpotable and, by corrupting the stream from which his livestock drank, compel him to get rid of his milk cows and other beasts. They were authorized to pile mining refuse wherever they desired, even if the chosen sites destroyed the homes of farmers and bestowed no substantial advantage on the corporations. The companies which held 'long-form' mineral deeds were empowered to withdraw subjacent supports, thereby causing the surface to subside and fracture. They could build roads wherever they desired, even through lawns and fertile vegetable gardens. They could sluice poisonous water from the pits onto crop lands. With im-

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quantity was obtained by the use of a newfound tool—the coal pick."

A similar description appears in H. Caudill, *supra,* n. 2, at 305–306:

"[W]hen the mountaineer's ancestor (for the seller is, in most instances, long since dead) sold his land he lived in an isolated backwater. Coal mining was a primitive industry whose methods had changed little in a hundred years and which still depended entirely on picks and shovels. To the mountaineer 'mining' meant tunneling into a hillside and digging the coal for removal through the opening thus made. That the right to mine could authorize shaving off and destroying the surface of the land in order to arrive at the underlying minerals was undreamed of by buyers and sellers alike."

punity they could hurl out from their washeries clouds of coal grit which settled on fields of corn, alfalfa and clover and rendered them worthless as fodder. Fumes from burning slate dumps peeled paint from houses, but the companies were absolved from damages.

". . . The companies, which had bought their coal rights at prices ranging from fifty cents to a few dollars per acre, were, in effect, left free to do as they saw fit, restrained only by the shallow consciences of their officials." [5]

The final blow in the expansion of the coal companies' rights under broad-form deeds was struck when the Kentucky Court of Appeals, in *Buchanan* v. *Watson,* 290 S. W. 2d 40 (1956), held that the broad-form deed conveys the right to strip-mine and that the mining company, in the absence of arbitrary, wanton, or malicious destruction, incurs no liability to the surface owner for destruction of the surface during the strip-mining process. The Kentucky court has adhered to that holding through an unbroken string of decisions culminating in *Martin* v. *Kentucky Oak Mining Co.,* 429 S. W. 2d 395 (1968), where the court reaffirmed *Buchanan* over the vigorous dissent of three of its members.[6] While the Kentucky General Assembly has finally provided legislative relief for the victims of strip mining,[7] that

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[5] H. Caudill, *supra,* n. 2, at 306-307.

[6] Judge Hill, joined in his dissenting opinion by Judge Milliken, stated: "I am shocked and appalled that the court of last resort in the beautiful state of Kentucky would ignore the logic and reasoning of the great majority of other states and lend its approval and encouragement to the diabolical devastation and destruction of a large part of the surface of this fair state without compensation to the owners thereof." 429 S. W. 2d, at 402.

[7] See n. 1, *supra.*

relief is prospective only and will not bring about the repair or reclamation of already ravaged lands.

In my view, the courts below took an unjustifiably narrow approach to the state-action issue presented by this lawsuit. It is undisputed that Kentucky imposes extensive regulatory controls upon strip miners, including a permit requirement and a requirement that plans meeting minimum legal standards be submitted.[8] This regulatory involvement alone might not be sufficient to warrant a finding of state action, but it is coupled with a long and unbroken line of state-court decisions recognizing and enforcing strip-mining rights under broad-form deeds. It is well settled that state judicial decrees, as well as legislative enactments, may constitute state action.[9] See *Shelley* v. *Kraemer*, 334 U. S. 1 (1948).

It is said that respondents are simply private parties engaged in the exercise of private contractual rights conferred upon them by petitioners' predecessors in interest; but the very claim raised by petitioners is that those private contractual rights have been arbitrarily and irrationally broadened by the state courts to a degree never contemplated by the grantors.[10] The State's role

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[8] Ky. Rev. Stat. Ann. §§ 350.060 (1)-(6), as amended by Ky. Acts 1974, c. 69, p. 64, c. 258, p. 491, and c. 273, p. 719.

[9] It is true that this particular deed has not been the subject of any state court proceeding, and that petitioners thus have not experienced the direct application of an adverse ruling by the state courts. Nevertheless, the Kentucky Court of Appeals has been unswerving in its adherence to the *Buchanan* rule, and there is no reason to suppose that petitioners' deed would receive a more favorable interpretation.

[10] It is interesting to note that Kentucky courts stand virtually alone in the degree to which they have expanded grantees' rights under broad-form deeds. Contrary decisions from sister States are collected in *Martin* v. *Kentucky Oak Mining Co.*, 429 S. W. 2d, at 402 (Hill, J., dissenting).

in this process can hardly be termed that of an innocent and disinterested bystander—respondents, in exercising their claimed rights under the broad-form deed, are clearly armed with the weight and force of state judicial precedent, and the enforcement power of the State lurks in the background as guarantor of those rights.

In light of the above, petitioners' claim of state action is not insubstantial on the facts of this case. Cf. *Jackson* v. *Metropolitan Edison Co.,* 419 U. S. 345, 359 (1974) (DOUGLAS, J., dissenting); *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144 (1970); *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961).

Even if petitioners can establish the presence of state action, they cannot prevail unless they can also establish a deprivation of a federal constitutional right. The Court of Appeals properly recognized that the interpretation and delineation of contractual and property rights is ordinarily a matter of state law, pure and simple, and that an adverse interpretation by a state court, even if erroneous, does not constitute a deprivation of property without due process of law. On the other hand, the Due Process Clause of the Fourteenth Amendment is not wholly without content for purposes of evaluating the arbitrariness of actions by the State; state enactments and regulations may be tested under that Clause against a modest but identifiable standard of minimum rationality. See *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 490–491 (1955); cf. *Roe* v. *Wade,* 410 U. S. 113 (1973).

Petitioners argue that the state courts have interpreted broad-form deeds as conveying far more than those deeds could ever have been intended to convey, and that the result has been a taking of their property without due process. As *Williamson* makes clear, the standard of review under the Due Process Clause is a very minimal one, at least where no fundamental right or interest is

involved; the odds against the success of this type of due process argument are high, but I am not prepared to say that it could not succeed under any set of circumstances, no matter how extreme or outrageous.

If a petitioner came to us claiming that he had entered into a written contract for sale of his car, and that the state courts, in an action upon the contract, had interpreted the term "car" to include not only his automobile but his house, dog, and vegetable garden as well, I would hesitate to characterize as wholly frivolous his claim that he had been deprived of property without due process of law. The relevance of this example to the instant case would depend, of course, on the amount of evidence which could be adduced bearing upon the intent of petitioners' predecessors in interest, including any evidence of the relationship between the purchase price paid for the mineral rights alone and the full market value of the land and minerals together.[11] Petitioners face serious obstacles of proof in making a claim of this sort, but such obstacles cannot justify throwing them out of court at the pleading stage.

In my view, the issues presented by this petition are substantial. In some of our Western States, corporations which operate copper smelters have acquired from downwind farmers releases of claims for damages which are now recorded as the acquisition of "smoke easements." Thus the problem presented here may have wide application and deserves explication and decision by this Court. I would grant certiorari and set the case for oral argument.

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[11] The record in the instant case apparently does not disclose any information about Magoffin County land values in relation to the purchase price per acre for the mineral rights under the deed in question, but such information could undoubtedly be produced on remand.

No. 74-1045. Moss et al. *v.* Federal Power Commission. C. A. D. C. Cir. Certiorari denied. The Chief Justice and Mr. Justice Blackmun would grant certiorari. Mr. Justice Stewart and Mr. Justice Powell took no part in the consideration or decision of this petition. Reported below: 164 U. S. App. D. C. 1, 502 F. 2d 461.

No. 74-1063. Carter et al. *v.* United States. C. A. 6th Cir. Certiorari denied. Mr. Justice Douglas, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Roth* v. *United States,* 354 U. S. 476, 508-514 (1957) (Douglas, J., dissenting); *Miller* v. *California,* 413 U. S. 15, 42-47 (1973) (Douglas, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70-73 (1973) (Douglas, J., dissenting), would grant certiorari and summarily reverse the judgment. Reported below: 506 F. 2d 1251.

Mr. Justice Brennan, with whom Mr. Justice Stewart and Mr. Justice Marshall join, dissenting.

Petitioners were charged in the United States District Court for the Western District of Tennessee with the transportation of obscene movies in interstate commerce by means of a common carrier in violation of 18 U. S. C. § 1462, transportation of obscene movies in interstate commerce for the purpose of distribution in violation of 18 U. S. C. § 1465, and with conspiracy to violate the aforesaid statutes in violation of 18 U. S. C. § 371. Title 18 U. S. C. § 1462 provides in pertinent part:

> "Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character;

. . . . .

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

Title 18 U. S. C. § 1465 provides in pertinent part:

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, photograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Petitioners moved to dismiss the indictment on two grounds. First, they argued that the obscenity decisions announced by this Court in June 1973, including *Miller* v. *California,* 413 U. S. 15, could not be applied retroactively to conduct which occurred prior to those decisions. Second, they contended that *Miller* and its related decisions rejected application of a national standard to the question of obscenity and that the statutes under which they were indicted contain that national standard. The District Court granted petitioners' motion to dismiss the indictment. The Court of Appeals for the Sixth Circuit reversed and remanded for a trial on the merits. 506 F. 2d 1251.

I adhere to my dissent in *United States* v. *Orito*, 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." 413 U. S., at 147–148. For the reasons stated in my dissent in *Miller* v. *California*, *supra*, at 47, I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Sixth Circuit was rendered after *Orito*, reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 74–1094. WOMACK ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Roth* v. *United States*, 354 U. S. 476, 508–514 (1957) (DOUGLAS, J., dissenting); *Miller* v. *California*, 413 U. S. 15, 42–47 (1973) (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70–73 (1973) (DOUGLAS, J., dissenting), would grant certiorari and summarily reverse the judgment. Reported below: 166 U. S. App. D. C. 35, 509 F. 2d 368.

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

Petitioners were convicted in the United States District Court for the District of Columbia of mailing

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

obscene matter in violation of 18 U. S. C. § 1461, and of transporting the matter in interstate commerce in violation of 18 U. S. C. § 1462. Title 18 U. S. C. § 1461 provides in pertinent part:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance;
>
> . . . . .
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier."

Title 18 U. S. C. § 1462 provides in pertinent part:

> "Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—
>
> "(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character;
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> . . . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

The Court of Appeals for the District of Columbia Circuit affirmed the convictions. 166 U. S. App. D. C. 35, 509 F. 2d 368.

I adhere to my dissent in *United States* v. *Orito*, 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive

exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." 413 U. S., at 147–148. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the District of Columbia Circuit was rendered after *Orito,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States,* 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioners must be given an opportunity to have their case decided on, and to introduce evidence relevant to, the legal standard upon which their convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioners should be afforded a new trial under local community standards.

No. 74–1103. ESTELLE, CORRECTIONS DIRECTOR *v.* JOHNSON. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE WHITE would grant certiorari. Reported below: 506 F. 2d 347.

No. 74–1115. MILLER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regu-

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

lation of, obscenity is prohibited by the Constitution, *Roth* v. *United States,* 354 U. S. 476, 508–514 (1957) (DOUGLAS, J., dissenting); *Miller* v. *California,* 413 U. S. 15, 42–47 (1973) (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (1973) (DOUGLAS, J., dissenting), would grant certiorari and summarily reverse the judgment. Reported below: 505 F. 2d 1247.

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

Petitioners were convicted in the United States District Court for the Central District of California of mailing allegedly obscene matter in violation of 18 U. S. C. § 1461. The Court of Appeals for the Ninth Circuit affirmed. 455 F. 2d 899 (1972). We granted certiorari and remanded the case for further consideration in light of *Miller* v. *California,* 413 U. S. 15 (1973). 413 U. S. 913 (1973). On remand, the Court of Appeals for the Ninth Circuit again affirmed the convictions. 505 F. 2d 1247.

For the reasons stated in my dissent from the remand of this case, 413 U. S. 914, and because the present judgment was rendered after *Miller,* I would grant certiorari and reverse the judgment.*

No. 74–1144. LAWRENCE ET AL. *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 264 S. C. 3, 212 S. E. 2d 52.

No. 74–1228. MILLER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regu-

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*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

lation of, obscenity is prohibited by the Constitution, *Roth* v. *United States,* 354 U. S. 476, 508–514 (1957) (DOUGLAS, J., dissenting); *Miller* v. *California,* 413 U. S. 15, 42–47 (1973) (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (1973) (DOUGLAS, J., dissenting), would grant certiorari and summarily reverse the judgment. Reported below: 507 F. 2d 1100.

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

Petitioners were convicted in the United States District Court for the Central District of California of mailing allegedly obscene matter in violation of 18 U. S. C. § 1461, and of transporting such matter in violation of 18 U. S. C. § 1462. The Court of Appeals for the Ninth Circuit affirmed. 431 F. 2d 655 (1970). We granted certiorari and remanded the case for further consideration in light of *Miller* v. *California,* 413 U. S. 15 (1973). 413 U. S. 913 (1973). On remand, the Court of Appeals for the Ninth Circuit again affirmed the convictions. 507 F. 2d 1100.

For the reasons stated in my dissent from the remand of this case, 413 U. S. 914, and because the present judgment was rendered after *Miller,* I would grant certiorari and reverse the judgment.*

No. 74–1229. AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.† Reported below: 503 F. 2d 1250.

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*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

†See also note, *supra,* p. 1001.

No. 74–1334. Zucker et al. *v.* Bell Telephone Company of Pennsylvania et al. C. A. 3d Cir. Certiorari denied. Mr. Justice Blackmun took no part in the consideration or decision of this petition.* Reported below: 510 F. 2d 971.

No. 74–1234. Abascal *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Brennan and Mr. Justice Marshall would grant certiorari, vacate the judgment, and remand case for consideration of question of mootness. Reported below: 509 F. 2d 752.

No. 74–1237. Brown et al. *v.* United States et al. C. A. 3d Cir. Certiorari denied. Mr. Justice Brennan would grant certiorari. Reported below: 508 F. 2d 618.

No. 74–1276. Cotten *v.* Schlesinger, Secretary of Defense. C. A. 4th Cir. Motion of Americans for Middle East Neutrality for leave to file a brief as *amicus curiae* denied. Mr. Justice Douglas took no part in the consideration or decision of this motion. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 506 F. 2d 1397.

No. 74–6195. Waugh *v.* Gray, Correctional Superintendent. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 845.

Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Marshall join, dissenting.

On November 15, 1969, petitioner was arrested in connection with a burglary in Amberly Village, Ohio. When arrested, he was in possession of a black purse from the burglarized home. On November 17, 1969, petitioner was convicted in Cincinnati Municipal Court of receiving or concealing the black purse. He was sen-

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*See also note, *supra*, p. 1001.

tenced to 30 days in the workhouse, and $55 in fines and costs were imposed.

After serving the sentence and paying the fines and costs, petitioner was indicted and convicted of burglary in the Hamilton County Court of Common Pleas. The prosecution's crucial evidence was the black purse. Petitioner was sentenced to a term of five to 30 years' imprisonment.

After exhausting available state-court remedies, petitioner sought a writ of habeas corpus in the United States District Court for the Southern District of Ohio, Eastern Division, contending that his conviction for burglary violated the Double Jeopardy Clause. Although the District Court found that both of petitioner's convictions arose out of "a single transaction," the petition was denied. The United States Court of Appeals for the Sixth Circuit affirmed. 508 F. 2d 845.

The two charges leveled against petitioner clearly arose out of the same criminal transaction or episode, yet they were tried separately. In that circumstance, we should grant certiorari and reverse the burglary conviction. I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969), requires the joinder at one trial, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See *Wells* v. *Missouri*, 419 U. S. 1075 (1974) (BRENNAN, J., dissenting); *Tijerina* v. *New Mexico*, 417 U. S. 956 (1974) (BRENNAN, J., dissenting); *Ciuzio* v. *United States*, 416 U. S. 995 (1974) (BRENNAN, J., dissenting);

Harris v. *Washington,* 404 U. S. 55, 57 (1971) (concurring statement); *Waller* v. *Florida,* 397 U. S. 387, 395 (1970) (BRENNAN, J., concurring). See also *People* v. *White,* 390 Mich. 245, 212 N. W. 2d 222 (1973); *State* v. *Brown,* 262 Ore. 442, 497 P. 2d 1191 (1972); *Commonwealth* v. *Campana,* 452 Pa. 233, 304 A. 2d 432, vacated and remanded, 414 U. S. 808 (1973), adhered to on remand, 455 Pa. 622, 314 A. 2d 854 (1974); *State* v. *Gregory,* 66 N. J. 510, 333 A. 2d 257 (1975).

Rehearing Denied

No. 73–1723. HILL, ATTORNEY GENERAL OF TEXAS *v.* STONE ET AL., 421 U. S. 289;

No. 74–519. FRANKEL *v.* AMERICAN EXPORT ISBRANDTSEN LINES, INC., 421 U. S. 946;

No. 74–1014. MEISTER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 421 U. S. 964;

No. 74–1046. BLANKNER *v.* CITY OF CHICAGO ET AL., 421 U. S. 948;

No. 74–6222. SMITH ET AL. *v.* LINK, GOVERNOR OF NORTH DAKOTA, ET AL., 421 U. S. 970; and

No. 74–6276. SMITH, TRUSTEE IN BANKRUPTCY *v.* BRYANT ET AL., 421 U. S. 979. Petitions for rehearing denied.

Assignment Order

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 District of Columbia Circuit on June 6, 1975, and for such additional 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.

June 23, 1975

Affirmed on Appeal

No. 74-1375. Montgomery *v.* Douglas et al. Affirmed on appeal from D. C. Colo. Reported below: 388 F. Supp. 1139.

Appeals Dismissed

No. 74-1227. Ellis et al. *v.* California. Appeal from App. Dept., Super. Ct. Cal., County of Santa Barbara, dismissed for want of substantial federal question.

No. 74-1467. William C. Haas & Co., Inc. *v.* Russian Hill Improvement Assn. et al. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. Reported below: 44 Cal. App. 3d 158, 118 Cal. Rptr. 490.

No. 74-6469. In re District Court of the Fifth Judicial District of Montana et al. (Mitchell et ux., real parties in interest) *v.* Montana ex rel. LeMieux, County Attorney of Jefferson County, et al. Appeal from Sup. Ct. Mont. dismissed for want of substantial federal question. Reported below: 166 Mont. 115, 531 P. 2d 665.

No. 74-1404. Pressman *v.* New York et al. Appeal from D. C. E. D. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Vacated and Remanded on Appeal

No. 73-1413. Staats, Comptroller General, et al. *v.* American Civil Liberties Union, Inc., et al. Appeal from D. C. D. C. [Probable jurisdiction noted, 417

U. S. 944.] Judgment vacated and case remanded with directions to dismiss the cause as moot. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. Reported below: 366 F. Supp. 1041.

No. 74-872. NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS *v.* UNITED STATES. Appeal from D. C. D. C. Judgment vacated and case remanded for further consideration in light of *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773 (1975). MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. Reported below: 389 F. Supp. 1193.

No. 74-1169. ROGERS ET AL. *v.* INMATES' COUNCILMATIC VOICE ET AL. Appeal from D. C. N. D. Ohio. Judgment vacated and case remanded so that a fresh order or decree may be entered from which a timely appeal may be taken to the United States Court of Appeals for the Sixth Circuit. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

No. 74-1458. CLARK ET AL. *v.* PETERS ET AL. Appeal from C. A. 5th Cir. Judgment vacated and case remanded for further consideration in light of *Dallas County* v. *Reese,* 421 U. S. 477 (1975). Reported below: 508 F. 2d 267.

Certiorari Granted—Vacated and Remanded

No. 74-1162. IMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Hale, ante,* p. 171. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. Reported below: 506 F. 2d 1055.

No. 74-5092. ROSE *v.* UNITED STATES. C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded

for further consideration in light of *United States* v. *Hale, ante,* p. 171. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. Reported below: 500 F. 2d 12.

No. 74-6118. WATTS *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Upon representation of the Solicitor General set forth in his brief for the United States filed May 2, 1975, judgment vacated, and case remanded to the United States District Court for the Northern District of Georgia to permit the Government to dismiss charges against petitioner. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion and petition. Reported below: 505 F. 2d 951.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST join, dissenting.

Petitioner was acquitted in the Superior Court of Fulton County, Ga., of aggravated assault with intent to rob and carrying a concealed weapon. Thereafter, petitioner was convicted in federal court of knowingly possessing an unregistered firearm, a sawed-off shotgun, in violation of 26 U. S. C. § 5861 (d). The federal charge arose out of the same episode, and involved the same weapon, as the state prosecution. The Court of Appeals affirmed the judgment of conviction, rejecting, *inter alia,* petitioner's contention that the state acquittal barred his federal prosecution under the Double Jeopardy Clause of the Fifth Amendment. 505 F. 2d 951.

The evidence at petitioner's federal trial established that in connection with a robbery attempt on November 14, 1973, petitioner, accompanied by another, assaulted Robert McGibbon with a 12-gauge, single-barreled, sawed-off shotgun. McGibbon managed to break away from his assailants and immediately reported the inci-

dent to Officer Ward, an Atlanta policeman who was nearby. Ward located petitioner and a companion a few blocks away and, on the basis of McGibbon's description, took them into custody. As petitioner's companion was entering the patrol car, Ward noticed him bend down "as if he was putting something under the car." Subsequent investigation revealed the sawed-off shotgun, which was not registered to petitioner, under the patrol car.

In rejecting petitioner's double jeopardy claim, the Court of Appeals pointed out that, under Ga. Code Ann. §§ 26–9911a, 9913a, possession of a sawed-off shotgun 15 inches or less in length is prohibited, whereas the shotgun involved here had an overall length of 16½ inches. The Court of Appeals held that, in any event, the prior state prosecution and acquittal were not a bar to the subsequent federal prosecution under *Abbate* v. *United States,* 359 U. S. 187 (1959), and *Bartkus* v. *Illinois,* 359 U. S. 121 (1959). Although he agrees with the latter conclusion, the Solicitor General nevertheless now requests the Court to vacate the judgment of the Court of Appeals and remand the case to the District Court to permit the Government to move for dismissal of the charges against petitioner. The request is based on the Government's belated claim that the prosecution of petitioner under § 5861 (d) "did not conform to the Department of Justice policy of not prosecuting individuals previously tried in a state court for offenses involving the same acts, unless there exist 'most compelling reasons,' and then only after the specific approval of the appropriate Assistant Attorney General has been obtained."

In support of his position, the Solicitor General states that no approval was sought in this case, and he concludes that it "does not present circumstances which

constitute 'compelling reasons' for the federal prosecution." He notes that the State did not indict petitioner for possession of a sawed-off shotgun, but for *carrying a concealed weapon,* as to which the length of the shotgun was irrelevant, and he speculates that, since there was ample evidence of concealment, the state jury likely acquitted petitioner because of insufficient evidence of possession. In light of the fact that possession is an element of the federal offense proscribed by § 5861 (d), the Solicitor General reasons that the policies underlying the Department's internal directive "are directly involved."

Since this is the third occasion in recent months upon which I have been unable to agree with the Court's acquiescence in a request by the Government for aid in implementing the policy of the Department of Justice, I deem it appropriate to state my views. See also *Hayles* v. *United States,* 419 U. S. 892 (1974); *Ackerson* v. *United States,* 419 U. S. 1099 (1975).

I

The policy upon which the Government relies was first promulgated shortly after our decisions in *Abbate* and *Bartkus, supra,* in a memorandum from Attorney General Rogers to United States Attorneys. See *Petite* v. *United States,* 361 U. S. 529, 531 (1960). Noting the duty of federal prosecutors "to observe not only the rulings of the Court but the spirit of the rulings as well," and advocating continuing efforts "to cooperate with state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or federal, where the public interest is best served," the Attorney General concluded that if "this be determined accurately, and is followed by efficient and intelligent cooperation of state and federal law enforcement authorities, then considera-

tion of a second prosecution very seldom should arise." He directed that "no federal case should be tried when there has already been a state prosecution for substantially the same act or acts without [the approval of the appropriate Assistant Attorney General after consultation with the Attorney General]." Department of Justice Press Release, Apr. 6, 1959; N. Y. Times, Apr. 6, 1959, p. 19, col. 2.

I question whether the action taken by the Court in *Hayles* and *Ackerson, supra,* and the action taken today represent "efficient and intelligent cooperation" among federal law enforcement authorities, let alone between state and federal authorities. In this case, for instance, we are asked to intervene in order that the Government may move for the dismissal of charges lawfully brought by it in the first instance, tried before a jury in the District Court, and the conviction upon which was affirmed by an opinion of a panel of the Court of Appeals. It requires more than the desire of the Department of Justice to keep its house in order to persuade me that the Court should have a hand in nullifying such a substantial commitment of federal prosecutorial and judicial resources. Indeed, since it appears that the trial and conviction of petitioner were without reversible defect, constitutional or otherwise, and that the putative hardship which the policy was designed to prevent has already been suffered and cannot be remedied, I believe that the Court's action today ill serves the "interest of justice," *Petite* v. *United States, supra,* at 531, if that phrase be interpreted to comprehend society's interest in the efficient use of its judicial resources to convict the guilty. Cf. *Orlando* v. *United States,* 387 F. 2d 348, 349 (CA9 1967) (Pope, J., dissenting). The only purpose served by the Court's action is to aid the Government in emphasizing to its staff lawyers the need for a con-

sistent internal administrative policy. But with all deference I suggest that is not a judicial function and surely not the function of this Court.

Neither the rulings of this Court, nor their "spirit," require that we sacrifice the careful work of the District Court and the Court of Appeals—to say nothing of the public funds which that work required—to the vagaries of administrative interpretation. If the Government attorneys who initiated this prosecution did so without consulting their superiors, that is an internal matter within the Department of Justice to be dealt with directly by that Department, but it should not bear on a judgment lawfully obtained. Corrective action more appropriately lies through prospective enforcement of departmental policies. Cf. *Sullivan* v. *United States,* 348 U. S. 170, 172–174 (1954); *United States* v. *Hutul,* 416 F. 2d 607, 626–627 (CA7 1969), cert. denied, 396 U. S. 1012 (1970). The resources of law enforcement agencies and courts, once committed to a rational course of action culminating in a valid judgment, should not be dissipated without better reason.

II

Quite apart from my general disagreement with the use of this Court to implement executive policy decisions, it is not at all clear to me that any federal court, and particularly this Court, should automatically conform its judgments to results allegedly dictated by a policy, however wise, which the judicial branch had no part in formulating. If these doubts be well founded, independent judicial appraisal is required *a fortiori* where, as here, the policy purportedly derives from the rulings of this Court and their "spirit." The federal courts have no role in prosecutorial decisions, but, once the judicial power has been invoked,

it is decidedly the role of federal courts to interpret the decisions of this Court and to assess the validity of judgments duly entered.

Judicial involvement in an independent appraisal of the Justice Department's application of its internal policy in this instance, however, could give rise to a form of surveillance in other instances. Surely it is not our function either to approve or disapprove internal prosecutorial policies and even less so their implementation. But the course on which the Government has persuaded this Court to embark requires us to do just that unless we are blindly to accept the Government's belated analysis. Cf. *United States* v. *Williams,* 431 F. 2d 1168, 1175 (CA5 1970), rev'd en banc on other grounds, 447 F. 2d 1285 (1971), cert. denied, 405 U. S. 954 (1972).

III

The present case vividly demonstrates the difficulties which confront judges who would undertake to do more than rubberstamp the policy decisions of the Department of Justice. The policy relied on, which appears to have been cast in terms to provide great flexibility and discretion, inevitably involves considerations and nuances inappropriate for judicial evaluation. Moreover, such evaluation is impossible without access to data regarding other applications of the policy in the 16 years since it was publicly announced. Finally, a comparison of the 1959 directive with the Government's statement of the policy in this case reveals variations which are not explained and of course need not be explained so long as application of the policy remains a matter within the Department of Justice. The 1959 memorandum referred to "a state prosecution for substantially the same act or acts." However, in speculating as to the basis for the verdict acquitting petitioner in state court, the Govern-

ment seems to suggest that the relevant inquiry under the policy is not whether the charges in federal court are based on the "same act or acts" as those which founded the state prosecution, but rather whether the state and federal offenses share common elements or require the same evidence for conviction. Cf. *Abbate* v. *United States,* 359 U. S., at 196–197 (opinion of BRENNAN, J.).

For present purposes, it is unnecessary to pursue these ambiguities. The factors I have discussed suggest the incompatibility of the action the Court takes today with the goal of "efficient and intelligent cooperation" which animated the Attorney General's 1959 memorandum, and with the "interest of justice," broadly conceived. The Department's 1959 policy is in no way questioned. But assuming as I do that *Abbate* and *Bartkus* remain good law, there is no reason for this Court to lend its aid to the implementation of an internal prosecutorial policy applicable only by speculation on our part, and there are abundant reasons for not doing so.

Miscellaneous Orders

No. ———. IN RE RESIGNATION OF NIXON. Motion of Richard M. Nixon, of San Clemente, Cal., to resign as a member of the Bar of this Court granted, and it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. MR. JUSTICE DOUGLAS and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this matter.

No. 74–940. COLORADO RIVER WATER CONSERVATION DISTRICT ET AL. *v.* UNITED STATES; and

No. 74–949. AKIN ET AL. *v.* UNITED STATES. C. A. 10th Cir. [Certiorari granted, 421 U. S. 946.] Motion of petitioners for divided argument granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

No. ———. Fuentes *v.* Workers' Compensation Appeals Board of California et al. Ct. App. Cal., 4th App. Dist. Motion to dispense with printing petition denied. *Snider* v. *All State Administrators, Inc.,* 414 U. S. 685 (1974).

No. 73–1808. Laing *v.* United States et al. C. A. 2d Cir. [Certiorari granted, 419 U. S. 824];

No. 74–75. United States et al. *v.* Hall. C. A. 6th Cir. [Certiorari granted, 419 U. S. 824]; and

No. 73–7031. Fowler *v.* North Carolina. Sup. Ct. N. C. [Certiorari granted, 419 U. S. 963.] Cases restored to calendar for reargument.

No. 74–858. Carey, Governor of New York, et al. *v.* Sugar et al.; and

No. 74–859. Curtis Circulation Co. et al. *v.* Sugar et al. Appeals from D. C. S. D. N. Y. [Probable jurisdiction noted, 421 U. S. 908.] Motion of appellants for additional time for oral argument granted and ten additional minutes allotted for that purpose. Mr. Justice Douglas took no part in the consideration or decision of this motion.

No. 74–1287. Weinstein et al. *v.* Bradford et al. C. A. 4th Cir. [Certiorari granted, 421 U. S. 998.] Motion for appointment of counsel granted and Howard Lesnick, Esquire, of Philadelphia, Pa., is appointed to serve as counsel for respondents in this case. Mr. Justice Douglas took no part in the consideration or decision of this motion.

No. 74–1366. Schaefer et al. *v.* First National Bank of Lincolnwood et al.; and

No. 74–1407. Rodman & Renshaw *v.* Schaefer et al. C. A. 7th Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 74–1427. Reuben L. Anderson-Cherne, Inc. *v.* Commissioner of Revenue of Minnesota. Appeal from Sup. Ct. Minn. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 74–6460. Herren *v.* United States District Court for the Eastern District of Arkansas;

No. 74–6498. Cozzetti *v.* United States District Court for the District of Nevada et al.; and

No. 74–6499. Goudie *v.* District of Columbia Court of Appeals. Motions for leave to file petitions for writs of mandamus denied. Mr. Justice Douglas took no part in the consideration or decision of these motions.

Probable Jurisdiction Noted

No. 74–1409. North *v.* Russell et al. Appeal from Ct. App. Ky. Probable jurisdiction noted.

Certiorari Granted

No. 74–882. De Canas et al. *v.* Bica et al. Ct. App. Cal., 2d App. Dist. Certiorari granted. Reported below: 40 Cal. App. 3d 976, 115 Cal. Rptr. 444.

No. 74–1396. Michelin Tire Corp. *v.* Wages, Tax Commissioner, et al. Sup. Ct. Ga. Certiorari granted. Reported below: 233 Ga. 712, 214 S. E. 2d 349.

No. 74–532. McKinney *v.* Alabama. Sup. Ct. Ala. Certiorari granted. Mr. Justice Douglas took no part in the consideration or decision of this petition. Reported below: 292 Ala. 484, 296 So. 2d 228.

No. 74–1274. Abbott Laboratories et al. *v.* Portland Retail Druggists Assn., Inc. C. A. 9th Cir. Motion of American Hospital Assn. for leave to file a

brief as *amicus curiae* and certiorari granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion and petition. Reported below: 510 F. 2d 486.

No. 74–1107. CAPPAERT ET AL. *v.* UNITED STATES ET AL.; and

No. 74–1304. NEVADA EX REL. WESTERGARD *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 508 F. 2d 313.

No. 74–1393. SINGLETON, CHIEF, BUREAU OF MEDICAL SERVICES, DEPARTMENT OF HEALTH AND WELFARE OF MISSOURI *v.* WULFF ET AL. C. A. 8th Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition which read as follows:

"1. Whether there is a logical nexus between the status of respondent-physicians and the claims they seek to have adjudicated sufficient to confer standing on them to challenge the constitutionality of Section 208.152, RSMo Supp. 1973.

"2. Whether the Court of Appeals acted in excess of its jurisdiction when it proceeded to determine on the merits the constitutionality of Section 208.152, RSMo Supp. 1973."

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 508 F. 2d 1211.

No. 74–1435. ENVIRONMENTAL PROTECTION AGENCY ET AL. *v.* CALIFORNIA EX REL. STATE WATER RESOURCES CONTROL BOARD ET AL. C. A. 9th Cir. Certiorari granted and case set for oral argument with No. 74–220, *Hancock* v. *Train* [certiorari granted, 420 U. S. 971]. Reported below: 511 F. 2d 963.

Certiorari Denied. (See also No. 74–1404, *supra.*)

No. 74–1170. Austin et al. *v.* United States et al. C. A. 2d Cir. Certiorari denied. Reported below: 511 F. 2d 622.

No. 74–1204. Rogers *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 2d 1079.

No. 74–1275. Metropolitan Trash, Inc. *v.* Dunlop, Secretary of Labor. C. A. 10th Cir. Certiorari denied. Reported below: 513 F. 2d 1324.

No. 74–1281. Franks *v.* United States; and

No. 74–6318. Mitchell *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 511 F. 2d 25.

No. 74–1286. Richter *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 507 F. 2d 682.

No. 74–1293. City of Black Jack, Missouri *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 508 F. 2d 1179.

No. 74–1317. Laidlaw Corp. *v.* National Labor Relations Board. C. A. 7th Cir. Certiorari denied. Reported below: 507 F. 2d 1381.

No. 74–1326. Indiana Harbor Belt Railroad Co. *v.* United States et al. C. A. 7th Cir. Certiorari denied. Reported below: 510 F. 2d 644.

No. 74–1331. City of Philadelphia et al. *v.* Baker, Trustee, et al. C. A. 3d Cir. Certiorari denied. Reported below: 508 F. 2d 279.

No. 74–1340. Hotel, Restaurant Employees & Bartenders' Union, Local 5, AFL–CIO *v.* Inter-Island Resorts, Ltd., dba Kona Surf Hotel, et al. C. A. 9th Cir. Certiorari denied. Reported below: 507 F. 2d 411.

No. 74–1333. Carr *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 507 F. 2d 191.

No. 74–1360. Peterson *v.* Blue Cross/Blue Shield of Texas et al. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 55.

No. 74–1389. Ament et al. *v.* Brocker. Ct. App. Ohio, Mahoning County. Certiorari denied.

No. 74–1428. Brott *v.* St. Francis Hospital of Lynwood. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–1429. Simes et al. *v.* Haase et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–1469. Amoco Production Co. et al. *v.* Mike Hooks, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 382.

No. 74–6051. Rosenberg *v.* Shubin, Correctional Superintendent. C. A. 2d Cir. Certiorari denied.

No. 74–6162. White *v.* Dalton, U. S. District Judge. C. A. 4th Cir. Certiorari denied.

No. 74–6223. Rothaermel *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 74–6252. Sturgis *v.* United States. Ct. App. D. C. Certiorari denied.

No. 74–6299. Hernandez *v.* Government of the Virgin Islands. C. A. 3d Cir. Certiorari denied. Reported below: 508 F. 2d 712.

No. 74–6328. Boruski *v.* United States et al. C. A. 2d Cir. Certiorari denied.

No. 74–6341. Boruski *v.* United States et al. C. A. 2d Cir. Certiorari denied.

No. 74–6345. LEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 509 F. 2d 645.

No. 74–6347. BELLE *v.* MACDONIELS. C. A. 8th Cir. Certiorari denied.

No. 74–6471. BORUSKI *v.* GENERAL ACCOUNTING OFFICE. C. A. 2d Cir. Certiorari denied.

No. 74–6621. REED *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 393 Mich. 342, 224 N. W. 2d 867.

No. 73–1176. 106 FORSYTH CORP., DBA PARIS THEATRE *v.* BISHOP, MAYOR OF ATHENS, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 482 F. 2d 280.

No. 73–6973. BOZEMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 495 F. 2d 508.

No. 73–7097. HALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 493 F. 2d 904.

No. 74–1015. INTERCOUNTY CONSTRUCTION CORP. ET AL. *v.* WALTER, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR, ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 163 U. S. App. D. C. 147, 500 F. 2d 815.

No. 74–6241. ANALLA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

No. 74–1198. MacKethan, Receiver *v.* Virginia. C. A. 4th Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition. Reported below: 508 F. 2d 838.

No. 74–6302. Fugate *v.* Hathaway, Secretary of the Interior, et al. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition. Reported below: 510 F. 2d 307.

No. 74–6303. Wertis *v.* United States. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition. Reported below: 505 F. 2d 683.

No. 74–6311. Vargas *v.* United States. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition. Reported below: 510 F. 2d 1406.

No. 74–6322. Barksdale *v.* Henderson, Warden. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition. Reported below: 510 F. 2d 382.

No. 74–6331. Davila-Leal *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition.

No. 74–6368. Navarro et al. *v.* Government of the Virgin Islands. C. A. 3d Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition. Reported below: 513 F. 2d 11.

No. 74–6371. Colon *v.* United States. C. A. 7th Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition. Reported below: 513 F. 2d 634.

No. 74–6355. Rivera-Lara *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition.

No. 74–6383. Rimka *v.* United States. C. A. 6th Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition. Reported below: 512 F. 2d 425.

No. 74–6386. Ferris *v.* Morgan, Chief Judge, U. S. District Court. C. A. 7th Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition.

No. 74–6462. White *v.* Reynolds et al. C. A. 4th Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition.

No. 74–6473. Romero *v.* Arizona. Sup. Ct. Ariz. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition.

No. 74–6480. Burns *v.* Slater et al. Sup. Ct. Okla. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition.

No. 74–6482. Tischmak *v.* Georgia. Ct. App. Ga. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition. Reported below: 133 Ga. App. 534, 211 S. E. 2d 587.

No. 74–6484. Baker *v.* California Land Title Co. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition. Reported below: 507 F. 2d 895.

No. 74–6492. Jones *v.* Gunn, Warden. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition.

No. 74-6485. Barkley v. California. Ct. App. Cal., 2d App. Dist. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition.

No. 74-6487. Hughes v. Ault, Corrections Director. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition.

No. 74-6488. Donaldson v. Wyrick, Warden. C. A. 8th Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition.

No. 74-6491. Warren v. Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition. Reported below: 537 P. 2d 443.

No. 74-6500. Jacobs v. Alabama. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition. Reported below: 511 F. 2d 1190.

No. 74-6582. Richardson v. Rundle, Correctional Superintendent. C. A. 3d Cir. Certiorari denied. Mr. Justice Douglas took no part in the consideration or decision of this petition. Reported below: 511 F. 2d 1396.

No. 74-1246. Knez v. Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari.

No. 74-1295. Deaton, Inc. v. National Labor Relations Board. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 502 F. 2d 1221.

No. 74–1159. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America et al. *v.* Pilot Freight Carriers, Inc. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 506 F. 2d 914.

No. 74–1377. Johnson et al. *v.* New York. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 46 App. Div. 2d 739, 361 N. Y. S. 2d 325.

No. 74–1394. Clinton Community Hospital Corp. *v.* Southern Maryland Medical Center et al. C. A. 4th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 510 F. 2d 1037.

No. 74–1422. Cincinnati Enquirer, Inc., et al. *v.* Ramey et al. C. A. 6th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 508 F. 2d 1188.

No. 74–6184. Poole *v.* United States. C. A. D. C. Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 161 U. S. App. D. C. 289, 495 F. 2d 115.

No. 74–6191. Britton *v.* United States. C. A. 6th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 511 F. 2d 25.

No. 74–6231. Klein *v.* Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari.

No. 74–1440. Michigan *v.* Reed. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 393 Mich. 342, 224 N. W. 2d 867.

No. 74–1310. Edwards Underground Water District et al. *v.* Hills, Secretary of Housing and Urban Development, et al. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas and Mr. Justice Blackmun would grant certiorari. Reported below: 502 F. 2d 43.

No. 74–1388. Peacock *v.* Board of Regents of the Universities and State Colleges of Arizona et al. C. A. 9th Cir. Motion of Association of California School Administrators for leave to file a brief as *amicus curiae* granted. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 510 F. 2d 1324.

Rehearing Denied

No. 73–1765. Meek et al. *v.* Pittenger, Secretary of Education, et al., 421 U. S. 349;

No. 74–950. Barrett *v.* United States, 421 U. S. 964;

No. 74–991. Costanza *v.* United States, 421 U. S. 987;

No. 74–1116. Smith *v.* United States, 421 U. S. 980;

No. 74–1164. Alfred A. Knopf, Inc., et al. *v.* Colby, Director, Central Intelligence Agency, et al., 421 U. S. 992;

No. 74–1210. Sadlak *v.* Gilligan, Governor of Ohio, et al., 421 U. S. 956;

No. 74–1280. Nat Harrison Associates, Inc. *v.* Louisville Gas & Electric Co. et al., 421 U. S. 988;

No. 74–5922. Crosier *v.* California, 421 U. S. 966;

No. 74–6068. Entrekin *v.* United States, 421 U. S. 977; and

No. 74–6169. Entrekin *v.* United States, 421 U. S. 977. Petitions for rehearing denied. Mr. Justice Douglas took no part in the consideration or decision of these petitions.

No. 74–6109. Bragg *v.* Mid-America Federal Savings & Loan Assn., et al., 421 U. S. 933;

No. 74–6122. Harrelson *v.* United States, 421 U. S. 968; and

No. 74–6357. Roots *v.* Wainwright, Corrections Director, 421 U. S. 996. Petitions for rehearing denied. Mr. Justice Douglas took no part in the consideration or decision of these petitions.

No. 74–6092. Borasky *v.* United States, 421 U. S. 977. Petition for rehearing and other relief denied. Mr. Justice Douglas took no part in the consideration or decision of this petition.

June 30, 1975*

Vacated and Remanded on Appeal

No. 74–726. Sheldon, Hospital Superintendent *v.* Reynolds; and

No. 74–5743. Reynolds *v.* Sheldon, Hospital Superintendent. Appeals from D. C. N. D. Tex. Motions of Perry Wayne Reynolds for leave to proceed *in forma pauperis* granted, judgment vacated, and cases remanded for further consideration in light of *O'Connor* v. *Donaldson, ante,* p. 563. Reported below: 381 F. Supp. 1374.

No. 74–1181. Mazer et al. *v.* Weinberger, Secretary of Health, Education, and Welfare, et al.; and

No. 74–5538. Kohr *v.* Weinberger, Secretary of Health, Education, and Welfare, et al. Appeals from D. C. E. D. Pa. Motion of appellant in No. 74–5538 for leave to proceed *in forma pauperis* granted. Judgments vacated and cases remanded to the United

*Mr. Justice Douglas took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date.

States District Court for the Eastern District of Pennsylvania to consider its jurisdiction in light of *Weinberger* v. *Salfi, ante,* p. 749. Reported below: No. 74–1181, 385 F. Supp. 1321; No. 74–5538, 378 F. Supp. 1299.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

The Court remands these cases for consideration in light of *Weinberger* v. *Salfi, ante,* p. 749, of the question whether there was jurisdiction in the District Court. It appears from the papers before us that the record in these cases concerning exhaustion of administrative remedies under 42 U. S. C. § 405 (g) is precisely the same as the record in *Salfi, supra.* In all three cases, the plaintiffs did not exhaust fully on the constitutional question because they believed exhaustion to be futile; and in all three cases, the Secretary objected in the District Court that there was no jurisdiction because exhaustion was not completed through a hearing. See *Salfi, ante,* p. 786 (BRENNAN, J., dissenting). I believe that if § 405 (g) is, as the Court holds in *Salfi,* to be the exclusive jurisdictional basis for constitutional attacks upon Title II of the Social Security Act, then we should not require exhaustion past the point of futility, even if the Secretary so desires. See *Salfi, ante,* at 793–794 (BRENNAN, J., dissenting). But even on the Court's holding in *Salfi,* which leaves the determination of futility to the Secretary, I think we are at least obliged to be consistent in our treatment of cases decided upon identical records. Since the Court found in *Salfi* that the Secretary had determined exhaustion to be adequate, consistency certainly requires that the Court make the same determination, albeit fictitious, in these cases. This would eliminate any jurisdictional question, and reaching the merits, I would affirm in both cases.

No. 74–6102. Hagler et ux. *v.* Snow, Judge. Appeal from Sup. Ct. Utah. Motion of appellants for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975).

Certiorari Granted—Vacated and Remanded

No. 73–6064. Huston *v.* California. Ct. App. Cal., 4th App. Dist. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Faretta* v. *California, ante,* p. 806.

No. 74–599. United States *v.* Speed et al. C. A. 5th Cir. Motions of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Bowen* v. *United States, ante,* p. 916, and *United States* v. *Peltier, ante,* p. 531. Reported below: 497 F. 2d 546.

No. 74–970. City of Parma, Ohio, et al. *v.* Cornelius et al. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Warth* v. *Seldin, ante,* p. 490.

No. 74–993. Janney *v.* United States. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Ortiz, ante,* p. 891, and *United States* v. *Brignoni-Ponce, ante,* p. 873. Reported below: 506 F. 2d 897.

No. 74–1339. Gumanis *v.* Donaldson. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *O'Connor* v. *Donaldson, ante,* p. 563, and *Wood* v. *Strickland,* 420 U. S. 308 (1975). Reported below: 493 F. 2d 507.

No. 74–5913. DUNAWAY *v.* NEW YORK. Ct. App. N. Y. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Brown* v. *Illinois, ante,* p. 590. Reported below: 35 N. Y. 2d 741, 320 N. E. 2d 646.

No. 74–6014. HART *v.* UNITED STATES; and DIXON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Ortiz, ante,* p. 891, and *United States* v. *Brignoni-Ponce, ante,* p. 873. Reported below: 506 F. 2d 887 (first case); 506 F. 2d 899 (second case).

No. 74–6016. ARNOLD *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Ortiz, ante,* p. 891, and *United States* v. *Brignoni-Ponce, ante,* p. 873. Reported below: 506 F. 2d 899.

No. 74–6061. ROCHA-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Ortiz, ante,* p. 891, and *United States* v. *Brignoni-Ponce, ante,* p. 873.

No. 74–6086. GONZALEZ-DIAZ *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Ortiz, ante,* p. 891, and *United States* v. *Brignoni-Ponce, ante,* p. 873.

No. 74–5551. Ryon *v.* Maryland. Ct. Sp. App. Md. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Brown* v. *Illinois, ante,* p. 590.

No. 74–6150. Coffey et al. *v.* United States. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Brignoni-Ponce, ante,* p. 873. Reported below: 509 F. 2d 574.

Certiorari Granted—Affirmed in Part and Reversed in Part. (See No. 74–337, *ante,* p. 922.)

Miscellaneous Orders

No. 74–730. Roemer et al. *v.* Board of Public Works of Maryland et al. Appeal from D. C. Md. [Probable jurisdiction noted, 420 U. S. 922.] Motion of appellees for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Appellants allotted 15 additional minutes for oral argument.

No. 74–1179. United States *v.* Miller. C. A. 5th Cir. [Certiorari granted, 421 U. S. 1010.] Motion for appointment of counsel granted, and Denver Lee Rampey, Jr., Esquire, of Warner Robins, Ga., is appointed to serve as counsel for respondent in this case.

Probable Jurisdiction Noted or Postponed

No. 74–1137. Lavine, Commissioner, Department of Social Services of New York *v.* Milne et al. Appeal from D. C. S. D. N. Y. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 384 F. Supp. 206.

No. 74–6212. Norton, a minor, by Chiles *v.* Weinberger, Secretary of Health, Education, and Wel-

FARE. Appeal from D. C. Md. Motion for leave to proceed *in forma pauperis* granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits. See *Weinberger* v. *Salfi, ante,* p. 749, at 763 n. 8. Reported below: 390 F. Supp. 1084.

Certiorari Granted

No. 73-861. EAST CARROLL PARISH SCHOOL BOARD ET AL. *v.* MARSHALL. C. A. 5th Cir. Certiorari granted. Reported below: 485 F. 2d 1297.

No. 74-520. MONTANYE, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* HAYMES. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 505 F. 2d 977.

No. 74-1055. STONE, WARDEN *v.* POWELL. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. In addition to those questions presented by the petition, counsel are requested to brief and argue the following question: Whether, in light of the fact that the District Court found that the Henderson, Nev., police officer had probable cause to arrest respondent for violation of an ordinance which at the time of the arrest had not been authoritatively determined to be unconstitutional, respondent's claim that the gun discovered as a result of a search incident to that arrest violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution is one cognizable under 28 U. S. C. § 2254. Reported below: 507 F. 2d 93.

No. 74-1222. WOLFF, WARDEN *v.* RICE. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. In addition to those questions presented by the petition, counsel are requested to brief and argue the following question: Whether the constitutional validity of the entry and search of re-

spondent's premises by Omaha police officers under the circumstances of this case is a question properly cognizable under 28 U. S. C. § 2254. Reported below: 513 F. 2d 1280.

Certiorari Denied

No. 73-1856. FOERSTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73-1896. HENDRIX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73-6851. RODRIGUEZ-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 168.

No. 73-6923. RICE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73-6926. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73-6975. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 492 F. 2d 37 and 499 F. 2d 1247.

No. 74-185. GREEN, ADMINISTRATOR *v.* WEINBERG ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 495 F. 2d 1368.

No. 74-572. ANTICO *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 74-584. SEARS *v.* DANN, COMMISSIONER OF PATENTS. C. A. 4th Cir. Certiorari denied. Reported below: 502 F. 2d 122.

No. 74-703. PHILLIPS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 1395.

No. 73-7088. DEVER, AKA DIZEREGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74-648. OWEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 463.

No. 74-904. DEPARTMENT OF HUMAN RESOURCES OF GEORGIA ET AL. *v.* BURNHAM ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 503 F. 2d 1319.

No. 74-5062. QUIROZ-REYNA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 500 F. 2d 1223.

No. 74-5114. LARIOS-MONTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 500 F. 2d 941.

No. 74-5148. GORDON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74-5214. JEANGUENAT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74-5307. BACA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74-5422. MADUENO-ASTORGA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 503 F. 2d 820.

No. 74-5554. BUTLER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 296 So. 2d 673.

No. 74-5584. SANDERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 911.

No. 74-6055. EVANS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 507 F. 2d 879.

No. 74–6003. ALVAREZ-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6126. COLLINS *v.* BENSINGER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 506 F. 2d 1405.

No. 74–6259. GONZALES, AKA MARTINEZ, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 383.

No. 74–6327. DE LEON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 506 F. 2d 1054.

Assignment Order

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 from October 20, 1975, to October 24, 1975, and for such additional 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.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS—1972, 1973, AND 1974

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	**1972**	**1973**	**1974** [1]	**1972**	**1973**	**1974** [1]	**1972**	**1973**	**1974** [1]	**1972**	**1973**	**1974** [1]
Number of cases on dockets	21	14	12	2, 183	2, 480	2, 308	2, 436	2, 585	2, 348	4, 640	5, 079	4, 668
Number disposed of during terms	8	4	4	1, 771	1, 868	1, 877	1, 969	2, 004	1, 966	3, 748	3, 876	3, 847
Number remaining on dockets	13	10	8	412	612	431	467	581	382	892	1, 203	821

	TERMS		
	1972	**1973**	**1974** [1]
Cases argued during term	177	170	175
Number disposed of by full opinions	159	161	144
Number disposed of by per curiam opinions	18	8	20
Number set for reargument	0	1	11
Cases granted review this term	154	183	172
Cases reviewed and decided without oral argument	265	188	157
Total cases to be available for argument at outset of following term	76	89	100

[1] Statistics adjusted as of July 1, 1974.

JUNE 30, 1975

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strue § 22 (d) to cover all broker-dealer transactions would displace antitrust laws by implication and also would impinge on Securities and Exchange Commission's more flexible authority under § 22 (f). Implied antitrust immunity can be justified only by a convincing showing of clear repugnancy between antitrust laws and regulatory system, and here no such showing has been made. U. S. v. National Assn. Securities Dealers, p. 694.

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authority over rates, all show that Congress intended Securities Exchange Act to leave supervision of fixing of reasonable rates to SEC. To interpose antitrust law, which would bar fixed commission rates as *per se* violations of Sherman Act, in face of positive SEC action, would unduly interfere with intended operation of Securities Exchange Act. Hence, implied repeal of antitrust laws is necessary to make that Act work as intended, since failure to imply repeal would render § 19 (b)(9) nugatory. Gordon v. New York Stock Exchange, p. 659.

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Confinement of mental patient—State hospital superintendent's liability.—Since Court of Appeals did not consider whether trial judge erred in refusing to give instruction requested by petitioner state hospital superintendent concerning his claimed reliance on state law as authorization for continued confinement of respondent as mental patient, and since neither court below had benefit of this Court's decision in *Wood* v. *Strickland,* 420 U. S. 308, on scope of a state official's qualified immunity under 42 U. S. C. § 1983, case is vacated and remanded for consideration of petitioner's liability *vel non* for monetary damages for violating respondent's constitutional right. O'Connor v. Donaldson, p. 563.

CIVIL RIGHTS ACT OF 1964.

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permissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated," petitioner employer's validation study is materially defective in that (1) it would not, because of odd patchwork of results from its application, have "validated" two general ability tests used by petitioner for all skilled lines of progression for which two tests are, apparently, now required; (2) it compared test scores with subjective supervisorial rankings, affording no means of knowing what job-performance criteria supervisors were considering; (3) it focused mostly on job groups near top of various lines of progression, but fact that test of those employees working near top of a line of progression score well on a test does not necessarily mean that test permissibly measures qualifications of new workers entering lower level jobs; and (4) it dealt only with job-experienced, white workers, but tests themselves are given to new job applicants, who are younger, largely inexperienced, and in many instances nonwhite. Albemarle Paper Co. v. Moody, p. 405.

2. *Title VII—Discrimination—Backpay.*—Given a finding of unlawful discrimination, backpay should be denied only for reasons that, if applied generally, would not frustrate central statutory purposes manifested by Congress in enacting Title VII of Act of eradicating discrimination throughout economy and making persons whole for injuries suffered through past discrimination. Albemarle Paper Co. v. Moody, p. 405.

3. *Title VII—Discrimination—Backpay—Absence of bad faith.*—Absence of bad faith is not a sufficient reason for denying backpay, Title VII of Act not being concerned with employer's "good intent or absence of discriminatory intent," for "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." Albemarle Paper Co. v. Moody, p. 405.

4. *Title VII—Discrimination—Employment tests—Validation—Relief.*—In view of facts that during appellate stages of litigation wherein respondent employees charged petitioner employer and union with violations of Title VII of Act employer has apparently been amending its departmental organization and use made of its employment tests; that issues of standards of proof for job relatedness and of evidentiary procedures involving validation tests have not until now been clarified; and that provisional use of tests pending new validation efforts may be authorized, District Court on remand

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CIVIL RIGHTS ACT OF 1964—Continued.
should initially fashion necessary relief. Albemarle Paper Co. v. Moody, p. 405.

5. *Title VII—Discrimination—Tardy backpay demand.*—Whether respondent employees' tardiness and inconsistency in making their backpay demand in their suit initially seeking injunctive relief against alleged violations of Title VII of Act were excusable and whether they actually prejudiced petitioners, employer and union, are matters that will be open to review by Court of Appeals if District Court, on remand, decides again to decline a backpay award. Albemarle Paper Co. v. Moody, p. 405.

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CONSTITUTIONAL LAW—Continued.

as required by Art. III of Constitution but is now moot and must be dismissed, since as to original complaint there is now no reasonable expectation that wrong will be repeated and question presented does not fall within category of harm capable of repetition, yet evading review. Preiser v. Newkirk, p. 395.

II. Due Process.

Right to liberty—Mental patient.—A State cannot constitutionally confine, without more, a nondangerous individual who is capable of surviving safely in freedom by himself or with help of willing and responsible family members or friends, and since jury found, upon ample evidence, that petitioner state hospital superintendent did so confine respondent as a mental patient, it properly concluded that petitioner had violated respondent's right to liberty. O'Connor v. Donaldson, p. 563.

III. Equal Protection of the Laws.

Social Security Act—Duration-of-relationship requirements.—Duration-of-relationship requirements of 42 U. S. C. §§ 416 (c)(5) and (e)(2) (1970 ed. and Supp. III), which define "widow" and "child" so as to exclude from social security insurance benefits surviving wives and stepchildren who had their respective relationships to a deceased wage earner for less than nine months prior to his death, are not unconstitutional. A statutory classification in area of social welfare such as Social Security program is constitutional if it is rationally based and free from invidious discrimination. Weinberger v. Salfi, p. 749.

IV. Fifth Amendment.

Privilege against self-incrimination—Testimony or statements of third parties.—Fifth Amendment privilege against compulsory self-incrimination, being personal to defendant, does not extend to testimony or statements of third parties called as witnesses at trial. In this instance fact that statements of third parties were elicited by a defense investigator on respondent's behalf does not convert them into respondent's personal communications, and requiring their production would in no sense compel respondent to be a witness against himself or extort communications from him. United States v. Nobles, p. 225.

V. First Amendment.

Freedom of speech—Ordinance prohibiting drive-in theaters from showing films containing nudity—Facial invalidity.—A Jacksonville, Fla., ordinance making it a public nuisance and a punishable offense

CONSTITUTIONAL LAW—Continued.
for a drive-in theater to exhibit films containing nudity, when screen is visible from a public street or place, is facially invalid as an infringement of First Amendment rights. Ordinance cannot be justified either as an exercise of city's police power for protection of children against viewing films or as a traffic regulation. Erznoznik v. City of Jacksonville, p. 205.

VI. Fourth Amendment.

1. *Searches and seizures—Border Patrol—Roving patrol—Authority to stop vehicle and question occupants.*—Fourth Amendment does not allow a roving patrol of Border Patrol to stop a vehicle near Mexican border and question its occupants about their citizenship and immigration status, when only ground for suspicion is that occupants appear to be of Mexican ancestry. Except at border and its functional equivalents, patrolling officers may stop vehicles only if they are aware of specific articulable facts, together with rational inferences therefrom, reasonably warranting suspicion that vehicles contain aliens who may be illegally in country. United States v. Brignoni-Ponce, p. 873.

2. *Searches and seizures—Border Patrol—Roving patrols—Traffic checkpoints—Nonretroactivity.*—Principles of *Almeida-Sanchez* v. *United States,* 413 U. S. 266, that Fourth Amendment prohibits Border Patrol from using roving patrols to search vehicles, without a warrant or probable cause, at points removed from border and its functional equivalents, will not be applied retroactively to invalidate searches that occurred prior to date of that decision. As Court of Appeals in this case correctly decided that *Almeida-Sanchez* did not apply retroactively, petitioner is not entitled to benefit of that court's further but unnecessary ruling that *Almeida-Sanchez* extended to searches at traffic checkpoints. Bowen v. United States, p. 916.

3. *Searches and seizures—Border Patrol—Traffic checkpoints.*—Fourth Amendment forbids Border Patrol officers, in absence of consent or probable cause, to search private vehicles at traffic checkpoints removed from border and its functional equivalents, and for this purpose there is no difference between a checkpoint and a roving patrol. United States v. Ortiz, p. 891.

4. *Searches and seizures—Border Patrol automobile search—Retroactivity of exclusionary rule.*—This Court's decision in *Almeida-Sanchez* v. *United States,* 413 U. S. 266, which held that a warrantless automobile search, conducted about 25 air miles from Mexican border by Border Patrol agents acting without probable cause,

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contravened Fourth Amendment, does not apply to Border Patrol searches like one in this case, which, though concededly unconstitutional under *Almeida-Sanchez* standards, was conducted prior to June 21, 1973, date of that decision. Policies underlying exclusionary rule do not require retroactive application of *Almeida-Sanchez* where, as here, agents were acting in reliance upon a federal statute supported by longstanding administrative regulations and continuous judicial approval. United States v. Peltier, p. 531.

5. *Searches and seizures—Illegal arrest—Inculpatory statements—Effect of Miranda warnings.*—Illinois courts erred in adopting a *per se* rule that *Miranda* v. *Arizona,* 384 U. S. 436, warnings in and of themselves broke causal chain between petitioner's illegal arrest and his giving of in-custody inculpatory statements after such warnings so that any such statement, even one induced by continuing effects of unconstitutional custody, was admissible so long as, in traditional sense, it was voluntary and not coerced in violation of Fifth and Fourteenth Amendments. When exclusionary rule is used to effectuate Fourth Amendment, it serves interests and policies that are distinct from those it serves under Fifth, being directed at all unlawful searches and seizures, and not merely those that happen to produce incriminating material or testimony as fruits. Thus, even if statements in this case were found to be voluntary under Fifth Amendment, Fourth Amendment issue remains. *Wong Sun* v. *United States,* 371 U. S. 471, requires not merely that a statement meet Fifth Amendment voluntariness standard but that it be "sufficiently an act of free will to purge the primary taint" in light of distinct policies and interests of Fourth Amendment. Brown v. Illinois, p. 590.

VII. Sixth Amendment.

1. *Right to jury trial—Labor union—Violation of National Labor Relations Act injunction—Contempt.*—Petitioner labor union, which was charged with criminal contempt for violating temporary injunctions issued pursuant to § 10 (*l*) of NLRA against picketing of an employer pending National Labor Relations Board's final disposition of employer's unfair labor practice charge against such picketing, and which upon being adjudged guilty was fined $10,000, does not have a right to a jury trial under Art. III, § 2, of Constitution, and Sixth Amendment. Despite 18 U. S. C. § 1 (3), which defines petty offenses as those crimes "the penalty for which does not exceed imprisonment for a period of six months, or a fine of not more than $500, or both," a contempt need not be considered a

CONSTITUTIONAL LAW—Continued.

serious crime under all circumstances where punishment is a fine of more than $500, unaccompanied by imprisonment. Here, where it appears that petitioner union collects dues from some 13,000 persons, $10,000 fine imposed was not of such magnitude that union was deprived of whatever right to a jury trial it might have under Sixth Amendment. Muniz v. Hoffman, p. 454.

2. *Rights to compulsory process and cross-examination—Defense investigator's testimony.*—It was within District Court's discretion to assure that jury would hear defense investigator's full testimony rather than a truncated portion favorable to respondent, and court's ruling that investigator could not testify about his interviews with key prosecution witnesses unless investigator's report, as edited by court to excise irrelevant matters, was submitted to prosecution for inspection at completion of investigator's testimony, did not deprive respondent of Sixth Amendment rights to compulsory process and cross-examination. That Amendment does not confer right to present testimony free from legitimate demands of adversary system and cannot be invoked as a justification for presenting what might have been a half-truth. United States v. Nobles, p. 225.

3. *State criminal trial—Defendant's right to self-representation.*—Sixth Amendment as made applicable to States by Fourteenth guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation and that he may proceed to defend himself *without* counsel when he voluntarily and intelligently elects to do so; and in this case state courts erred in forcing petitioner against his will to accept a state-appointed public defender and in denying his request to conduct his own defense. Faretta v. California, p. 806.

4. *State criminal trial—Right to make defense—Denial of final summation.*—A total denial of opportunity for final summation in a nonjury criminal trial as well as in a jury trial deprives accused of basic right to make his defense, and a New York statute granting every judge in a nonjury criminal trial power to deny such summation before rendition of judgment violates Sixth Amendment as applied against States by Fourteenth. Herring v. New York, p. 853.

CONTEMPT. See also **Constitutional Law**, VII, 1.

1. *Violation of National Labor Relations Act injunction—Right to jury trial.*—Petitioner labor union officer and union, who were charged with criminal contempt for violating temporary injunctions

CONTEMPT—Continued.

issued pursuant to § 10 (*l*) of NLRA against picketing of an employer pending National Labor Relations Board's final disposition of employer's unfair labor practice charge against such picketing, are not entitled to a jury trial under 18 U. S. C. § 3692, which provides for jury trial in contempt cases arising under any federal law governing issuance of injunctions "in any case" growing out of a labor dispute. Muniz v. Hoffman, p. 454.

2. *Violation of National Labor Relations Act injunction—Right to jury trial—Exemption from Norris-LaGuardia Act.*—It is clear from § 10 (*l*) of NLRA, as added by Labor Management Relations Act, and related sections, particularly § 10 (h) (which provides that courts' jurisdiction to grant temporary injunctive relief or to enforce or set aside a National Labor Relations Board unfair labor practice order shall not be limited by Norris-LaGuardia Act), and from legislative history of such sections, that Congress not only intended to exempt injunctions authorized by NLRA and LMRA from Norris-LaGuardia Act's limitations, including original § 11 of Act (now repealed) requiring jury trials in contempt acts arising out of that Act, but also intended that civil and criminal contempt proceedings enforcing those injunctions were not to afford contemnors right to a jury trial. By providing for labor Act injunctions outside Norris-LaGuardia Act's framework, Congress necessarily contemplated that there would be no right to a jury trial in such contempt proceedings. Muniz v. Hoffman, p. 454.

COOK INLET. See **Water Rights.**

COPYRIGHT ACT OF 1909.

Receipt of copyrighted songs on food shop radio.—Respondent's receipt of petitioners' copyrighted songs in his food shop from local broadcasting station, which, as opposed to respondent, was licensed by American Society of Composers, Authors and Publishers to perform songs, did not infringe upon petitioners' exclusive right, under Act, "[t]o perform the copyrighted work publicly for profit," since radio reception did not constitute a "performance" of copyrighted songs. Twentieth Century Corp. v. Aiken, p. 151.

CORPORATIONS. See **Elections,** 1–3; **Internal Revenue Code.**

"CORRESPONDENT ASSOCIATE" BANKS. See **Antitrust Acts,** 1, 9; **Bank Holding Company Act.**

CRIMINAL CONTEMPT. See **Constitutional Law,** VII, 1; **Contempt.**

CRIMINAL LAW. See also **Constitutional Law,** IV; V; VI; VII, 2–4; **Elections,** 1; **Evidence; Federal Rules of Criminal Procedure.**

1. *Accused's right to be present at trial—Effect of absence during judge's communication to jury*—"[T]he orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties . . . to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict," and, as *Shields* v. *United States,* 273 U. S. 583, and Fed. Rule Crim. Proc. 43 make clear, a criminal defendant has the right to be present "at every stage of the trial including the impaneling of the jury and the return of the verdict." Although a violation of Rule 43 may in some circumstances be harmless error, that conclusion cannot be reached in this case where trial judge, through marshal, answered affirmatively jury's question whether he would accept a verdict of "Guilty as charged with extreme mercy of the Court." At very least, trial court should have reminded jury that its recommendation would not in any way be binding and should have admonished jury to reach its verdict without regard to what sentence might be imposed. In circumstances of this case, trial court's errors were such as to warrant this Court's taking cognizance of them regardless of petitioner's failure to raise issue in Court of Appeals or in this Court. Rogers v. United States, p. 35.

2. *Disclosure of investigative report—Effect of attorney work-product doctrine—Waiver.*—Qualified privilege derived from attorney work-product doctrine is not available to prevent disclosure to prosecution of report of respondent's defense investigator, since respondent, by electing to present investigator as a witness, waived privilege with respect to matters covered in his testimony. United States v. Nobles, p. 225.

3. *Production of witness statements—Defense investigator's report.*—In a proper case, prosecution, as well as defense, can invoke federal judiciary's inherent power to require production of previously recorded witness statements that facilitate full disclosure of all relevant facts. Here report of defense investigator, who had obtained statements from key prosecution witnesses, might provide critical insight into issue of witness' credibility that investigator's testimony would raise and hence was highly relevant to such issues. United States v. Nobles, p. 225.

4. *Reference in trial to accused's silence during police interrogation—Prejudicial impact.*—Respondent's silence during police inter-

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rogation following his arrest for robbery and after he had been advised of his right to remain silent, lacked significant probative value and under these circumstances any reference during cross-examination of him to such silence carried with it an intolerably prejudicial impact. This Court, exercising its supervisory authority over lower federal courts, therefore concludes that respondent is entitled to a new trial. United States v. Hale, p. 171.

CROSS-EXAMINATION. See **Constitutional Law,** VII, 2; **Criminal Law,** 4.

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DISCLOSURE OF INFORMATION. See **Freedom of Information Act.**

DISCLOSURE OF STOCK OWNERSHIP. See **Securities Exchange Act of 1934.**

DISCRETION OF TRIAL COURT. See **Constitutional Law,** VII, 2; **Federal-State Relations,** 6.

DISCRIMINATION. See **Civil Rights Act of 1964; Standing to Sue; Voting Rights Act of 1965,** 2.

DISCRIMINATORY EMPLOYMENT PRACTICES. See **Civil Rights Act of 1964.**

DISTRICT COURTS. See **Appeals; Federal-State Relations,** 2–6; **Judicial Review; Jurisdiction,** 1–4.

DRIVE-IN MOVIE THEATERS. See **Constitutional Law,** V.

DUE PROCESS. See **Constitutional Law,** II; III.

DURATION-OF-RELATIONSHIP REQUIREMENTS. See **Constitutional Law,** III; **Jurisdiction,** 2–4.

EFFECT ON INTERSTATE COMMERCE. See **Antitrust Acts,** 2, 4–5.

ELECTIONS. See also **Voting Rights Act of 1965.**

1. *Prohibition against political contributions by corporation—Violation—No implied private right of action.*—With respect to whether respondent stockholder has an implied right of action for a violation of 18 U. S. C. § 610, which prohibits corporations from making contributions or expenditures in connection with specified federal elections, § 610 was primarily concerned, not with internal relations between corporations and stockholders, but with corporations as a source of aggregated wealth and therefore of potential corrupting influence; thus this statute differs from other criminal statutes in which private causes of action have been inferred because of a clearly articulated federal right in plaintiff, or a pervasive legislative scheme governing relationship between plaintiff class and defendant class in a particular regard. Cort v. Ash, p. 66.

2. *Prohibition against political contributions by corporation—Violation—Stockholder's remedy.*—Respondent stockholder's derivative suit with regard to alleged violation by petitioner directors of petitioner Delaware corporation in connection with 1972 Presidential election, of 18 U. S. C. § 610, which prohibits corporations from making contributions or expenditures in connection with specified federal elections, cannot be implied under § 610, and respondent's remedy, if any, must be under Delaware's corporation law. Cort v. Ash, p. 66.

3. *Prohibition against political contributions by corporation—Violation—Stockholder's remedy—Effect of intervening law.*—Federal Election Campaign Act Amendments of 1974, under which Federal

ELECTIONS—Continued.

Election Commission can receive citizen complaints of statutory violations and where warranted request Attorney General to seek injunctive action, constitute an intervening law that relegates to Commission's cognizance respondent's complaint as citizen or stockholder for injunctive relief against any alleged violations in future elections of 18 U. S. C. § 610, which prohibits corporations from making contributions or expenditures in connection with specified federal elections, since this Court must examine this case according to law existing at time of its decision. Cort v. Ash, p. 66.

4. *Texas Election Code—Intervening legislation—Mootness.*—In light of recent amendments to Texas Election Code provision whose constitutionality is at issue, District Court's judgment is vacated, and case is remanded to that court for reconsideration and for dismissal if case is or becomes moot. Hill v. Printing Industries of Gulf Coast, p. 937.

5. *Texas election districts—Intervening legislation—Mootness.*—In light of recent Texas apportionment legislation substituting single-member election districts for multimember districts at issue, District Court's judgment is vacated, and case is remanded to that court for reconsideration and for dismissal if case is or becomes moot. White v. Regester, p. 935.

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964.**

EMPLOYMENT TESTS. See **Civil Rights Act of 1964,** 1, 4.

ENVIRONMENTAL IMPACT STATEMENTS. See **Appeals,** 2; **Judicial Review.**

EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972. See **Civil Rights Act of 1964,** 2–4.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** III.

EQUITY. See **Securities Exchange Act of 1934.**

EVIDENCE. See also **Constitutional Law,** VI, 5; **Water Rights.**

Voluntariness of confession—Factors considered—Admissibility—Burden of proof.—Question whether a confession is voluntary under *Wong Sun* v. *United States,* 371 U. S. 471, must be answered on facts of each case. Though *Miranda* v. *Arizona,* 384 U. S. 436, warnings are an important factor in resolving issue, other factors must be considered; and burden of showing admissibility of in-custody statements of persons who have been illegally arrested rests on prosecutor. State failed to sustain its burden in this case of

EVIDENCE—Continued.

showing that petitioner's statements made after his illegal arrest and after *Miranda* warnings were given were admissible under *Wong Sun*. Brown v. Illinois, p. 590.

EVIDENCE OF SILENCE AT TIME OF ARREST. See **Criminal Law,** 4.

EXCHANGE COMMISSION RATES. See **Antitrust Acts,** 10–11.

EXCLUSIONARY RULE. See **Constitutional Law,** VI, 4–5; **Evidence.**

EXCLUSIONARY ZONING PRACTICES. See **Standing to Sue.**

EXEMPTION 3 OF FREEDOM OF INFORMATION ACT. See **Freedom of Information Act.**

EXHAUSTION OF REMEDIES. See **Jurisdiction,** 1, 4.

FACIAL INVALIDITY. See **Constitutional Law,** V.

FAIR COMPETITION. See **Antitrust Acts,** 2–5.

FEDERAL AVIATION ACT OF 1958. See **Freedom of Information Act.**

FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974. See **Elections,** 3.

FEDERAL INTERFERENCE WITH STATE PROSECUTIONS. See **Federal-State Relations,** 1–4; **Jurisdiction,** 5.

FEDERAL-QUESTION JURISDICTION. See **Jurisdiction,** 2.

FEDERAL RULES OF CRIMINAL PROCEDURE. See also **Constitutional Law,** IV; VII, 2; **Criminal Law,** 1.

Rule 16—Effect on trial court's discretion as to evidentiary questions at trial.—Rule 16, whose language and history both indicate that it addresses only pretrial discovery, imposes no constraint on District Court's power to condition impeachment testimony of respondent's witness, a defense investigator, on production of relevant portions of his report. Fact that Rule incorporates Jencks Act limitation shows no contrary intent and does not convert Rule into a general limitation on trial court's broad discretion as to evidentiary questions at trial. United States v. Nobles, p. 225.

FEDERAL-STATE RELATIONS. See also **Jurisdiction,** 5; **Water Rights.**

1. *Aid to Families with Dependent Children—Connecticut statute—Conflict with Social Security Act—Intervening amendment.*—A three-judge District Court's judgment upholding constitutionality

FEDERAL-STATE RELATIONS—Continued.

of a Connecticut statute that requires mother of an illegitimate child receiving AFDC assistance to disclose putative father's name and imposing a criminal sanction for noncompliance, and concluding that statute does not conflict with Social Security Act, is vacated and case is remanded for further consideration in light of an intervening Social Security Act amendment requiring parents, as a condition of eligibility for AFDC assistance, to cooperate with state efforts to locate and obtain support from absent parents but providing no punitive sanctions, and, also, if a relevant state criminal proceeding is pending, in light of *Younger* v. *Harris,* 401 U. S. 37, and *Huffman* v. *Pursue, Ltd.,* 420 U. S. 492. Roe v. Norton, p. 391.

2. *Federal interference with state prosecution.*—In action by appellee theater operators against appellant police officers and prosecuting attorneys, seeking an injunction against enforcement of California obscenity statute and for return of copies of allegedly obscene film seized in connection with state misdemeanor charges against theater employees, and a judgment declaring statute unconstitutional, District Court erred in reaching merits of case despite appellants' insistence that it be dismissed under *Younger* v. *Harris,* 401 U. S. 37, and *Samuels* v. *Mackell,* 401 U. S. 66. Where state criminal proceedings are begun against federal plaintiffs after federal complaint is filed but before any proceedings of substance on merits have taken place in federal court, principles of *Younger* v. *Harris* should apply in full force. Here, appellees were charged in state criminal proceedings prior to appellants' answering federal case and prior to any proceedings before three-judge court, and hence federal complaint should have been dismissed on appellants' motion absent satisfactory proof of those extraordinary circumstances warranting one of exceptions to rule of *Younger* v. *Harris* and related cases. Hicks v. Miranda, p. 332.

3. *Federal interference with state prosecution—Bar of injunctive and declaratory relief.*—In District Court action by three corporations for relief against enforcement of ordinance proscribing topless dancing, only one of which corporations was prosecuted under ordinance, *Younger* v. *Harris,* 401 U. S. 37, squarely bars injunctive relief and *Samuels* v. *Mackell,* 401 U. S. 66, bars declaratory relief for that one corporation in view of fact that when criminal summonses were issued against it on days immediately following filing of federal complaint, federal litigation was in an embryonic stage and no contested matter had been decided. Doran v. Salem Inn, Inc., p. 922.

FEDERAL-STATE RELATIONS—Continued.

4. *Federal relief against enforcement of ordinance.*—In District Court action by three corporations for relief against enforcement of ordinance proscribing topless dancing, only one of which corporations was prosecuted under ordinance, question of entitlement to relief in light of *Younger* v. *Harris,* 401 U. S. 37, and companion cases, should be considered as to each corporation separately and not in light of contradictory outcomes and other factors relied upon by Court of Appeals when it lumped three plaintiffs together for purpose of holding that *Younger* v. *Harris* and companion cases did not bar relief. Doran v. Salem Inn, Inc., p. 922.

5. *Federal relief against enforcement of ordinance.*—In District Court action by three corporations for relief against enforcement of ordinance proscribing topless dancing, two corporations against which no criminal proceedings under ordinance were pending were not subject to restrictions of *Younger* v. *Harris,* 401 U. S. 37, in seeking declaratory relief. Those two corporations could also seek preliminary injunctive relief without regard to *Younger*'s restrictions, since prior to a final judgment a declaratory remedy cannot afford relief comparable to a preliminary injunction. Doran v. Salem Inn, Inc., p. 922.

6. *Federal relief against enforcement of ordinance.*—In circumstances of case and in light of existing case law, District Court in action by three corporations for relief against enforcement of ordinance proscribing topless dancing did not abuse its discretion in granting preliminary injunctive relief to two corporations against which no prosecution under ordinance was pending. District Court was entitled to conclude that these two corporations satisfied one of two traditional requirements for securing a preliminary injunction, *viz.,* showing irreparable injury, because they made uncontested allegations that absent such relief they would suffer a substantial business loss and perhaps even bankruptcy. District Court was also entitled to conclude that those corporations satisfied other traditional requirement for interim relief by showing a likelihood that they would prevail on merits, since they were, *inter alia,* challenging (and had standing to challenge) a "topless" ordinance as being unconstitutionally overbroad in its application to protected activities at places that do not serve liquor as well as to places that do. Doran v. Salem Inn, Inc., p. 922.

FIFTH AMENDMENT. See **Constitutional Law,** III; IV; VI, 5.

FILMS. See **Appeals,** 1; **Constitutional Law,** V; **Federal-State Relations,** 2.

FINALITY. See **Jurisdiction,** 1.

FINAL SUMMATIONS IN CRIMINAL TRIALS. See **Constitutional Law,** VII, 4.

FIRST AMENDMENT. See **Constitutional Law,** V.

FISHING REGULATIONS. See **Water Rights.**

"FIVE-PERCENT" BANKS. See **Antitrust Acts,** 1, 9; **Bank Holding Company Act.**

FIXED COMMISSION RATES. See **Antitrust Acts,** 10–11.

FIXING PRICES OF MUTUAL-FUND SHARES. See **Antitrust Acts,** 6.

FLORIDA. See **Civil Rights Act of 1871; Constitutional Law,** II; V.

FLOW OF INTERSTATE COMMERCE. See **Antitrust Acts,** 2–5.

FOOD SHOPS. See **Copyright Act of 1909.**

FOURTEENTH AMENDMENT. See **Constitutional Law,** II; VI, 5; VII, 3–4.

FOURTH AMENDMENT. See **Constitutional Law,** VI.

FREEDOM OF INFORMATION ACT.

Exemption 3—Systemsworthiness Analysis Program (SWAP) Reports.—Federal Aviation Administration's SWAP Reports, which consist of FAA's analyses of operation and maintenance performance of commercial airlines, are exempt from public disclosure under Exemption 3 of FOIA as being "specifically exempt from disclosure by statute." Broad discretion vested by Congress in FAA under § 1104 of Federal Aviation Act of 1958 to withhold information from public is not necessarily inconsistent with Congress' intent in enacting FOIA to replace broad standard disclosure section of Administrative Procedure Act. Congress could appropriately conclude that public interest in air transport safety was better served by guaranteeing confidentiality of information necessary to secure from airlines maximum amount of information relevant to safety, and Congress' wisdom in striking such a balance is not open to judicial scrutiny. FAA Administrator v. Robertson, p. 255.

FREEDOM OF SPEECH. See **Constitutional Law,** V.

FREIGHT RATES. See **Appeals,** 2; **Judicial Review; Jurisdiction,** 1.

FRUITS OF ILLEGAL ARREST. See **Constitutional Law,** VI, 5; **Evidence.**

GENERAL REVENUE PROCEEDINGS. See **Appeals,** 2; **Judicial Review,** 2–3; **Jurisdiction,** 1.

GEORGIA. See **Antitrust Acts,** 1, 9; **Bank Holding Company Act.**

"GRANDFATHER" PROVISIONS. See **Bank Holding Company Act.**

HARMLESS MENTAL PATIENTS. See **Civil Rights Act of 1871; Constitutional Law,** II.

HEALTH, EDUCATION, AND WELFARE SECRETARY. See **Jurisdiction,** 2, 4.

HISTORIC BAYS. See **Water Rights.**

HOLDING COMPANIES. See **Antitrust Acts,** 1, 9; **Bank Holding Company Act.**

HORIZONTAL COMBINATIONS AND CONSPIRACIES. See **Antitrust Acts,** 7.

HOSPITALS FOR MENTAL PATIENTS. See **Civil Rights Act of 1871; Constitutional Law,** II.

IDENTIFICATION TESTIMONY. See **Constitutional Law,** IV; VII, 2; **Criminal Law,** 2–3; **Federal Rules of Criminal Procedure.**

ILLEGAL ARRESTS. See **Constitutional Law,** VI, 5; **Evidence.**

ILLEGAL ENTRY OF ALIENS. See **Constitutional Law,** VI, 1, 3.

ILLEGITIMATE CHILDREN. See **Federal-State Relations,** 1.

IMMUNITY FROM ANTITRUST LIABILITY. See **Antitrust Acts,** 6–8, 10–11.

IMPEACHING CREDIBILITY. See **Criminal Law,** 3–4; **Federal Rules of Criminal Procedure.**

IMPLIED PRIVATE CAUSES OF ACTION. See **Elections,** 1–2.

IMPLIED REPEAL OF ANTITRUST LAWS. See **Antitrust Acts,** 10–11.

INCOME TAXES. See **Internal Revenue Code.**

INCOMPETENT PERSONS. See **Civil Rights Act of 1871; Constitutional Law,** II.

IN-CUSTODY INCULPATORY STATEMENTS. See **Constitutional Law, VI, 5; Evidence.**

INFRINGEMENT OF COPYRIGHTS. See **Copyright Act of 1909.**

INJUNCTIONS. See **Appeals; Constitutional Law, VII, 1; Contempt; Federal-State Relations, 2–3, 5–6; Jurisdiction, 1, 5; Securities Exchange Act of 1934.**

INLAND WATERS. See **Water Rights.**

INSPECTION OF WITNESS STATEMENTS. See **Constitutional Law, IV; VII, 2; Criminal Law, 2–3; Federal Rules of Criminal Procedure.**

INSTRUCTIONS TO JURY. See **Criminal Law, 1.**

INTERFERENCE WITH STATE CRIMINAL PRECEEDINGS. See **Federal-State Relations, 1–3.**

INTERNAL REVENUE CODE.

Corporation's accumulated earnings—Marketable securities—Net liquidation value.—In determining applicability of § 533 (a) of Code—which provides a rebuttable presumption that a corporation that has accumulated earnings "beyond the reasonable needs of the business" did so with "the purpose to avoid the income tax with respect to shareholders"—listed and readily marketable securities owned by corporation and purchased out of its earnings and profits, are to be taken into account, not at their cost to corporation, but at their net liquidation value. Ivan Allen Co. v. United States, p. 617.

INTERSTATE COMMERCE. See **Antitrust Acts, 2–5.**

INTERSTATE COMMERCE COMMISSION. See **Appeals, 2; Judicial Review; Jurisdiction, 1.**

INTERVENING LEGISLATION. See **Elections, 3–5; Federal-State Relations, 1.**

INTRASTATE ACTIVITIES. See **Antitrust Acts, 2–3.**

INVESTIGATORS' REPORTS. See **Constitutional Law, IV; VII, 2; Criminal Law, 2–3; Federal Rules of Criminal Procedure.**

INVESTIGATORY ARRESTS. See **Constitutional Law, VI, 5; Evidence.**

INVESTMENT COMPANY ACT OF 1940. See **Antitrust Acts, 6–8.**

INVESTORS. See **Antitrust Acts, 10–11.**

INVIDIOUS DISCRIMINATION. See **Constitutional Law,** III.

INVOLUNTARY COMMITMENT OF MENTAL PATIENT. See **Civil Rights Act of 1871; Constitutional Law,** II.

IRREPARABLE INJURY. See **Federal-State Relations,** 5–6; **Securities Exchange Act of 1934.**

JACKSONVILLE, FLA. See **Constitutional Law,** V.

JANITORIAL SERVICES. See **Antitrust Acts,** 3.

JOB-RELATED EMPLOYMENT TESTS. See **Civil Rights Act of 1964,** 1, 4.

JUDGE'S COMMUNICATIONS TO JURY. See **Criminal Law,** 1.

JUDICIAL REVIEW. See also **Appeals,** 2; **Jurisdiction,** 1.

1. *District Court—Interstate Commerce Commission—Freight rate increases—Recyclables—Environmental impact statement.*—District Court erred in deciding that oral hearing that ICC held prior to its October 1972 order involving railroad freight rate increases on recyclables was an "existing agency review process" during which a final environmental impact statement should have been available. National Environmental Policy Act provides that a formal impact statement "shall accompany the proposal through the existing agency review processes," and hence does not affect time when "statement" must be prepared, but simply provides what must be done with "statement" once it is prepared. Under *this* provision time at which agency must prepare final "statement" is time at which it makes a recommendation or report on a *proposal* for federal action. Here, until October 1972 report, ICC had made no proposal, and hence earliest time at which *statute* required a statement was time of October 1972 report—some time after oral hearing. Aberdeen & Rockfish R. Co. v. SCRAP, p. 289.

2. *District Court—Interstate Commerce Commission—Freight rate increases—Recyclables—Environmental impact statement.*—District Court erred in deciding that ICC in a general revenue proceeding involving railroad freight rate increases on recyclables should have "started over again" after it decided to propose a formal environmental impact statement, even assuming that ICC erred in failing to prepare a separate impact statement to accompany its October 1972 report or that consideration given to environmental factors in that report was inadequate. Aberdeen & Rockfish R. Co. v. SCRAP, p. 289.

3. *District Court—Interstate Commerce Commission—Freight rate increases—Recyclables—Sufficiency of environmental impact*

JUDICIAL REVIEW—Continued.

statement.—District Court erred in concluding that final environmental impact statement issued by ICC in general revenue proceeding involving railroad freight rate increases on recyclables was deficient. Aberdeen & Rockfish R. Co. v. SCRAP, p. 289.

JURISDICTION. See also **Antitrust Acts,** 2–5; **Appeals; Federal-State Relations,** 3–6; **Judicial Review.**

1. *District Court—Review of Interstate Commerce Commission decision—Freight rates.*—District Court had jurisdiction to review ICC's decision not to declare increased railroad freight rates unlawful, notwithstanding such decision was made in a general revenue proceeding. Aberdeen & Rockfish R. Co. v. SCRAP, p. 289.

2. *District Court—Social Security claim—Bar of federal-question jurisdiction.*—District Court did not have federal-question jurisdiction under 28 U. S. C. § 1331, of appellees' class action seeking declaratory and injunctive relief brought on behalf of all widows and stepchildren denied social security insurance benefits because of nine-month duration-of-relationship requirements of 42 U. S. C. §§ 416 (c)(5) and (e)(2) (1970 ed. and Supp. III). Such jurisdiction is barred by third sentence of 42 U. S. C. § 405 (h), which provides that no action against United States, Secretary of Health, Education, and Welfare, or any officer or employee thereof shall be brought under, *inter alia,* 28 U. S. C. § 1331 to recover on any claim arising under Title II of Social Security Act, which covers old-age, survivors', and disability insurance benefits. Weinberger v. Salfi, p. 749.

3. *District Court—Social Security claim—Class action—Named parties.*—In appellees' class action seeking declaratory and injunctive relief brought on behalf of all widows and stepchildren denied social security insurance benefits because of nine-month duration-of-relationship requirements of 42 U. S. C. §§ 416 (c)(5) and (e)(2) (1970 ed. and Supp. III), District Court had jurisdiction over named appellees under 42 U. S. C. § 405 (g). Weinberger v. Salfi, p. 749.

4. *District Court—Social Security claim—Class action—Unnamed members of class.*—In appellees' class action seeking declaratory and injunctive relief brought on behalf of all widows and stepchildren denied social security insurance benefits because of nine-month duration-of-relationship requirements of 42 U. S. C. §§ 416 (c)(5) and (e)(2) (1970 ed. and Supp. III), District Court had no jurisdiction over unnamed members of class under 42 U. S. C. § 405 (g), which provides that "[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective

JURISDICTION—Continued.

of the amount in controversy, may obtain a review of such decision by a civil action." Complaint as to such class members is deficient in that it contains no allegation that they have even filed an application for benefits with the Secretary of Health, Education, and Welfare, much less that he has rendered any decision, final or otherwise, review of which is sought. Weinberger v. Salfi, p. 749.

5. *Supreme Court—Certiorari jurisdiction.*—Issues, which were neither briefed nor argued, whether 28 U. S. C. § 1254 (2) applies to a review of affirmance of a preliminary injunction or is confined to review of a final judgment, and whether Court of Appeals in fact held challenged ordinance proscribing topless dancing unconstitutional, need not be resolved, since this Court has certiorari jurisdiction under 28 U. S. C. § 2103, under which this matter can be reviewed. Doran v. Salem Inn, Inc., p. 922.

JURY'S COMMUNICATIONS TO JUDGE. See **Criminal Law, 1.**

JURY TRIALS. See **Constitutional Law,** VII, 1–3; **Contempt; Criminal Law,** 1.

JUSTICIABILITY. See **Constitutional Law,** I; **Standing to Sue.**

KEY PROSECUTION WITNESSES. See **Constitutional Law,** VII, 2; **Criminal Law,** 3.

LABOR UNIONS. See **Constitutional Law,** VII, 1; **Contempt.**

LIBERTY RIGHTS. See **Constitutional Law,** II.

LIMITATION OF ACTIONS. See **Longshoremen's and Harbor Workers' Compensation Act.**

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

Claim timely filed under § 13 of Act—Effect of § 22.—While language of § 22 of Act is ambiguous, section's legislative history, including history of amendment inserting phrase "whether or not a compensation order has been issued," shows that section's one-year time limit was meant to apply only to Deputy Commissioner's power to modify previously entered compensation orders, and that therefore section does not bar consideration of claim timely filed under § 13 of Act, which has not been subject of prior action by Deputy Commissioner, and with respect to which Deputy Commissioner took no action until more than one year after claimant's last receipt of a voluntary compensation payment. Taken in its historical and statutory context, phrase "whether or not a compensation order has been issued" is properly interpreted to mean merely that one-year

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT—Continued.

time limit imposed on Deputy Commissioner's power to modify existing orders runs from date of final payment of compensation even if order sought to be modified is actually entered only after such date. Intercounty Construction Corp. v. Walter, p. 1.

LOW- OR MODERATE-COST HOUSING. See **Standing to Sue.**

MALONEY ACT OF 1938. See **Antitrust Acts,** 6–8.

MARKETABLE SECURITIES. See **Internal Revenue Code.**

MAXIMUM OR MINIMUM SECURITY PRISONS. See **Constitutional Law,** I.

MENTAL PATIENTS. See **Civil Rights Act of 1871; Constitutional Law,** II.

MERGERS. See **Antitrust Acts,** 1, 9; **Bank Holding Company Act.**

MEXICAN BORDER SEARCHES. See **Constitutional Law,** VI, 1–4.

MINORITY RACE'S POLITICAL STRENGTH. See **Voting Rights Act of 1965.**

MIRANDA WARNINGS. See **Constitutional Law,** VI, 5; **Criminal Law,** 4; **Evidence.**

MONETARY DAMAGES. See **Civil Rights Act of 1871.**

MOOTNESS. See **Constitutional Law,** I; **Elections,** 4–5.

MOTHERS OF ILLEGITIMATE CHILDREN. See **Federal-State Relations,** 1.

MOTHER'S SOCIAL SECURITY BENEFITS. See **Constitutional Law,** III; **Jurisdiction,** 2–4.

MOVIES. See **Appeals,** 1; **Constitutional Law,** V; **Federal-State Relations,** 2.

MULTIMEMBER ELECTION DISTRICTS. See **Elections,** 5.

MUSICAL COMPOSITIONS. See **Copyright Act of 1909.**

MUTUAL FUNDS. See **Antitrust Acts,** 6–8.

NAMED MEMBERS OF CLASS. See **Jurisdiction,** 3.

NATIONAL ENVIRONMENTAL POLICY ACT. See **Appeals,** 2; **Judicial Review,** 1.

NATIONAL LABOR RELATIONS ACT. See **Constitutional Law,** VII, 1; **Contempt.**

NEGROES. See **Civil Rights Act of 1964; Voting Rights Act of 1965.**

NEW TRIAL. See **Criminal Law,** 4.

NEW YORK. See **Constitutional Law,** I; VII, 4; **Standing to Sue.**

NEW YORK STOCK EXCHANGE. See **Antitrust Acts,** 10–11.

NINE-MONTH DURATION-OF-RELATIONSHIP REQUIREMENT. See **Constitutional Law,** III; **Jurisdiction,** 2–4.

NONJURY CRIMINAL TRIALS. See **Constitutional Law,** VII, 4.

NORRIS-LAGUARDIA ACT. See **Contempt.**

NORTH HEMPSTEAD, N. Y. See **Federal-State Relations,** 3–6; **Jurisdiction,** 5.

OBSCENITY. See **Appeals,** 1; **Federal-State Relations,** 2.

OPEN-END MANAGEMENT COMPANIES. See **Antitrust Acts,** 6–8.

OPERATION AND MAINTENANCE OF AIRLINES. See **Freedom of Information Act.**

ORDINANCES. See **Federal-State Relations,** 3–6; **Jurisdiction,** 5.

OVERBREADTH. See **Constitutional Law,** V.

PENFIELD, N. Y. See **Standing to Sue.**

PERFORMANCE OF COPYRIGHTED WORKS. See **Copyright Act of 1909.**

PERMANENT DISABILITY. See **Longshoremen's and Harbor Workers' Compensation Act.**

PERSONS OF LOW OR MODERATE INCOME. See **Standing to Sue.**

PETTY OFFENSES. See **Constitutional Law,** VII, 1.

PICKETING. See **Constitutional Law,** VII, 1; **Contempt.**

POLICE POWER. See **Constitutional Law,** V.

POLITICAL CONTRIBUTIONS. See **Elections,** 1–3.

POLITICAL FUNDS REPORTING AND DISCLOSURE ACT OF 1975 (TEXAS). See **Elections,** 4.

PORTFOLIO SECURITIES. See **Internal Revenue Code.**

PREJUDICIAL ERROR. See Criminal Law, 1, 4.

PRELIMINARY INJUNCTIONS. See Federal-State Relations, 5–6; Jurisdiction, 5.

PREREQUISITES TO VOTING. See Voting Rights Act of 1965.

PRESENCE OF ACCUSED AT TRIAL. See Criminal Law, 1.

PRESIDENTIAL ELECTIONS. See Elections, 1–3.

PRISONS. See Constitutional Law, I.

PRIVATE CAUSES OF ACTION. See Elections, 1–3.

PRIVILEGE AGAINST SELF-INCRIMINATION. See Constitutional Law, IV; Criminal Law, 4.

PROBABLE CAUSE. See Constitutional Law, VI, 2–4.

PRODUCTION OF WITNESS STATEMENTS. See Constitutional Law, IV; VII, 2; Criminal Law, 2–3; Federal Rules of Criminal Procedure.

PRO SE DEFENDANTS. See Constitutional Law, VII, 3.

PROTECTED SPEECH. See Constitutional Law, V.

PRUDENTIAL STANDING RULE. See Standing to Sue.

PUBLIC DISCLOSURE OF INFORMATION. See Freedom of Information Act.

PUBLIC NUISANCES. See Constitutional Law, V.

PUNITIVE SANCTIONS. See Federal-State Relations, 1.

PURCHASE AND SALE OF MUTUAL-FUND SHARES. See Antitrust Acts, 6–8.

PUTATIVE FATHERS. See Federal-State Relations, 1.

QUALIFICATIONS FOR VOTING. See Voting Rights Act of 1965.

QUALIFIED IMMUNITY OF STATE OFFICIALS FROM LIABILITY. See Civil Rights Act of 1871.

QUESTIONING OF AUTOMOBILE OCCUPANTS. See Constitutional Law, VI, 1.

RACIAL BLOC VOTING. See Voting Rights Act of 1965.

RACIAL DISCRIMINATION. See Civil Rights Act of 1964; Standing to Sue; Voting Rights Act of 1965.

RADIO BROADCASTS. See Copyright Act of 1909.

RAILROADS. See Appeals, 2; Judicial Review; Jurisdiction, 1.

RANDOM STOPS OF MOTOR VEHICLES. See **Constitutional Law,** VI, 1, 4.

RATE INCREASES. See **Appeals,** 2; **Judicial Review; Jurisdiction,** 1.

RATIONAL BASES. See **Constitutional Law,** III.

READILY MARKETABLE SECURITIES. See **Internal Revenue Code.**

REASONABLE NEEDS OF BUSINESS. See **Internal Revenue Code.**

REASONABLE SUSPICION. See **Constitutional Law,** VI, 1.

REBUTTABLE PRESUMPTIONS. See **Internal Revenue Code.**

RECOMMENDATIONS OF LENIENCY. See **Criminal Law,** 1.

RECYCLABLE MATERIALS. See **Appeals,** 2; **Judicial Review,** 2–3.

RESTAURANTS. See **Copyright Act of 1909.**

RESTRAINTS OF TRADE. See **Antitrust Acts,** 1, 9; **Bank Holding Company Act.**

RESTRICTIONS ON TRANSFER OF MUTUAL-FUND SHARES. See **Antitrust Acts,** 6–8.

RETROACTIVITY. See **Constitutional Law,** VI, 2, 4.

RICHMOND, VA. See **Voting Rights Act of 1965.**

RIGHT TO BE PRESENT AT TRIAL. See **Criminal Law,** 1.

RIGHT TO COMPULSORY PROCESS. See **Constitutional Law,** VII, 2.

RIGHT TO CROSS-EXAMINATION. See **Constitutional Law,** VII, 2.

RIGHT TO JURY TRIAL. See **Constitutional Law,** VII, 1; **Contempt.**

RIGHT TO LIBERTY. See **Constitutional Law,** II.

RIGHT TO MAKE DEFENSE. See **Constitutional Law,** VII, 4.

RIGHT TO REMAIN SILENT. See **Criminal Law,** 4.

RIGHT TO SELF-REPRESENTATION. See **Constitutional Law,** VII, 3.

RIGHT TO VOTE. See **Voting Rights Act of 1965,** 2.

ROBBERY. See **Criminal Law,** 4.

ROCHESTER, N. Y. See **Standing to Sue.**

ROVING BORDER PATROLS. See **Constitutional Law,** VI, 1–2, 4.

RULES OF CRIMINAL PROCEDURE. See **Criminal Law,** 1; **Federal Rules of Criminal Procedure.**

SALES OF SECURITIES. See **Securities Exchange Act of 1934.**

SCHEDULES OF STOCK OWNERSHIP. See **Securities Exchange Act of 1934.**

SEARCHES AND SEIZURES. See **Constitutional Law,** VI; **Federal-State Relations,** 2.

SECONDARY MARKET TRANSACTIONS. See **Antitrust Acts,** 6–8.

SECRETARY OF HEALTH, EDUCATION, AND WELFARE. See **Jurisdiction,** 2, 4.

SECURITIES AND EXCHANGE COMMISSION. See **Antitrust Acts,** 6–7, 10–11.

SECURITIES EXCHANGE ACT OF 1934. See also **Antitrust Acts,** 6–7, 10–11.

Right to injunctive relief based on § 13 (d) of Act—Necessity for irreparable harm.—A showing of irreparable harm, in accordance with traditional principles of equity, is necessary before a private litigant can obtain injunctive relief based upon § 13 (d) of Act, as added by Williams Act, which requires a person who has acquired more than 5% of a corporation's stock to file a disclosure statement within 10 days after such acquisition. Here Court of Appeals erred in concluding that respondent corporation suffered "harm" because of petitioner's technical default in not filing disclosure schedule until about three months after statutory filing time, since petitioner has not attempted to obtain control of respondent, has now made proper disclosure, and has given no indication that he will not report any material changes in his disclosure schedule. Persons who allegedly sold their stock to petititioner at unfairly depressed predisclosure prices have adequate remedies by an action for damages, and those who would not have invested, had they thought a takeover bid was imminent, are not threatened with injury. Rondeau v. Mosinee Paper Corp., p. 49.

SELF-INCRIMINATION. See **Criminal Law,** 4.

SELF-REPRESENTATION. See **Constitutional Law,** VII, 3.

SERIOUS CRIMES. See **Constitutional Law,** VII, 1.

SHAM MARRIAGES. See **Constitutional Law,** III.

SHERMAN ACT. See **Antitrust Acts,** 1, 4, 7–11; **Bank Holding Company Act.**

SILENCE DURING POLICE INTERROGATION. See **Criminal Law,** 4.

SINGLE-MEMBER ELECTION DISTRICTS. See **Elections,** 5.

SIXTH AMENDMENT. See **Constitutional Law,** VII.

SOCIAL SECURITY ACT. See **Constitutional Law,** III; **Federal-State Relations,** 1; **Jurisdiction,** 2–4.

SONGS. See **Copyright Act of 1909.**

STANDING TO SUE.

Action challenging exclusionary zoning practices.—Whether rules of standing are considered as aspects of constitutional requirement that a plaintiff must make out a "case or controversy" within meaning of Art. III, or, apart from such requirement, as prudential limitations on courts' role in resolving disputes involving "generalized grievances" or third parties' legal rights or interests, none of petitioners, as plaintiffs or attempted plaintiffs in action for declaratory and injunctive relief and damages claiming that town's zoning ordinance, by its terms and as enforced, effectively excluded persons of low and moderate income from living in town, in violation of petitioners' constitutional rights and of 42 U. S. C. §§ 1981, 1982, and 1983, has met threshold requirement of such rules that to have standing a complainant must clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of dispute and exercise of court's remedial powers. Warth v. Seldin, p. 490.

STATE AFDC PLANS. See **Federal-State Relations,** 1.

STATE CRIMINAL TRIALS. See **Constitutional Law,** VI, 5; VII, 3–4.

STATE HOSPITALS. See **Civil Rights Act of 1871; Constitutional Law,** II.

STATEMENTS OF THIRD PARTIES. See **Constitutional Law,** IV; VII, 2; **Criminal Law,** 3; **Federal Rules of Criminal Procedure.**

STATE OFFICIALS' LIABILITY FOR VIOLATION OF CONSTITUTIONAL RIGHTS. See **Civil Rights Act of 1871.**

STATE RESTRICTIONS ON BANK BRANCHING. See **Antitrust Acts,** 1, 9.

STATE SOVEREIGNTY. See **Water Rights.**

STATUTE OF LIMITATIONS. See **Longshoremen's and Harbor Workers' Compensation Act.**

STEPCHILDREN'S SOCIAL SECURITY BENEFITS. See **Constitutional Law,** III; **Jurisdiction,** 2–4.

STOCK EXCHANGES. See **Antitrust Acts,** 10–11.

STOCKHOLDERS' DERIVATIVE SUITS. See **Elections,** 1–3.

SUBSURFACE LANDS. See **Water Rights.**

SUBURBAN BANKS. See **Antitrust Acts,** 1, 9; **Bank Holding Company Act.**

SUFFICIENCY OF EVIDENCE. See **Water Rights.**

SUMMATIONS IN CRIMINAL TRIALS. See **Constitutional Law,** VII, 4.

SUPPRESSION OF EVIDENCE. See **Constitutional Law,** VI, 5; **Evidence.**

SUPREME COURT. See also **Appeals; Criminal Law,** 4; **Jurisdiction,** 5.

1. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the District of Columbia Circuit, p. 1029.

2. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Seventh Circuit, p. 1058.

SYSTEMSWORTHINESS ANALYSIS REPORTS. See **Freedom of Information Act.**

TAKEOVER BIDS. See **Securities Exchange Act of 1934.**

TAXES. See **Internal Revenue Code.**

TEMPORARY DISABILITY. See **Longshoremen's and Harbor Workers' Compensation Act.**

TEMPORARY INJUNCTIONS. See **Constitutional Law,** VII, 1; **Contempt.**

TERRITORIAL SOVEREIGNTY. See **Water Rights.**

TEXAS. See **Elections,** 4–5.

THEATERS. See **Appeals,** 1; **Constitutional Law,** V; **Federal-State Relations,** 2.

THIRD PARTIES' STATEMENTS. See **Constitutional Law,** IV; VII, 2; **Criminal Law,** 3; **Federal Rules of Criminal Procedure.**

THREE-JUDGE COURTS. See **Appeals; Federal-State Relations,** 2; **Judicial Review; Jurisdiction,** 1.

TOPLESS DANCING. See **Federal-State Relations,** 3–6; **Jurisdiction,** 5.

TRAFFIC CHECKPOINT SEARCHES. See **Constitutional Law,** VI, 2–3.

TRAFFIC REGULATIONS. See **Constitutional Law,** V.

TRANSFERS OF PRISONERS. See **Constitutional Law,** I.

TRIAL BY JURY. See **Constitutional Law,** VII, 1; **Contempt; Criminal Law,** 1.

UNFAIR LABOR PRACTICES. See **Constitutional Law,** VII, 1; **Contempt.**

UNION OFFICERS. See **Contempt,** 1.

UNIONS. See **Constitutional Law,** VII, 1; **Contempt.**

UNITED STATES. See **Water Rights.**

UNLAWFUL ARRESTS. See **Constitutional Law,** VI, 5; **Evidence.**

UNNAMED MEMBERS OF CLASS. See **Jurisdiction,** 4.

VALIDATION TESTS. See **Civil Rights Act of 1964,** 1, 4.

VEHICLE SEARCHES. See **Constitutional Law,** VI, 2–4.

VERDICTS. See **Criminal Law,** 1.

VERTICAL RESTRICTIONS ON SECONDARY MARKET ACTIVITIES. See **Antitrust Acts,** 8.

VIRGINIA. See **Voting Rights Act of 1965.**

VOLUNTARINESS OF CONFESSION. See **Evidence.**

VOTING RIGHTS ACT OF 1965.

1. *Annexation—Recognition of minority race's political potential.*—An annexation reducing relative political strength of minority race in enlarged city as compared with what it was before annexation does not violate § 5 of Act as long as post-annexation system fairly recognizes, as it does in this case, minority's political potential. City of Richmond v. United States, p. 358.

2. *Racial discrimination—Denial of vote—Annexation—Further proceedings.*—Since § 5 of Act forbids voting changes made for purpose of denying vote for racial reasons, further proceedings are

VOTING RIGHTS ACT OF 1965—Continued.

necessary to update and reassess evidence bearing upon issue whether city has sound, nondiscriminatory economic and administrative reasons for retaining annexed area, it not being clear that Special Master and District Court adequately considered evidence in deciding whether there are now justifiable reasons for challenged annexation that took place January 1, 1970. City of Richmond v. United States, p. 358.

WAIVER OF RIGHT TO COUNSEL. See **Constitutional Law,** VII, 3.

WARD SYSTEM OF CHOOSING COUNCILMEN. See **Voting Rights Act of 1965.**

WARRANTLESS ARRESTS. See **Constitutional Law,** VI, 5; **Evidence.**

WARRANTLESS SEARCHES. See **Constitutional Law,** VI, 2, 4.

WATER RIGHTS.

Rights to land beneath waters—Insufficiency of proof of historic bay—United States' paramount rights.—Proof was insufficient to establish Cook Inlet as a historic bay, and hence United States, as against Alaska, has paramount rights to land beneath waters of lower, or seaward, portion of inlet. United States v. Alaska, p. 184.

WIDOWS' SOCIAL SECURITY BENEFITS. See **Constitutional Law,** III; **Jurisdiction,** 2–4.

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WITHHOLDING PUBLIC DISCLOSURE OF INFORMATION. See **Freedom of Information Act.**

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WORDS AND PHRASES.

1. *"Engaged in commerce."* § 7, Clayton Act, 15 U. S. C. § 18. U. S. v. American Bldg. Maintenance Industries, p. 271.

2. *"Injunction."* 28 U. S. C. § 1253. Aberdeen & Rockfish R. Co. v. SCRAP, p. 289.

3. *"Perform."* § 1 (d), Copyright Act of 1909, 17 U. S. C. § 1 (d). Twentieth Century Corp. v. Aiken, p. 151.

4. *"Specifically exempt from disclosure by statute."* 5 U. S. C. § 552 (b) (3) (Exemption 3 of Freedom of Information Act). FAA Administrator v. Robertson, p. 255.

WORDS AND PHRASES—Continued.

5. "*Whether or not a compensation order has been issued.*" § 22, Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 922. Intercounty Construction Corp. v. Walter, p. 1.

WORK-PRODUCT DOCTRINE. See **Criminal Law,** 2.

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WORDS AND PHRASES—Continued.

5. "Whether or not a compensation order has been issued." § 22, Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 922. Intercounty Construction Corp. v. Walter, p. 4.

WORK-PRODUCT DOCTRINE. See Criminal Law, 2.

ZONING. See Standing to Sue.

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